

# Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation

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## Keywords

INTERNATIONAL COMMERCIAL ARBITRATION; TAKING OF EVIDENCE; PROCEDURAL RULES; COMMON LAW; CIVIL LAW; LEGAL CULTURES

## Abstract

The article discusses the procedure of taking evidence in international commercial arbitration from the perspective of balancing different legal cultures and values. It analyses the results of the existing evidentiary rules and attempts to harmonise the procedure, and their sufficiency in terms of securing the interests, expectations and rights of the parties involved in the international arbitration. The actual outcome must be estimated taking into consideration the balancing of the relationships and the differences between legal cultures, fairness and flexibility. In the first instance the author analyses each of the legal systems, civil law and common law, in order to compare the differences and similarities in terms of the procedure, especially in relation to evidentiary issues. A further step involves the analysis of the need for harmonised rules of procedure and in particular evidentiary rules in international arbitration and the factors in the determination and application of the rules, with a focus on the role of the tribunal's discretion, the parties' autonomy, as well as the impact of cultural background. Furthermore, the International Bar Association (IBA) Rules on Taking of Evidence in International Arbitration are analysed in terms of their completeness in such areas as admissibility and assessment of evidence, which permits the comprehension of the strengths and weaknesses of the IBA Rules and the need for the introduction of further rules. Finally, conclusions follow as to the proper way of balancing the competing values and approaches and the need for the application of new solutions in terms of taking of evidence in order to achieve the desired outcome in arbitral proceedings.

## I. Introduction

Economic globalisation has led to the increasing development of international arbitration, being a private, informal and non-judicial form of dispute resolution. In the absence of transnational civil courts, which would have a universal jurisdiction over commercial cross-border private disputes, international arbitration is the preferred mechanism of dispute resolution, which permits the parties to submit the dispute to a non-national tribunal. Since the parties come from different jurisdictions, speak different languages and have different legal backgrounds and cultures, international commercial arbitration is inevitably linked with the possibility of conflicts and misunderstandings. The differences between the parties' approaches, legal backgrounds and expectations are

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often so significant that international commercial arbitration becomes a true clash of legal cultures.<sup>1</sup>

As culture influences behaviour, values, attitude, legal background and many other aspects of life, the cultural differences between the parties of international commercial arbitration have a strong impact on the arbitral proceedings. Not only do the expectations of the parties in relation to the international arbitral process vary depending on their respective legal backgrounds, but also those of the arbitrators and legal counsel. The participants in the international arbitration process naturally expect to have conflicts resolved according to the values and norms familiar to them. Hence, the cultural legal background determines the approach of the participants in international arbitration, as they expect the arbitration to be similar to what they are accustomed to in their own legal system. This is particularly evident when it comes to the procedural issues of international arbitration. The differences in the legal systems are well pronounced not only between cultures, but also between countries belonging to the same culture. However, while the substantive norms differ from country to country, the procedural norms in their basic form are, most of the time, common to a particular legal culture. Nowadays the predominant legal systems and cultures are common law and civil law. Further subdivision may be observed within each of these systems, based on the region, religion and tradition, such as Arab countries,<sup>2</sup> Non-Arab African countries, Latin American countries, and East Asian countries.<sup>3</sup> However, the cultural clash in relation to international arbitration is mainly observed between the common law and civil law systems.

The divergences between civil and common law in international arbitration influence whole proceedings, but they particularly affect evidentiary issues. Taking evidence is one of the most important parts of the proceedings as it has a direct impact on the outcome of the arbitration. The approach adopted in the procedures for taking evidence, methods of presentation, admissibility, relevance and weight of documentary and oral evidence are of great importance for the parties taking part in dispute resolution. Evidentiary rules and procedures vary significantly between civil law and common law traditions. The differences are the most pronounced when it comes to the preparation and submission of documentary evidence, oral evidence from witnesses of fact and expert witnesses, the actual conduct of evidentiary hearings, as well as the general approach to the proceedings, the role of the tribunal, counsel and the conduct of the proceedings. Many participants of the arbitration proceedings expect the proceedings to be conducted in a similar way to the national litigation they are familiar with. Legal counsel experienced in litigation often make the assumption that international arbitration is just an international litigation and the same rules of evidence and tactical approach can be adopted. This might be the case when the parties are not very experienced in international arbitration and may not know enough about the cultural expectations and legal tradition of the other participants. A clash of different legal traditions and expectations may have a negative impact on the result of the arbitration, when the participants do not recognise the mutual

<sup>1</sup> Cremades, BM, “Powers of the Arbitrators to Decide on the Admissibility of Evidence and to Organize the Production of Evidence”, 10(1) *ICC International Court of Arbitration Bulletin* (1999) 49.

<sup>2</sup> For a detailed description of the legal system of Arab countries and Shari'a see Fadlallah, I, “Arbitration Facing Conflicts of Culture”, 25(3) *Arbitration International* (2009) 303.

<sup>3</sup> For a detailed description of the legal system of Non-Arab African countries, Latin American countries, East Asian and Arab countries see Pair, LM, “Cross-cultural Arbitration: Do the Differences between Cultures Still Influence International Commercial Arbitration Despite Harmonization?”, 9(1) *ILSA Journal of International & Comparative Law* (2002) 57.

approach and do not understand it. Each party is influenced by its legal background, nationality and tradition and international arbitration must be conducted in a way that bridges the differences in order for the proceedings to be neutral and fair. The influence of the legal background not only relates to the parties and their counsel, but also to the arbitrators, as their legal culture may affect the way they conduct the proceedings and their choice of evidentiary approach. An arbitrator, as any other participant of the international arbitration, trained in a particular legal culture will naturally tend to apply the principles familiar to them based on their legal background. However, in order not to oversimplify, it must be underlined that experienced lawyers, with knowledge of the differences in legal cultures, will most of the time try to adopt an international approach towards evidentiary issues instead of rigidly sticking to their legal training and background. In particular, the personal characteristics of the arbitrators such as experience, legal training, age, time commitments and expertise will definitely play a role in the approach adopted by them in terms of evidence. This transnational approach is the result of recent attempts to harmonise arbitral proceedings<sup>4</sup> and the fact that to some extent the gap between common and civil law in terms of evidentiary rules has been successfully reduced. Nevertheless, the issue of cultural differences in international arbitration is still relevant today, as the clash of cultures continues to exist. Despite increased globalisation and the flow of information about other legal systems, culture continues to play a role. There are still issues that need to be resolved and the need for mutual understanding is a subject of great importance. In order to overcome cultural problems emerging in international arbitration with a particular emphasis on the evidence, one should understand those differences, their source and impact on the approach, and use them creatively in order to obtain the best outcome of international arbitration. Only through mutual understanding, preparation, knowledge and respect might the problems in cross-cultural international arbitration be avoided and resolved. The following part of this article will briefly discuss the procedural differences in the process of taking evidence in the common and civil law traditions, the general approach adopted by each legal system and the source of those differences. Such knowledge is essential in order to understand the conflicts that may arise in international arbitration as a result of the clash of different legal cultures. The analysis will not cover substantial law.

## II. Civil Law and Common Law Diversity in Terms of Procedure and the Approach to Fact Finding

As stated above, the greatest differences in terms of fact-finding can be noticed between two main legal families, civil law and common law. Differences can be observed in the methodology of the approach in each of the systems, the role of the judge/arbitrator, the role of counsel, the pleadings, the way the evidence is introduced including document discovery, fact witnesses and other aspects of the legal proceedings such as the ethics of counsel. The differences apply to both national litigation and national arbitration in the two systems, as similar rules are adopted in terms of procedure when the proceedings are national. Within the common law and civil law countries further divisions take place, as each of the countries has developed its own procedure, the general rules, however, are

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<sup>4</sup> In particular, International Bar Association (IBA), *Rules on the Taking of Evidence in International Arbitration*, 29 May 2010, at [ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx) (accessed 27 April 2015).

common for the countries belonging to the particular legal family. The most common determinant to distinguish both systems is the traditional division into continental civil law based on civil codes and the common law which is based on case law and precedent. In this article the two main systems will be discussed with regards to the US and England on one side and the European countries on the other side as the representatives of two legal cultures, even though some differences in the procedure from country to country apply.

