

Adverse Inferences in Defense of Good Faith

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Principles of adverse inferences are applied universally. International law endorses the arbitrator's inherent authority to draw adverse inferences against a party for unjustified non-compliance with an order to produce information. Moreover, arbitrators can rely on general principles of law when applying adverse inferences as a basis for decisions.

The general principle of good faith imposes a positive obligation on parties to cooperate in international arbitration proceedings. Contracts like treaties in international law carry the obligation to honor the agreed undertaking according to good faith. [fn]See Charles T. Kotuby Jr. and Luke A. Sobota, *General Principles of Law and International Due Process* 90-91 (2017); see also Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 113 (1993).[/fn] Because arbitration agreements are a type of contract, good faith requires that parties submit to the "obligation to act with fairness, reasonableness, and decency in the formation and performance" [fn]Kotuby and Sobota, *General Principles of Law and International Due Process*, *supra* note 1, at 88[/fn] of agreements to arbitrate disputes.

It may be rather dubious to exact a definition of the good faith principle, but the duty imposed can be illustrated by experience. Whether it derives from a contract, national, or international law, good faith commands that parties cooperate in the evidentiary procedure. That is, parties must provide truthful responses to information requests, not use document production to obstruct proceedings, and produce responsive documents and witnesses following an evidence order. Also, when the parties agree to be guided by the IBA Rules on the Taking of Evidence in International Arbitration, they agree to be guided by good faith in evidence production.

Good faith compels the parties to marshal the relevant and material information that is within their control and not protected by a privilege. Justified refusals against producing document or witness evidence generally go towards the scope of the evidence request or are based on a control or privilege argument. A justified refusal does not infringe the good faith duty and forecloses the drawing of an adverse inference.

Nevertheless, adverse inferences are warranted for the sake of enforcing good faith. The breach of procedural good faith does not give way to a separate cause of action, but it does allow for arbitral tribunal recourse. The authority to draw adverse inferences can derive expressly from the law of the forum, the arbitration rules, or by way of the IBA Evidence Rules. Moreover, as a matter of international law, arbitral tribunals are inherently equipped to safeguard the integrity of the arbitration in the face of party non-compliance. While a party can choose at its own peril to default in arbitration, tribunals have the inherent recourse to adverse inferences against failures to produce responsive information, which derives from their authority to weigh the evidence and to govern the procedure.[fn]Menalco J. Solis, *Adverse Inferences in Investor-State Arbitration*, *Arb. Int'l* 79, 81-85

(2018).[/fn]

Whether arbitral tribunals draw adverse inferences in defense of good faith, in any event, may depend on fairness and efficiency. Fairness is considered because adverse inferences bridge gaps in information that a party may need to make out their case effectively. To invoke adverse inferences, however, the breach of good faith or unjustified non-cooperation must be attributable to the party against whom the adverse inference is sought. For instance, in *Copper Mesa Mining v. Ecuador*, the tribunal refused to draw the respondent's adverse inferences from several witnesses' failure to appear (fugitive and former employers) because the non-cooperation of the private individuals could not be attributed to the claimant.

Furthermore, when a party seeks an adverse inference regarding information that the counterparty refused to produce, that party must have itself cooperated in good faith and been unable to produce the information. For example, in *ConocoPhillips v. Venezuela*, the tribunal refused to draw an adverse inference regarding any misrepresentation in contractual negotiations because both parties failed to provide evidence regarding the negotiations. Fairness considerations also require the inference request to be reasonably related to the non-production. As in *Busta v. Czech Republic*, the respondent requested the adverse inference that the claimant did not own all the items on a list of goods because the invoices it provided did not cover their entire value. The tribunal refused to draw the adverse inference that the claimant lacked ownership because the discrepancy alone was an insufficient basis to make that assertion.

Efficiency is considered, on the other hand, because tribunals may refuse to decide matters that are unlikely to succeed on their face or that do not require an answer in order for it to render a decision. Accordingly, the tribunal can decide not to address the breach of procedural good faith and the ancillary adverse inference request if it considers that the request is unlikely to succeed or that it is unnecessary. For example, in *WNC Factoring Ltd. v. Czech Republic*, the claimant requested an adverse inference to be drawn from the respondent's unwillingness to produce its employee to testify. The adverse inference from the non-appearance went to substantiate the claimant's corruption claim. The tribunal found, however, that the claimant failed to muster a *prima facie* showing of corruption and therefore any adverse inference in that regard could not succeed without more evidence. The refusal to address the adverse inference in *WNC Factoring* was a matter of arbitral efficiency: although an adverse inference may have been warranted in light of the refusal to cooperate, it was unnecessary to resolve the adverse inference going to bolster a claim that was obviously doomed.

The case of *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria* is also illustrative. The respondent requested the adverse inferences that the claimant did not have a protected investment because it did not produce certain contracts and that it waived its right to bring a damages claim because it did not produce the board minutes related to the sale of its investment. The tribunal never addressed the adverse inference regarding the contracts because it found that the claimant had an independent basis for establishing an investment that did not depend on the contracts. Also, and while the tribunal did not opine on the matter, the adverse inference regarding the contracts could have been rejected outright as a matter of general principles because the contracts were not originally covered by a document production request and the claimant did not rely on them to assert jurisdiction. The claimant, therefore, had no burden to produce the contracts and the claimant did not resist an evidence order that could implicate its procedural good faith obligation. Furthermore, the respondent's adverse inference request regarding the board minutes may have been warranted, but the tribunal did not address the question because there was an independent and adequate basis to find that the claims were inadmissible. The fact that the claimant sold its shares alone supported the conclusion that it waived its right to claim damages for past harms, which attached to the shares.

Comparatively, in *Windstream Energy LLC v. Canada*, the claimant requested the adverse inference that the government directed the adoption of a moratorium that negatively affected its investment to support its claim that the moratorium was attributable to the respondent. The adverse inference was to be drawn from the fact that documents were deleted from the premier's office. The tribunal ultimately did not consider the adverse inference question and whether the documents were intentionally deleted because it already found that imposing the moratorium was attributable to the respondent. The *Flemingo DutyFree Shop Private Ltd. v. Poland* tribunal similarly found it unnecessary to draw adverse inferences from any failure to comply in the document production for establishing attribution because the evidence in the record was a sufficient basis for attributing the acts or omissions to the respondent.

In short, there is a procedural good faith obligation in international arbitration, which requires that the parties cooperate in the evidence gathering procedure. If procedural good faith is breached in evidence gathering, this can result in the drawing of an adverse inference. Adverse inferences are justified as a matter of general principles of law and apply in defense of the parties' obligation of procedural good faith. Whether a tribunal addresses the adverse inference question ultimately depends, however, on considerations of fairness and efficiency.

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