## II.1. Method: Adversarial Versus Inquisitorial System and Their Main Characteristics

The methodology of the approach in the proceedings is one of the main differences distinguishing common law and civil law. The legal approach determines the participants' expectations in terms of procedure, since it is the core element that influences all further divergences between those two legal cultures. The approach to the proceedings concerns the role and function of judges/arbitrators in proceedings and the way they are organised. Common law is characterised by the adversarial approach, where the judges do not play an active role in the dispute before them. Their role is limited to ensure the equity and fairness of the proceedings, while the parties are the protagonists and it is left to them to introduce all the issues of the dispute in the proceedings. The matters, questions and objections not raised by the parties will not be taken into consideration by the judges.<sup>5</sup> The adversarial approach influences all stages of the proceeding, determining the rules of evidence presentation, exclusionary rules and the role of counsel. This system obligates the parties to present all the relevant evidence in their possession, including evidence which is adverse to their own interest.<sup>6</sup> The common law system also developed elaborate evidence and exclusionary rules, which was partly due to the fact that historically evidence was judged by juries composed of lay persons often not even literate and with no legal background.<sup>7</sup> For this reason, the common law is mostly oriented towards oral evidence and hearings, as the evidence was discussed and accessed orally, which permitted the jury to fully understand and evaluate it. A further result of the adversarial approach and the presence of the jury is the division of interlocutory proceedings and the final hearing. Historically, counsel had to select and properly present information and gather evidence, because the jury composed of laypersons might have considered irrelevant evidence or failed to evaluate it correctly. The jury was only selected and received information after the interlocutory proceedings. Therefore, all the information needed to be introduced again to the jury.<sup>8</sup>

Civil law is characterised by the totally opposite approach. The inquisitorial method focuses on the active role of the judge or arbitrator. The judge is in charge of the conduct of the proceedings. The role of the judge is to investigate the case, establish all the facts and the law while the parties and their counsels assist in this process. This approach also

<sup>5</sup> Vercauteren, L, "Note and Comment: The Taking of Documentary Evidence in International Arbitration", 23 *The American Review of International Arbitration* (2012) 341.

<sup>6</sup> Waincymer, J, "Approaches to Evidence and Fact Finding" in Waincymer, J, *Procedure and Evidence in International Arbitration* (Kluwer Law International, Alphen aan den Rijn, 2012), 746.

<sup>7</sup> Smit, RH, "Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence" in Van den Berg, AJ, *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, (vol 7, Kluwer Law International, Alphen aan den Rijn, 1996), 161.

<sup>8</sup> Pair, *supra* nt 3, 62.

influences all the other issues in the proceedings, including the rules of evidence. The parties are not required to present all the relevant evidence. They can determine which evidence they wish to rely on without being forced to present the evidence not in line with their interests. The active participation of the judge/arbitrator in the proceedings is linked to the historical roots of civil law, when under the Roman Law judges were highly educated and trained magistrates, capable of assessing the case and the evidence correctly. Consequently, civil law gives much emphasis to written evidence and documents since there was no need for oral explanation of the evidence to the judges during the hearings, as opposed to the common law jury. Furthermore, as according to the inquisitorial approach the judge is also the fact-finder, there is no need to separate the stages of the proceedings into the pre-hearing and hearing phases.

The approaches presented above reflect different views of each of the legal systems in the search for the truth. For the common law participants in the proceedings, the main goal of the process is the search for the factual truth, which is determined by the final decision.<sup>9</sup> On the other hand, in the civil law tradition, where the parties only bear the burden of proof of their own case, the rules of law will be applied only to the facts revealed by the parties, in line with the Roman Law rule *da mihi factum, dabo tibi jus*.<sup>10</sup> Thus the factual aspects are the exclusive domain of the parties whereas the domain of the judge is the legal aspects. The truth is relative, being that which emerges from the proceedings, in comparison to the objective truth found in common law.

## II.2. Pleadings

Generally, the pleadings stage is the first step in the proceedings in which a party brings its suit. Pleadings are formal written statements which are filed with the court and which include a party's claims or defences to another party's claims. According to the approach adopted in each of the legal systems, the importance given to pleadings is different.

In the common law tradition, pleadings have less value, since preference is given to oral presentation of the case. A pleading is a brief pre-hearing statement of a claim or defence, possibly combined with a counterclaim.<sup>11</sup> Common law lawyers tend to prepare pleadings in a very limited, almost bullet-point form,<sup>12</sup> with no evidence attached or legal arguments made, with the intention that the details necessary to understand the case will be provided later orally during the hearing. This is the consequence of the adversarial approach and the historical fact that the jury was composed of lay persons, as mentioned above, often illiterate, when oral persuasion was more efficient and paper documents were less persuasive than emotional witness statements and live testimony. For the same reasons the weight given to the advocacy of a common law lawyer in order to secure

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<sup>9</sup> de Boisseson, M, "Comparative Introduction to the Systems of Producing Evidence in Common Law Countries and the Countries from Roman Law Tradition" in International Chamber of Commerce, *Taking of Evidence in International Arbitration Proceedings* (ICC Publishing SA, 1990), 101.

<sup>10</sup> Give me the fact, I'll give you the law. See Mourre, A, "Differenze e convergenze tra Common Law e Civil Law nell'amministrazione della prova: Spunti di riflessione sulle IBA on Taking of Evidence" in Istituto Superiore di Studi sull'Arbitrato, International Chamber of Commerce, *La prova nell'arbitrato internazionale. Atti del convegno svoltosi a Roma il 5 febbraio 2010* (Edizioni Lapis, Rome, 2011), 88.

<sup>11</sup> Laeuchli, UM, "Civil and Common Law Contrast and Synthesis in International Arbitration" in American Arbitration Association, *Handbook on International Arbitration Practice*, (Juris, New York, 2010), 40.

<sup>12</sup> Lew, JDM and Shore, L, "International Commercial Arbitration: Harmonizing Cultural Differences" in American Arbitration Association, *Handbook on International Arbitration Practice* (Juris, New York, 2010), 6.

tactical and strategic advantage is greater than that given to written pleadings. The common law lawyer is accustomed to extensive oral arguments.

In the civil law tradition, pleadings are lengthy documents, including a claim or a defence and description of the facts and legal arguments, as all information has to be identified and provided in writing in detail. The pleadings have exhibits attached, being considered the evidence in the case. Pleadings are presented orally during the hearing, however, they are most often read from the written document, and are far from the common law lawyers' tactical speeches. As traditionally the judges were well-trained professionals, they could easily extract the most important facts from the written documents instead of lengthy oral statements and witness examination. Written documents in civil law are expected to support the claims and points of view of the party and the evidence should be identified as early as possible.

### II.3. Hearings and Oral Evidence

In accordance with the prevailing method of presenting the case, hearings as well as their duration and form vary between common law and civil law. Hearings and trials are much longer in common law countries, which is a consequence of the historical factors specified above. As the common law system gives greater importance to oral submissions and the presentation of the evidence to the jury, the hearings are a crucial part of the proceedings. Pleadings do not contain many details of the case, evidence or legal arguments; hence, during the hearing the most important facts of the case are revealed. Having historically developed the tradition of oral advocacy, hearings permit legal counsel to express fully their tactical and strategic capacities. A common law hearing starts with limited opening statements, followed by the examination and cross-examination of witnesses, which may last for days or weeks, to close with limited closing arguments of counsel where they sum up all the evidence presented during the trial.<sup>13</sup>

Hearings in civil law countries, where the pleadings contain a detailed description of facts, legal arguments and attached documentary evidence and where a couple of rounds of written submissions between the parties takes place, are not the central part of the proceedings. In some cases, where the crucial facts can be established based on contracts or other documentary evidence, the hearing can be totally omitted. Whenever there is still a need for oral submissions and evidence, the hearing is conducted, however, in much shorter time limits in comparison to the common law tradition, as it usually takes one or two days. During the hearing the parties restate their claims and the witnesses are heard if needed.

The conduct, form and length of a hearing are related to the method of examination of oral evidence, namely the witnesses and experts. In common law cases witness testimony is the crucial evidence and huge weight is given to the examination and cross-examination of the witness. Again, this is a consequence of the preference for oral proceedings and the jury deciding on the facts of the case on the basis of what they heard from the witnesses and counsel's oral submissions.

In civil law countries, there is a general mistrust of witness testimony and greater weight is given to documentary evidence, since the professional judge could hardly be influenced by the aggressive tactics of counsel typical in the common law or the emotional testimony of the witnesses, which may be effective in the case of the jury. In

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<sup>13</sup> Hanotiau, B, "The Conduct of the Hearings" in Newman, LW and Hill, RD, eds, *The Leading Arbitrators' Guide to International Arbitration*, (2nd ed, JurisNet, New York, 2008), 361.

this context the tactics and methods of witness examination in both of the legal systems are significantly different.

Common law lawyers, in particular US lawyers, are well trained in tactical witness examination as it is considered the focal point of the trial. This is related to the fact that in the adversarial approach to the proceedings the judge is not the protagonist and does not lead the examination of the witness, leaving its conduct to counsel. The court controls the mode and order of the interrogations but does not ask questions itself. The examination of witnesses can be divided into the examination-in-chief (or direct examination) and cross-examination. The main difference is that examination-in-chief refers to the examination of a witness called by the same party that is examining the witness whereas cross-examination refers to oral questioning of a witness called by the opponent party. A witness called by the opponent party is generally seen as a hostile witness, hence, the rules of the examination, modes of questioning and techniques used by counsel are different. Counsel are specifically trained in the techniques and prescriptive rules of questioning which form a part of advocacy and are acquired through experience, forming a set of skills which are crucial for the Common lawyer's practice.<sup>14</sup> The techniques serve the purpose of complying with the rules of examination-in-chief and cross-examination and developing the capacity for questioning the witness in a way particular to each of the examinations, that is: in a logical, readily comprehensible and ultimately persuasive manner in the case of examination-in-chief or in a more aggressive manner, aimed to reveal error, uncertainty or falsity in the case of cross-examination.<sup>15</sup> The prescriptive rules of examination state what is permitted and what is prohibited in cross-examination of a witness. The most fundamental rule universal in common law jurisdictions relates to leading questions. Leading questions are generally prohibited in direct examination and permitted (and most often desired and widely used by counsel) in cross-examination, which is due to the fact that in direct examination counsel examines the witness called by the party he represents so he should not suggest the answers, presumably helpful to his or her case, by leading questions. In cross-examination leading questions are one of the most important tactics, together with an aggressive, adversarial and destructive attitude.

Witness examination in civil law countries is not as important a part of the proceedings as in the common law tradition, due to written documents being the preferred form of evidence. A main difference in terms of witness examination is the fact that in the civil law tradition the proceedings are conducted in accordance with the inquisitorial approach, hence the judge is the protagonist of the interrogation. In some jurisdictions the judge is the only person who can directly ask questions of the witness, without the intervention of counsel. In others, counsel may ask questions only after the judge has finished the interrogation. Generally, there is no division into direct examination and cross-examination and the same rules apply to both counsels. The court controls the conduct of the examination, and the sort of questions asked, which generally shall not be leading questions, include comments or ask for a witness' opinion, however, often there are no codified rules as to the content of the questions asked by counsel. It is

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<sup>14</sup> The famous Ten Commandments of Cross Examination proclaimed by Irving Younger, a scholarly state judge in New York and teacher of trial advocacy. See Smit, RH, "Cross-examining Witnesses before Civil Law Arbitrators" in Newman, WL and Sheppard Jr, BH, eds, *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, New York, 2010), 246.

<sup>15</sup> Cremandes, BM, Cairns, DJA, "Cross-examination in International Arbitration: Is it Worthwhile?" in Newman, WL and Sheppard Jr, BH, eds, *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, New York, 2010), 227–228.

not a common practice, as opposed to the common law tradition, to examine the witness in an aggressive, tricky and confusing manner, as the oral evidence is not a crucial means of establishing facts, hence, the sophisticated methods and techniques of advocacy are not the main part of a civil law counsel's practice. On the contrary, the aggressive approach of counsel tending to embarrass, trick or bully the witness is not seen positively by the judge and might result in the judge admonishing counsel as to the modality of questioning.

#### II.4. Expert Witnesses

In common law traditions the experts are appointed by the parties in order to give the opinion on the technical or other complex matters requiring the specific knowledge which is relevant for the party. The party is free to select an expert of its choice as there is no official list of experts held by the courts. The expert produces a written report on the issue in question and is then examined in a way similar to other witnesses, as he or she does not act as the party's advocate.<sup>16</sup> The cross-examination of experts serves to verify whether he or she is impartial and is not misleading the court. It also tests the expert's competence so the techniques of advocacy in examining the expert are as widely used as in examining the witness.

In civil law tradition the experts are appointed by the judge upon the request of the parties or within the authority of the judge to act *ex officio*. The court holds the list of experts in various fields and the expert is chosen from the list. There might be one or more experts appointed by the court, depending on the specific information needed. The expert is asked to issue a report on a matter requested by the court and the parties may formulate questions and issues they consider important and which should be covered in the report. After the issuing of the report the parties have the opportunity to make written comments on the report and to request the summoning of the expert to attend the hearing in order to be examined by the court and the parties. The examination of the expert by the parties is, however, quite limited in comparison to the cross-examination conducted by the counsel in common law countries. The cost of the expert report are covered directly by the court, however, these costs are first advanced by the parties. The parties may request another expert to be appointed. However, in order for the court to satisfy this requests, it must be persuaded that the expert lacks competence or the report has some significant inconsistencies and might not be relied on.

#### II.5. Documentary Evidence

Documentary evidence and the approach toward it is the aspect in which the two legal systems vary the most. In common law, where the proceedings were historically based on oral submissions and evidence due to the presence of the jury, less weight was given to the documentary evidence. However, since the jury was often illiterate, the documentary evidence had to be gathered beforehand, selected and assessed by the counsel in order to present it later to the jury. This led to the development of the pre-hearing stage of the proceedings, in which all the documentary evidence was supposed to be presented and submitted to the other party. In the contemporary common law countries, the discovery of documentary evidence is the key feature in the pre-trial stage of the proceedings. The

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<sup>16</sup> Brown, D, "Oral evidence and experts in arbitration" in Levy, L and Veeder, VV, eds, *Arbitration and Oral Evidence* (ICC Publishing, 2004), 80.

approach concerning the search of the factual objective truth is represented by the obligation of both parties to present and submit all the relevant evidence, both incriminating and favourable for the case. The documents, which include inter alia correspondence, emails and notes, are the prevailing evidence being produced in the discovery stage, however, all the other physical evidence is also included. The common law countries, especially the US, permit the discovery of an extremely broad variety of documents, which often leads to time- and cost-consuming proceedings. This is less true in the case of other common law jurisdictions, for example, England.<sup>17</sup> In fact, the so called ‘fishing expeditions’ are often used by common law counsel as a tactic to exhaust or burden the opposite party. Documentary evidence gathered during discovery is assessed by counsel and only the documents relevant to the case are presented as evidence in the proceedings. The written evidence in common law tradition is introduced and authenticated by counsel and explained by witnesses during the hearing.

In civil law tradition the legal and factual arguments are preferably supposed to be proven by the documentary evidence, which is submitted with the pleadings in the early stages of the proceedings. As judges are professional lawyers and they conduct the proceedings in the inquisitorial way, they can quickly assess the case based on the attached documentary evidence. The judge conducts his own enquiries into the issues of fact and law.<sup>18</sup> Since the approach taken is the search for procedural truth, there is no need for the pre-trial discovery, as the case is being assessed based on the evidence produced freely by each party, without the obligation to produce all the relevant documents in their possession. The parties do not have to produce unfavourable evidence to the opposite party. There is almost no discovery in the civil law countries, which limits the time of the proceedings as well as the costs. The only possibility of limited discovery and forced document production may take place in the case of a third party being in possession of a document essential for the case or a specifically identified document in the possession of a party, which is relevant in the course of the proceedings. In those cases the court may order the production of this document. The documentary evidence, which is typically submitted with the written pleadings and memorials, is self-authenticating. The weight given to the documentary evidence, especially to the official documents issued by State organs is greater than that given to any other type of evidence.

## II.6. Ethics

The legal culture also influences the ethics of counsel, since there are different standards and approaches toward the conduct of the proceedings. It is an usual and desired practice for common law lawyers to prepare a witness to testify. The preparation of a witness is commonly known as horseshedding.<sup>19</sup> A failure to adequately prepare a witness both for direct and cross-examination may be regarded as professional misconduct. The necessity to prepare the witness for testimony is due to the adversarial approach adopted by the

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<sup>17</sup> Karrer, PA, “The Civil Law and Common Law divide: An international arbitrator tells it like he sees it” in American Arbitration Association, *Handbook on International Arbitration and ADR* (2nd ed, Juris, 2010), 53.

<sup>18</sup> Davidson, BR, Muller, W and Riegler, S, “Procedural matters checklist” in Hanessian, G and Newman WL, *International Arbitration Checklist* (2nd ed, JurisNet, 2009), 90.

<sup>19</sup> Horseshedding being the instruction of a witness favourable to one’s case about the proper method of responding to questions while giving testimony. For more detailed description of the practice of preparing witness see Rifkind, RS, “Practice of the horseshed: Preparation of the witnesses by counsel in America” in Levy, L and Veeder, VV, eds, *Arbitration and Oral Evidence* (ICC Publishing, 2004), 55.

common law procedures. While documentary evidence is important, their evaluation and organisation is given by the oral testimony. In the highly developed technical and tactical cross-examination of witnesses, the counsel may not conduct this process without knowing what the witness will say and what may potentially be said by the opposite party's witnesses. What is a common practice in common law tradition, is being seen as unethical and prohibited in the civil law tradition. The preparation of a witness is prohibited for civil lawyers and for English as well, even though they come from common law tradition. In most continental European countries the counsel may approach and interview witnesses, but cannot prepare them to testify (for example, Austria, Germany, Sweden), however in other civil law countries the Rules of Conduct of the Bar included in ethical codes prohibit the counsel to interview witnesses (for example, Belgium, Italy, France).<sup>20</sup> Professional misconduct is subject to the disciplinary sanctions of Bar Authorities.

Another difference in ethics is the obligation of English lawyers to refer to the relevant case law, both favourable and unfavourable, whereas in civil law tradition the counsel may refer to the law and the precedent court decisions, but is not obliged to do so, since the judge is actively involved in the search for truth and applying the law. Moreover, in the German tradition, the counsel can speak in confidence with the opposite party's counsel without revealing the details of this communication to the client, whereas in common law the counsels cannot have secrets towards their clients.<sup>21</sup>

It has been shown above that civil law and common law vary significantly in terms of procedure, taking evidence, approaches and techniques. Understanding the differences and knowing the sources of them is the key to the mutual comprehension when it comes to the clash of the two cultures in transnational disputes and international arbitration proceedings, especially in cases where the parties come from two opposite legal traditions and tend to apply their own legal approach.

### III. The Need for Harmonisation of Procedural Rules

Having analysed the main differences between common and civil law tradition, it becomes clear that the expectations of the parties coming from each of the system and being involved in international dispute are significantly different. In terms of procedure the two systems represent almost opposite positions in key matters, starting from the approach adapted, the role of the judge, the conduct of the proceedings, search for truth, counsel's position and their practice, to evidentiary means. It seems that the major differences are present in terms of the taking of evidence and the weight that each system gives to various means of evidence, namely oral and documentary evidence. The taking of evidence has major influence on the outcome of the dispute, since it permits the gathering of all the necessary evidence to support ones' case. In international arbitration serious conflicts may arise due to the differences of legal traditions of the parties, in addition to the main substantive dispute between them. For this reason, defining the procedural rules has become a crucial issue for the international practitioners and institutions taking part in international arbitration. However, since legal traditions vary so significantly, the major problem is the choice of such procedural rules which would

<sup>20</sup> van Houtte, H, "Counsel-witness relations and Professional misconduct In Civil law systems", in Levy, L and Veeder, VV, eds, *Arbitration and Oral Evidence* (ICC Publishing, 2004), 106.

<sup>21</sup> Winter, JB and Newman, LW, "Cultural factors and language" in Hanessian, G and Newman, LW, eds, *International Arbitration Checklist* (2nd ed, JurisNet, 2009), 80.

satisfy both traditions and would not particularly favor any of the approaches. Hence, harmonising procedural rules of international arbitration proceedings has become a particular problem in an international society. Harmonising such different approaches is not an easy task and may lead to a variety of results, as combining some of the rules and approaches may not be fully satisfactory for either side.

Many institutions have set their own procedural rules to provide the parties with specified provisions which facilitate the conduct of international arbitration. The development of international arbitration in recent years has led to the amendments of rules and certain harmonisation of the practices used in the conduct of the proceedings, however with diverse effects. The rules according to which the international arbitration will be conducted are usually not the subject of arbitration agreements between the parties, since during the process of signing the contract the parties focus on only a few provisions in relation to the international arbitration, such as the seat of arbitration, the language, the number of arbitrators, and only sometimes deciding on the institutional rules governing the proceedings. However, most of the times, even if they do choose the institutional rules, they are not familiar with them and do not fully realise how the proceedings will be conducted. Usually, only after a dispute arises, the parties start to realise that there are many significant differences between their legal traditions influencing their expectations. Depending on the rules chosen, the extent of the parties' autonomy and the arbitrators' powers concerning the conduct of the proceedings differ. Usually the institutional rules are silent when it comes to detailed conduct of the proceedings, especially in relation to evidentiary matters. Institutional rules, such as UNCITRAL,<sup>22</sup> ICC,<sup>23</sup> LCIA Rules<sup>24</sup> provide only general provisions in terms of the taking of evidence. They define the procedural issues such as the request for arbitration, constitution of the tribunal, place of arbitration, the language and the other case management provisions, however, when it comes to the establishment of facts of the case, they usually contain only few generic articles, leaving the details to be set by the parties or the tribunal. In cases where the parties come from different legal traditions, finding a common ground as to the gathering of evidence might be problematic and lead to further conflicts. On the other hand, in the absence of agreement between the parties, one of the parties may feel unsatisfied or even deprived of its right to be heard and to present its case. In this situation, the tribunal in its authority sets the rules governing the taking of evidence and applies the rules familiar to its legal background and the opponent party's background. Hence, more detailed rules of evidence are required.

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<sup>22</sup> United Nations Commission on International Trade Law (UNCITRAL), *Arbitration Rules (as revised in 2010)*, 6 December 2010, A/RES/65/22 at <[uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2010Arbitration\\_rules.html](http://uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html)> (accessed 18 April 2015).

<sup>23</sup> International Chamber of Commerce (ICC), *Rules of Arbitration*, in force as of 1 January 2012, at <[iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/](http://iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/)> (accessed 18 April 2015).

<sup>24</sup> London Court of International Arbitration, *Arbitration Rules*, effective 1 October 2014, at <[lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](http://lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx)> (accessed 18 April 2015).

### III.1. IBA Rules on the Taking of Evidence in International Arbitration

The international community has recognised the abovementioned problems and provided a solution to fill the gaps in institutional arbitration rules. The International Bar Association (IBA) has provided guidance to parties in relation to the taking of evidence in international arbitration. Since the IBA Committee is composed of practitioners from all over the world,<sup>25</sup> it was qualified to create a set of international rules, which would be satisfying for parties coming from different legal backgrounds. The first version of the Rules was adopted in 1983 as *Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration*. The feedback from the international community was positive and the Rules were seen as an example of harmonisation of procedures regarding the taking of evidence in international arbitration. With time, new problems and new procedures had to be developed, since international arbitration became more popular as a method of dispute resolution. As a result, the Rules were updated in 1999 as the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*. This version of the rules was also well accepted and received as useful harmonisation in the procedures used in international arbitration. The ultimate revision of the rules took place in 2010 when IBA established the *IBA Rules on the Taking of Evidence in International Arbitration* (IBA Rules) (deleting from the title the word ‘commercial’ so that the Rules could also be used in the investment arbitration).

The IBA rules of evidence contain procedures initially developed in the civil law and the common law systems, which is why they are widely used in both institutional and *ad hoc* international arbitration proceedings. The IBA Rules may be adopted by the parties and the tribunals as a whole or in part, and they may also be used just as guidelines. The IBA Rules are not intended to substitute the institutional rules such as ICC, LCIA or UNCITRAL rules, as they do not contain the rules for the whole international arbitration procedure. They simply fill some gaps in terms of the procedure of taking evidence. The IBA Rules have been considered as the harmonisation of the differences in international arbitration procedure, however, it is disputable whether these Rules actually satisfy the needs and the expectations of the participants of the arbitral proceedings by creating a harmonised set of rules originating from common and civil Law tradition or if they only create a hybrid system which still does not completely resolve the existing issues in an efficient way. This problem will be discussed below.

<sup>25</sup> The 1999 IBA Working Party was led by Giovanni Ughi of Italy, and its members were Hans Bagner, Sweden; John Beechey, England; Jacques Buhart, France; Peter Caldwell, Hong Kong; Bernardo M Cremades, Spain; Otto De Witt Wijnen, The Netherlands; Emmanuel Gaillard, France; Paul A Gelinat, France; Pierre A Karrer, Switzerland; Wolfgang Kühn, Germany; Jan Paulsson, France; Hilmar Raeschke-Kessler, Germany; David W Rivkin, United States; Hans van Houtte, Belgium; and Johnny Veeder, England. The 2010 IBA Rules of Evidence Review Subcommittee was led by Richard Kreindler of United States/Germany, and its members were David Arias, Spain; C Mark Baker, United States; Pierre Bienvenu, Canada; Antonias Dimolitsa, Greece; Paul Friedland, United States; Nicolás Gamboa, Colombia; Judith Gill QC, United Kingdom; Peter Heckel, Germany; Stephen Jagusch, New Zealand; Xiang Ji, China; Kap-You (Kevin) Kim, Korea; Amy Cohen Kläsener, Review Subcommittee Secretary, United States/Germany; Toby T Landau, QC, United Kingdom; Alexis Mourre, France; Hilmar Raeschke-Kessler, Germany; David W Rivkin, United States; Georg von Segesser, Switzerland; Essam al Tamimi, United Arab Emirates; Guido S Tawil, Argentina; Hiroyuki Tezuka, Japan; Ariel Ye, China: *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 2010, at <[ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx)> (accessed 26 May 2015).

### III.2. Determination and Application of Rules of Evidence, Parties' Autonomy and Arbitrators' Discretion

One of the reasons why international arbitration is a preferred means of dispute resolution, apart from the intentional avoidance of the national courts, is the freedom the parties enjoy in choosing the rules that will govern the arbitration. An important advantage is the right of parties to appoint their own arbitrators who can be qualified in the matter which is the subject of the dispute and decide on the legal background of the arbitrators. Parties can create their own procedural rules and the standards of the proceedings, as the arbitration is founded on their will. Different systems of law may regulate different aspects of the proceeding. The recognition and enforcement of the arbitration agreement can be governed by one system of law while the recognition and the enforcement of the award may be governed by another. A third system might apply to the proceeding and a fourth to the substantive matters of the dispute.<sup>26</sup>

Although the parties have the powers to decide the procedural rules, including the taking of evidence, applicable to arbitration when drafting the substantive contract and the arbitral clause, they rarely do that, choosing only the institutional rules, if they choose any at all, under which the arbitration will be conducted. If parties explicitly set the particular evidentiary rules guiding the procedures, they will have to be respected by the arbitral tribunal unless they violate the mandatory norms of due process. Usually, however, the parties only choose the institutional rules which will govern the whole arbitration process, such as the ICC Rules or the LCIA Rules. Most arbitral rules do not provide detailed provisions as to how the evidentiary proceedings shall be conducted, leaving much freedom to the parties and to the arbitral tribunal in setting those rules. They usually contain a provision stating that the tribunal shall proceed to establish the facts of the case by all appropriate means, leaving a wide discretion to the tribunal. This intentional gap gives freedom to the parties and the tribunal in setting some more specific rules and in the absence of agreement between the parties, the tribunal has the discretion to set such rules. Even where there is a lack of previous agreement between the parties as to the evidentiary rules, it is possible to set them before the commencement of the arbitration. However, in a situation of conflict, this is sometimes impossible. The parties may also agree upon particular rules during the proceedings or before the hearing. In the event of a lack of agreement between the parties, the arbitral tribunal has a discretionary power to decide about the procedure, admissibility, materiality and weight of evidence. However, it has to consider the right of the parties to be heard, the opportunity to present the case, the norms of due process, fairness, equal treatment and the expectations of the parties. As parties may come from different legal background and have different views on many aspects of the procedures of taking evidence, the arbitral tribunal must seek an efficient and appropriate solution suitable in the given circumstances. Since the tribunal might be also influenced involuntarily by its own legal background, it is particularly important that it decides upon the rules carefully and with the utmost possible participation of the parties.

It is desirable for the tribunal to adopt the IBA Rules on taking evidence in international arbitration in cases where the parties come from different legal backgrounds and in case they have not come to any agreement on the procedures of taking evidence.

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<sup>26</sup> Hunter, M and Redfern, A, *Law and Practice of International Commercial Arbitration* (3rd ed, Sweet and Maxwell, 1999), 1–2.

The IBA Rules to some extent have reduced the gap between common and civil law in terms of evidentiary rules.

The IBA rules can be adopted as a whole, as the rules governing evidence, in part or as guidelines not strictly binding the tribunal. The IBA Rules are to be considered supplementary to the legal provisions of the institutional rules, *ad hoc* rules or other rules chosen by the parties, hence, they do not influence the application of those rules, since they fill in gaps intentionally left in those procedural frameworks with respect to the taking of evidence. According to the article 1 of the IBA Rules, in case of conflict with any mandatory provision of law determined to be applicable to the case by the parties or by the arbitral tribunal, the rules will not be applicable to that extent. In case of conflict between any provisions of the IBA Rules and the institutional rules, *ad hoc* rules or any other procedural rules established by parties or the tribunal, the tribunal shall apply the IBA Rules in the manner that it determines best, in order to accomplish the purposes of both the institutional rules and the IBA Rules, unless the parties agree to the contrary. Hence, the IBA Rules give the tribunal the discretion to apply the rules in the way that it determines the most appropriate. Moreover, the tribunal also enjoys the power to interpret the IBA Rules accordingly to their purpose and in a manner most appropriate to a particular case in any event of the dispute in relation to the meaning of the provisions of IBA rules. The discretion of the arbitral tribunal is significant also in cases where the IBA Rules and the institutional or other agreed rules are silent on some matter concerning evidence and when the parties have not agreed otherwise. In such case the tribunal can conduct the procedure of taking evidence in a way it deems appropriate, in accordance with the general principles of the IBA Rules. This solution provides further flexibility of the proceedings when some additional issues in terms of evidence arise. The IBA Rules invite the parties and the tribunal to consult each other at the earliest time possible to agree in an efficient, economical and fair process of taking evidence.

As stated above, the process of the taking of evidence is due to the parties' autonomy, since they have the freedom to set the rules of the taking of evidence tailored for their specific case and circumstances. In the event of a lack of selection of any rules of evidence and failure to reach an agreement, the parties are subject to the discretion of the tribunal in relation to evidentiary rules. Limitations to parties' autonomy are the norms of due process, fairness and the mandatory rules of the applicable law and selected institutional rules. However, even in the event of the tribunal's discretion in deciding the rules of evidence or its interpretation, the tribunal has to consider the interests of both parties, their expectations, right to be heard and their legal background as the tribunals' discretionary power always has its source in the will of the parties to arbitrate.

The discretionary power of the tribunal to decide about the rules of taking evidence includes also the admissibility of certain types of evidence. Since national rules on admissibility do not bind the tribunal, problems related to the technical rules of admissibility such as leading questions in direct examination of a witness, hearsay or the testimony of an individual being an employee of one of the parties will not be applicable in international arbitration. Such concepts might be crucial for the parties coming from a certain legal background when in their traditions the evidentiary rules prohibit the admission of this evidence. In international arbitration this evidence would not be excluded, unless the parties have explicitly agreed on admissibility of some types of evidence. The parties must be aware not to rely on the technical rules concerning admissibility during the proceedings, especially when the tribunal is composed of arbitrators coming from different background than theirs. Arbitrators are extremely reluctant to limit evidence that can be submitted and normally permit the parties to present evidence, including the introduction of materials of questionable relevance,

because they are concerned that their award will not be recognised or enforced by national courts due to a party being unable to present its case.<sup>27</sup>

Notwithstanding that, some evidence might not be admissible due to violations of public policy, protection by privilege or secrecy. Moreover, the rules of admissibility, even if not applicable, may matter at the stage of assessment of the evidence by the tribunal. The tribunal may assess that the evidence which has been admitted does not have probative value or has little value. Given that, a question may arise as to how the arbitral tribunal actually assesses the value of evidence and whether the parties may know in advance that some of the evidence presented by them will not have a strong value.

### **III.3. Cultural Diversity's Impact on Determination of the Rules**

The determination of the rules of evidence depends widely on the background of the parties. The cultural diversity in terms of legal tradition, views on the evidentiary matters, the approach and the expectations of the parties influence their vision of the best procedural rules appropriate for their dispute. When parties come from the same legal tradition, agreeing on certain rules of evidence may be much simpler, since the parties have a similar view on most of the evidentiary matters, the prevalence of the documentary or oral evidence, the method of examining the witnesses, the expert evidence, the discovery of documents and the approach of the tribunal. However, when the parties come from different legal traditions, defining the rules of evidence might be the focal point of the dispute, particularly when both of the parties and their counsels are not experienced in international arbitration. Additional problems might arise if the arbitral tribunal is composed only of arbitrators coming from the legal background of one of the legal parties and are inexperienced in disputes between parties representing opposite legal traditions. The legal and cultural background, even of arbitrators, is not to be underestimated. The Arbitrators are probably the most flexible of all the participants of the arbitration, however, still they have the baggage of some principal values coming from their own legal tradition and this is a significant factor to take into consideration. It is probable that an arbitrator trained in a particular legal culture will tend to apply the principles familiar to them when conducting the proceedings and addressing particular issues. This can constitute a serious problem for the parties and their counsel in preparing their case and trying to ascertain which legal approach will be taken by the tribunal and how its background may affect the conduct of the proceedings. To that extent, the knowledge of the differences, approaches and expectations of the participants of the international arbitration is of a fundamental importance. The counsel and the parties are far less flexible in reaching the agreement as to the evidentiary rules. This leads to the clash of cultures and tailoring the appropriate rules of evidence might be a harsh task. The IBA Rules are said to be the compromise between the common law and civil law tradition, which harmonises the legal traditions, methods, approaches and views on the taking of evidence. However, the IBA Rules are not just the compilation of the rules present in different legal traditions and their harmonisation, but rather a new, hybrid system which includes some of the features of both of the system. The IBA Rules also create their own procedures, uniquely different from those of the civil law or common law traditions. The IBA Rules contain procedures that are not present in the proceedings

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<sup>27</sup> Von Mehren, GM and Salomon, C, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide", 20(3) *Journal of International Arbitration* (2003) 288.

before the national courts. However, some issues that are the source of conflict between the two legal traditions are not covered or are merely mentioned in the IBA Rules.<sup>28</sup> Consequently, it is debatable whether the IBA Rules are actually a satisfying compromise and whether they are sufficiently adjusted to the needs of parties coming from different backgrounds. Due to the broadness of the matter and the limited length of the present article, it is not possible to analyse all the IBA Rules provisions in relation to all the forms of evidence. Hence, for the purpose of this study, only the issues of assessment and admissibility of evidence and the absence of some provisions in the IBA Rules will be discussed.

#### **IV. Admissibility and Assessment of Evidence According to IBA Rules of Taking Evidence**

The assessment of the evidentiary material depends on many elements which may influence the value and credibility of the evidence. This part of the article will discuss potential factors which are important for the assessment of the gathered evidence by the arbitral tribunal.

One of the major concerns of the parties and the lawyers, especially those coming from common law traditions, in relation to taking of evidence, is whether the evidence will be admissible. However, in international arbitration, strict rules as to the admissibility of the evidence do not apply and the principles governing the admissibility of the evidence are less rigid. The limits of the admissibility in case of international arbitration are defined by the discretion of the arbitral tribunal and the parties' agreement. If the parties adopt some evidentiary rules, such as IBA Rules, admissibility may be governed by them. However, in most cases, evidentiary rules give little guidance as to admissibility, stating only the main principles, leaving the decision at the discretion of the arbitrator. The parties of the arbitral proceedings may submit and produce many kinds of different evidence, of which the relevance, weight and credibility may vary. The material submitted in the case, if not challenged by the parties, will be assessed by the tribunal at the end of the proceedings. Article 9(1) of the IBA Rules provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence. The arbitrators might be reluctant in refusing to admit some evidence because it might possibly lead to a challenge of the award. Moreover, the liberal approach to admitting any evidence might be reasonable in light of the fact that a challenge of the award based on the merits is usually not allowed. However, the discretion of the arbitrator in this case may not be regarded by the parties as fair. The arbitral tribunal, on the other hand, should consider the efficiency principle and avoid allowing massive document production that may be irrelevant, in order to prevent delays and unnecessary costs for the parties. To some extent, the arbitrators tend to be more restrictive as to limiting the admissibility of evidence based on procedural rather than substantive grounds. They might reject evidence submitted after a deadline rather than on ground of substantive inadmissibility. The standards of admissibility in the case of civil law arbitrators are lower than those coming from a common law tradition. Hence, the result as to the admissibility may depend on the composition of the tribunal and the background of the practitioners. In case of common law tribunals, the practitioners from

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<sup>28</sup> Matters such as hearsay, legal privilege, adverse inference, professional conduct and ethics, timing of the document production scope of disclosure, burden and standard of proof, witness' examination and preparation.

civil law tradition should be aware not to rely only on the evidence which, in the tradition of the arbitrator, might be considered inadmissible. Similarly, the common law lawyer should be mindful that a civil law tribunal might not take into consideration the evidentiary rules regarding admissibility. However, an experienced tribunal, especially one composed of arbitrators of mixed legal traditions, will take an international and flexible approach and will focus on finding the facts of the case that are necessary for establishing the issues between the parties rather than being limited by rules of evidence and its legal background.<sup>29</sup>

The IBA Rules do not provide much guidance as to how admissibility is to be determined, leaving it to the discretion of the tribunal. As each jurisdiction may have different restrictions on this matter, conflicts and misunderstandings may arise. The admissibility may relate to the exclusion of corporate officers of the party, the approach to hearsay, prohibition of the evidence obtained from the illegal sources, or the prohibition of leading questions during direct examination. The tribunals, having little guidance from the IBA Rules, will tend to focus on the party's right to be heard and to present its case, rather than on the exclusion of the evidence, allowing all the evidence and deciding on their weight rather than excluding them as inadmissible.

Some standards of admissibility of the evidence by a tribunal is provided in Article 9(2) of the IBA Rules which, however, is not exclusive and does not include the issues which in some jurisdictions are considered as limiting or excluding the admissibility of the evidence. One such issue is that of hearsay, which is not admissible in common law jurisdictions. The tribunal allowing hearsay as evidence shall ensure that the witness is accurately examined and the weight of such evidence shall be balanced with other evidence that may confirm its credibility. It shall be taken into consideration by the parties that even if the evidence is admitted, it does not mean that it will be considered as having a probative value.

#### **IV.1. Legal Privilege and Secrecy**

Article 9(2) (b) and (e) of the IBA Rules relates to privilege and confidentiality as grounds for denying a request to produce documents. The party requested to produce documents shall indicate that the requested documents include privileged and confidential documents if it wants the request to be denied. In relation to the request for production of documents, the IBA Rules do not provide in detail which privilege should be taken into consideration leaving it to the discretion of the tribunal and the parties. Hence, the tribunal will carefully consider any claims of privilege and confidentiality filed by a party. The tribunal may handle the issues of privilege and confidentiality in consultation with the parties in various ways, such as by granting the request to produce such documents on condition that it will not be distributed by the other party outside of the arbitral proceedings, or by asking an independent expert to review the documents and indicate which parts of those documents are relevant for the case. The tribunal is to take into consideration the interest of both parties and the need to safeguard confidential documents, balancing the efficiency of the procedures with the principles of fairness and accuracy.

The IBA Rules do not specify how the tribunal will determine which legal or ethical rules are applicable in order to exclude the evidence due to legal impediment or privilege,

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<sup>29</sup> Redfern, A, Hunter, M, Blackaby, N and Partasides, C, *Law and Practice of International Commercial Arbitration*, (Sweet andMaxwell, London, 2004), 296.

stating only that such rules are determined by the tribunal. Such a generic provision may be a source of conflict since common and civil law traditions have different approaches towards legal privilege. The evidentiary privilege concerns rules that allow a party not to produce a document or other evidence to the other side of the proceedings or in a certain investigation or dispute. The most common type of privilege concerns the counsel-client communications, namely communications or documents created for purposes of preparing for the proceedings or notes made by a lawyer. In common law tradition the protection of certain communication or documents is privileged, while in civil law countries it is generally referred to as confidential.<sup>30</sup> The principle of confidentiality relates to the client-counsel relationship and is usually set out in the ethical rules in each jurisdiction, stating that in the absence of the client's informed consent, the counsel must not reveal information relating to representation.<sup>31</sup> In the civil law tradition, other forms of communication protected by the confidentiality relate to the communication with the doctor, between the close family members and confession before the priest. In international arbitral proceedings the most common privilege issues concern the communication between the counsel and their client, counsel's work products, and the settlement attempts, being all the communication entitled 'without prejudice'.

In common law jurisdictions, the discovery in the pre-trial phase of the proceedings does not involve the documents related to the work of the counsel and their relations with the client. Communication with external counsel is privileged, however, in some jurisdictions the communication with in-house lawyers does not enjoy the same level of protection. The privilege applies both to the communication, work products and any materials which are produced during the process of legal advice or representation in the litigation.

In the civil law tradition, the party is not obliged to provide any documents that may harm its case, hence the concept of privilege is not so common, as the party does not need to be protected from the mandatory disclosure. However, the communication between the lawyer and their client and all documentation submitted in the process of legal advice are protected by a professional obligation of secrecy. The civil law lawyer is obliged by the ethical rules and codes of conduct to maintain in secrecy all the information that came to their knowledge during their professional conduct. The lawyers can refuse to give evidence which relates to the communication with and representation of the client, even in court proceedings.<sup>32</sup> However, this obligation does not bind the client, who cannot refuse to give testimony in case of proceedings against the lawyer or other proceedings, when asked to give evidence about the legal advice received.

In the event of international arbitration between the parties coming from both common law and civil law jurisdictions, some conflicts concerning privilege may arise. Since privilege and confidentiality have different scopes in each of the traditions, a question may arise as to which of these approaches the tribunal will apply in order to provide fair proceeding. While it might be determined that particular evidence is not covered by the client-counsel privilege, the ethical duty of confidentiality might still

<sup>30</sup> Waincymer, J, *Approaches to Evidence and fact Finding in Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012), 801.

<sup>31</sup> Centre for Professional Responsibility, Michmerhuizen, S, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, May 2007, at <[americanbar.org/content/dam/aba/administrative/professional\\_responsibility/confidentiality\\_or\\_at\\_torney.authcheckdam.pdf](http://americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_at_torney.authcheckdam.pdf)> (accessed 26 May 2015).

<sup>32</sup> von Schlabrendorff, F and Sheppard, A, *Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution* (Liber Amicorum in Honour of Robert Briner, 2005), 752.

apply. Moreover, it would seem unfair if one of the parties benefited from having privilege and the other not. As the IBA Rules do not give an answer to this question, it has been proposed that in cases where there is a conflict of privileges and the rules differ as significantly as they do between the common law and civil law systems, it does not appear in accordance with legal ethics to apply different rules of privilege to different parties.<sup>33</sup> The expectations of the parties should be taken into consideration and the most appropriate solution is the application of the most favourable privilege. As the parties will be treated with consideration, equality and fairness, the arbitral tribunals can determine which privileges may be applicable to each party and allow any party to claim the same legal privilege available to the other party. This approach seems to be acceptable for both sides and the risk of challenging the award will be lowered. Moreover, the arbitrators should not consider the adoption of wide privileges as an obstacle to truth-finding since generally, even in national litigation, the courts do not need such communication between lawyers and clients as an indispensable means of establishing the facts of the case. For the sake of avoiding the conflicts of cultures in this regard, it would be advisable that the IBA Rules adopt a similar approach and include a more precise provision in relation to privilege.

#### IV.2. Other Reasons for Evidence Exclusion

Among other reasons for the exclusion of evidence, in Article 9(2)(a) the IBA Rules also refer to the lack of materiality and relevance. The tribunal may exclude any irrelevant evidence, if it assesses that it has no evidentiary value for proving the facts or that lacks materiality. The relevance and materiality of a request for document production are mandatory requirements for admissibility. A document is considered relevant if it is likely to prove the facts from which the legal conclusions are drawn.<sup>34</sup> The document is material when it is necessary in aiding the consideration of a legal issue by the tribunal.<sup>35</sup> Hence, if the fact can be proven by other means, then there will be no need for the additional document to be produced even if it is relevant for the case. In order for the tribunal to assess the materiality and relevance of the requested documents, the parties clearly indicate the factual allegations they want to establish by the documents. For those reasons, it is important that the request for production is filed in a precise phase of the proceedings, permitting the tribunal to become familiar with the case, claims and the evidence that needs to be provided in order to prove the alleged facts. The arbitrators can assess the relevance and materiality only at the time of the filing of the request, which is referred to as '*prima facie* relevance'.<sup>36</sup> The arbitrators may point out that they will not be in the position to rule on the ultimate relevance of the documents until the issues in the case have been finally determined.<sup>37</sup>

The relevance and materiality of the documents is related to the burden of proof for the factual allegation criterion. As underlined by Yves Derains

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<sup>33</sup> *Id.*, 771.

<sup>34</sup> Kaufmann-Kohler, G, and Bartsch, P, *Discovery In International Arbitration: How Much is Too Much?* (SchiedsVZ, Heft 1, 2004), 18.

<sup>35</sup> *Ibid.*

<sup>36</sup> Hamilton, V, "Document Production in ICC Arbitration", *ICC International Court of Arbitration Bulletin, Special Supplement, Document Production in International Arbitration* (2006) 63, 69.

<sup>37</sup> Hanotiau, B, "Document Production in International Arbitration: A Tentative Definition of "Best Practices", *ICC International Court of Arbitration Bulletin, Special Supplement, Document Production in International Arbitration* (2006), 117.

to be efficient, document production must serve the purpose of bringing to the arbitral tribunal's knowledge not just any documents relevant and material to the outcome of the dispute, but documentary evidence without which a party would not be able to discharge the burden of proof lying upon it... On the other hand, when a document production request is disputed, the arbitrators have the responsibility of determining whether the requesting party actually needs the documents to discharge the burden of proof. If not, the request should be denied. ... When assessing requests, arbitrators must carefully check that the burden of proof actually lies on the requesting party.<sup>38</sup>

Derains also points out that the arbitral tribunal often grants the request for document production only if they appear relevant to the case and material to the outcome of the dispute, irrespective of whether the party making the request actually bears the burden of proof.<sup>39</sup> Hence, a request for document production will be denied when a party fails to indicate the allegations it wants to prove and fails also to explain that without the documents its burden of proof cannot be discharged. In such cases it might be enough for the other party to be reminded by the request that it has not satisfied its burden of proof and to voluntarily produce the requested document.

The evidence which is unreasonably burdensome to acquire can also be excluded from the proceedings. Such burdensomeness may include situations where there is a large quantity of evidence, where evidence is difficult to obtain or access (in case of witnesses), or where other evidence exists, which is sufficient for establishing the facts. The burdensomeness of the document production is another issue to be considered. As stated in the Article 9(2)(c) of the IBA Rules, the request for production of document shall not place undue, unreasonable burden on the producing party. The burdensomeness is related to the requirement of specificity of the request since the lack of the detailed description, or a request which is too broad, will create an unreasonable burden for the requested party in identifying and producing the document. Accordingly, such a request shall not be granted, however, the tribunal shall in each case, take into consideration the importance of the document in the fact finding process and balance it with the degree of the burden it presents.

### IV.3. Burden of Proof, Standard of Proof and Weight of Evidence

The burden of proof is considered to be an important element in evidentiary proceedings. In most legal traditions, a party bears the burden of proof, meaning the burden of proving the facts upon which the party relies in support of its claims. In other words, a party has to prove its own allegations. In international arbitration, the burden of proof is less important than before national courts and arbitral rules are often silent about it. The IBA Rules do not mention the burden of proof that a party shall bear. In the absence of such rules, the tribunal enjoys wide discretion as to how to treat the burden of proof. Usually the arbitrators apply the principle of *actori incumbit probatio*, ('he who avers has the burden of proving') meaning that the burden of proof lies on the person making the particular assertion. The burden of proof is highly relevant in deciding a case. As the parties submit

<sup>38</sup> Derains, Y, "Towards Greater Efficiency in Document Production before Arbitral Tribunals: A Continental Viewpoint", *ICC International Court of Arbitration Bulletin*, Special Supplement, *Document Production in International Arbitration* (2006), 87.

<sup>39</sup> *Ibid.*

a wide range of evidence without regard to who bears the burden of proof, the tribunal may consider the burden of proof if, at the end of the proceedings, a clear and convincing answer is not found.<sup>40</sup>

Similar to the burden of proof, the standard of proof is also not expressly referred to in the IBA Rules. A standard of proof defines the criteria before something can be considered to be proven. It can also be referred to as the level of proof.<sup>41</sup> In international arbitration, a more flexible approach is favoured over the application of strict rules. Where, in the rare event, the arbitrators refer to the standard of proof they are applying, they tend to do so in accordance with the approach of their legal culture. In the common law legal system, the standard of proof in civil litigation is generally the comparative one of the balance of probabilities, which version is more likely true than any other. In the civil law system, the laws and legal doctrine refer to non-comparative concepts of the 'conviction of the judge'.<sup>42</sup> In international arbitration the standard of proof applied can be summarised as a 'balance of probability'.

Since in international arbitration many evidential rules that are present in national jurisdictions do not apply, such as some admissibility rules, burden of proof or standard of proof, the weighing of evidence is an important part of the process of decision-making by the tribunal. The weight given to documentary evidence is slightly higher than that given to evidence provided by a witness. The tribunal also gives less weight to evidence which has been gathered in circumstances of hearsay, even if there is no rule which forbids hearsay evidence, as the tribunal tends to avoid the possibility of challenge of the award. Moreover, the tribunal may be influenced by its own legal background when deciding on the weight of witness statements, cross-examination of witnesses or the direct examination conducted by the tribunal itself. The tribunal takes into consideration the non-production reasons, destruction of evidence and all the other possible reasons which did not result in refusal of the admission of the evidence, but need to be weighed in order to give them a proper evidentiary value in the consideration of principles of fairness and equality.

In the process of weighing evidence, the tribunal distinguishes between direct and indirect evidence. Direct evidence is preferred and will generally be given more weight than indirect evidence. However, indirect evidence is generally accepted by international tribunals, and if direct evidence is not available, indirect evidence is the only method of proof. Similarly, if direct evidence is impeached, indirect evidence may be decisive.<sup>43</sup> As stated by the International Court of Justice in the *Corfu Channel* case, 'indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion'.<sup>44</sup>

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<sup>40</sup> Bockstiegel, K, "Presenting, Taking and Evaluating Evidence in International Arbitration" in Carbonneau TE, executive ed, Jaeggi J, Partridge, SK, assistant eds, *Handbook on International Arbitration and ADR* (JurisNet, 2010), 81.

<sup>41</sup> Zuberbuhler, T, Hofmann, D, Oetiker, C, and Rohner, T, *IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, (Schulthess, 2012), 169.

<sup>42</sup> Landolt, P and Reeves, BN, "Burden and Standard of Proof in Competition Law Matters Arising in International Arbitration" in Blanke, G, and Landolt, P, eds, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, (Kluwer Law International, Alphen aan den Rijn, 2011), 160.

<sup>43</sup> Pietrowski, R, "Evidence in International Arbitration", 22(3) *Arbitration International* (2006) 373.

<sup>44</sup> International Court of Justice, *The Corfu Channel Case (United Kingdom v Albania)*, ICJ Reports 1949, 9 April 1949, 18.

## V. Balancing the Competing Values: The Need for the Application of New Solutions

The differences in approaches between the civil and common law are evident. As has been discussed, in the field of taking evidence the clash of cultures is inevitable since each of the traditions has its own rules, expectations and ethics, which are deeply rooted in the mentality of the practitioners from civil and common law tradition. Their expectations are usually a reflection of the procedures and rules applicable in the domestic court proceedings to which they are accustomed. The differences in the case of evidence laws are relatively important because in almost every area, the different traditions present an almost opposite approach. International arbitration, by its nature, combines these legal traditions, however, whether this is a successful ‘marriage’ is disputable. Since the international arbitral procedure is characterised by the absence of restrictive rules governing the form, submission, admissibility and evaluation of evidence, it is important that some guidance and indications exist in order to facilitate the conduct of proceedings for the parties coming from different legal backgrounds. The general approach of international tribunals is to keep open the possibilities to submit evidence that will assist in establishing the truth with respect to disputed facts. Generally, all evidence, documentary and testimonial, is admissible and the tribunal itself determines the relevance, materiality and probative value of the evidence. However, together with this flexibility comes a concern about the fairness of the proceedings and the interest of the parties. While the IBA Rules provide a wide discretion to the tribunal, it is imperative that some more specific guidelines exist, since in many areas the IBA Rules are too general and leave some gaps as to which disputes may arise between the parties. This is the case especially when it comes to issues such as legal privilege, hearsay, timing of the production of documentary evidence and the burden and standard of proof, in which guidelines may be helpful in combining the different approaches of common and civil law.

The IBA Rules implement a hybrid system which favours neither civil nor common law. The mechanism present in the IBA Rules is a new system, which combines some of the aspects of each legal system, but also implements new solutions. The question is whether such a solution, without more specific guidelines, is satisfactory for both sides while none of the original approaches of the parties is implemented, but instead the ‘half measures’ solutions are suggested and the broad discretion of the arbitral tribunal is used as a means of solving this problem. A combination of various rules from different legal systems is not always the best solution, especially when it does not provide the proper and precise rules of their implementation, hence a hybrid system of taking evidence in its current form may lead to embodying the weaknesses of each system. The discretion of the tribunal is not enough in order to provide the satisfactory evidentiary solutions in the problematic issues. In the view of the author, the IBA Rules, being a step forward towards harmonisation (if not already being itself a harmonised system) still miss important elements in order to provide a satisfactory solution. Instead of very general rules which are a combination of legal rules from civil and common law jurisdictions that fail to detail how the solutions shall be implemented and leave a very broad discretion to the tribunal, the IBA Rules should, contain some more detailed and precise provisions as to the taking of evidence. Another solution could be the introduction by the arbitral institutions of precise protocols or guidelines containing default rules on the most questionable issues which are not present or are too generic in the IBA Rules. This should be the case especially in relation to documentary evidence, which still causes

major conflicts between the parties, in relation to the scope of disclosure and the possibilities to refuse the production in case of privilege, secrecy and confidentiality. The professional conduct and ethics of counsel are another weak point of the IBA Rules, as there is a lack of precise provisions and only a general provision detailing the possibility of interviewing the witness.<sup>45</sup> Parties coming from civil law traditions may consequently be disadvantaged. It is not defined to what degree the contact with the witness is allowed and where the limit between a simple interviewing and preparing the witness for the hearing and so called 'coaching' the witnesses lies. Greater detailed rules as to what standards to adopt in witness examination, cross-examination, and witness statement preparation are crucial in order to avoid the unequal treatment of the parties, particularly where one party has an advantage in terms of not being bound by ethical rules. It has been argued that notwithstanding the actual state of harmonisation in international arbitration proceedings, the parties', attorneys' and arbitrator's cultural and legal background and experience materially affect the success and outcome of the arbitration proceedings. The inexperienced participants are bound to be disadvantaged in the current state of affairs. There are still a number of areas in which a consensus has yet to emerge and more precise rules to be established. The arbitral discretion is insufficient in securing satisfactory solutions for both of the parties. The Preamble to IBA Rules in paragraph 3 states that the 'taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely'. The good faith principle is to be taken into consideration by the tribunal when deciding on the particular matters of the proceedings and may lead to negative consequences for the parties in the event of bad faith. The principle of good faith serves as guidance for the parties inexperienced in the proceedings and the tribunal on how to proceed, however, it may lead to confusion, particularly between the parties coming from different backgrounds, as to what is seen as acting in good faith, and towards whom the good faith shall be shown. The IBA Rules do not explain in detail how to understand the good will principle and do not give the examples on what standards the tribunal should follow in assessing the failure to act in good faith. The breach of good faith might be constituted by the excessive document production requests, failure to comply with the document production order, holding back the documents on which the party relies on in attempt to surprise the other party in the later stage of the proceedings.<sup>46</sup> The principle stated in the same paragraph of the Preamble giving the party the right to know in advance what evidence the other party relies on is the rule applicable to all the other provisions of the IBA Rules. The party shall always be informed as of side's actions, arguments and evidence in order to be able to prepare itself for the rebuttal. The arbitral tribunal shall take this rule in consideration when deciding upon the acceptance of late submission of evidence.

The search for fairness may lead to further abuse or conflicts since the standards of due process, the right to be heard and the possibility to present one's case may be understood in different ways by the parties coming from different legal backgrounds. What is seen as due process by the common law lawyer, might be seen as unjustly burdensome and causing delay by the civil law lawyer. Procedural rules and the IBA Rules give the tribunal guidance as to the conduct of the proceedings, however, in the absence of precise

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<sup>45</sup> Article 4(3), IBA Rules.

<sup>46</sup> Zuberbühler, T, Hofmann, D, Oetiker, C and Rohner, T, *IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of evidence in International Arbitration*, (Schulthess, 2012), 5.

rules the main task of the tribunal is to balance carefully the efficiency, fairness and equality of evidence presented. The discretionary power of the arbitrators is not absolute and is limited by the parties' autonomy and rights, whereas the principles and main features of the proceedings are the result and, simultaneously, the main goal of the arbitral proceedings. The parties' rights of due process are the limits to the arbitrator's discretion and the arbitrator has a duty to ensure those rights. At the same time, the parties' rights are guaranteed by the arbitrator's discretion in the event of attempts by the other party to diminish them. The arbitrator is a reconciler of the competing principles enabling the adjustment of the proceedings to the needs of particular case. The administration of the case by the arbitrator must be conducted with respect to time and cost, the party's rights, accuracy of facts and legal norms. This must be considered impartially and independently.

The discretion of the arbitral tribunal and its role in balancing various values also applies to the balancing of the differences between the parties' legal backgrounds and cultures. One very difficult aspect of the equal and fair treatment of parties is the extent to which the tribunal shall take into account the legal background of the party, since it cannot apply different standards to each of the parties in this regard. The IBA Rules are helpful and provide guidelines, however, they leave a vast discretion to the tribunal in most of the cases when a conflict could arise and when the approaches are difficult to combine. The gaps in the IBA Rules are to be filled by the discretion of the tribunal, which may not be an easy task. The notions of fairness and due process are also influenced by the legal culture, since what is a due process for one party might seem unfair to another. The lack of precise rules also leads to situations in which the identical positions of the parties may be treated in a different way and the outcome of a dispute may depend not upon factual accuracy, but upon the personality of the relevant arbitrator.

The level of compromise and harmonisation reached by the IBA Rules, is to some extent very efficient, and its broad acceptance confirms the success of such initiatives. The guidelines are often very helpful in conducting the process of taking of evidence, however, they do not resolve some of the procedural challenges which might be encountered by the tribunal and the parties. The rules on how to resolve those challenges are needed in order to properly balance all the values, principles and rights at stake in arbitration proceedings. The discretion of the tribunal is often not a sufficient guarantee for the fairness of the proceedings. What the participants of international arbitration want is a precise award which is predictable based on the particular circumstances. The wide discretion of the tribunal and the lack of precise rules leave the parties in uncertainty as to whether their case will be dealt with in an accurate and fair manner. In order to avoid judicialisation of international arbitral proceedings, more precise rules would act as the guidelines and default rules, so that there is no danger in the proceedings evolving into international litigation, since the parties would always have the power to decide whether to adopt them. In this regard, rather than leaving those issues to the discretion of the tribunal and creating uncertainty for the parties, more precise rules could be adopted, either by amendment of the existing IBA Rules and the inclusion of the solutions for the matters they do not cover, or by way of the setting the default rules, which would prevent the creation of the stiff and binding procedural rules, but would at the same time provide some certainty for the parties who would know in advance of the proceedings which rules would be adopted.

The current state of the rules governing the proceedings in relation to the taking of evidence is unsatisfactory. It has been shown that the IBA Rules, which are the most advanced existing rules in that regard and which combine the approaches from both civil

and common legal systems, provide a new, synthesised system of rules governing the taking of evidence. This, to some extent, works well and these rules are widely used by practitioners. However, they do have some weaknesses, which result in the dissatisfaction of the parties, further conflicts and may lead to the challenge of the award if the arbitral tribunal exercise the discretion left by the IBA Rules in an unfair way. The IBA Rules are a compromise between both legal systems which are not yet definitively elaborated and lack some more detailed rules. The silence of the IBA Rules or by leaving the solution of these problems to the arbitrators is their main weakness and a reason for some parties' discontent. The parties expect accuracy of awards and predictability of proceedings over the wide discretion given to the arbitrator. The broad application of the IBA Rules results from the fact that they do provide some rules and guidance in case of evidentiary matters which were missing in the institutional rules and were left to the discretion of the arbitrators. The existing problems and the issues raised by the practitioners in relation to the lack of guidance in a number of evidentiary matters mean, however, that the international society does want the introduction of certain rules and solutions and the predictability of the procedure. More precise rules are needed in order to ensure the fairness and efficiency of the proceedings, with the consideration of the approaches and expectations of the different parties, providing certainty and predictability of the proceedings. Striking a balance between efficiency, fairness and accuracy entails reconciliation of different legal traditions and rules. A certain degree of harmonisation does exist and will continue to emerge. However, the uniformity does not and maybe will never exist in the light of the variety of expectations and approaches. The need for the detailed rules may seem opposite to one of the main goals of the arbitration which is flexibility. However, flexibility will always exist, taking into account a party's autonomy to adopt the set of precise rules. Too much flexibility and leaving the controversial issues to the arbitrator's discretion may sometimes lead to confusion and uncertain results. It is not surprising that the parties of international arbitration desire certainty within the rules adopted and an ordered process without surprises. Flexibility may seem crucial at the time of drafting of the arbitral agreement, however, when the dispute arises the parties will be more satisfied with the certainty of the procedures and a fair and accurate award.

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