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INTRODUCTION

The recent growth of international commerce has led to a corresponding explosion of cross-border litigation and international disputes. National courts lacked expertise and experience in dealing with diverse legal systems while parties of a dispute were also reluctant to submit their case to the court of the opposite party. This situation gave a background to the growth of international commercial arbitration. The rules of procedure and the practices applied in international arbitration, especially those related to evidence in international arbitration are of a great importance since they affect the outcome of a dispute and the rights of a party as much as the substantive law. The actual procedures applied differ widely between countries and between legal systems. As the parties of international arbitration often come from different legal and cultural backgrounds, they differ in tactical evaluation of the case as the nature of the rules governing the evidence varies between Common Law and Civil Law countries. In the context of international arbitration certain procedures and practices have evolved over time, some taken from one system and some from another, which has led to some degree of standardization, leaving however flexibility and discretion to arbitrators. The nationality, legal training and experience of the participants of arbitration proceedings have a strong impact on the procedural rules they tend to follow. Apart from the parties, also the arbitrators might by influenced by their own legal system and favor different

evidentiary rules. Institutional rules on taking evidence in international arbitration have been established is attempt to harmonize various influences and approaches. In order to determine the proper rules of evidence several factors must be balanced. The role of the arbitrator in balancing the opposite principles and approaches must not be underestimated.

The thesis discusses the procedure of taking evidence in international commercial arbitration from the perspective of balancing the different legal cultures and values, analyzing the actual results of the existing evidentiary rules and attempts to harmonize the procedure, 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 and handling of the relationships and differences between legal cultures, fairness, efficiency, flexibility and predictability.

The methodology applied in the research has been the following. In the first instance the author analyzed 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 the evidentiary issues. The further step involved the search for the procedural rules which govern the international arbitration and verification whether the evidentiary rules are present and to what extent, together with analyzing the factors which determine the rules of procedure. Furthermore, the International Bar Association Rules on Taking of evidence in International Arbitration were analyzed, as an example of the most detailed and widely used evidentiary

rules. The analysis of the provisions of IBA Rules compared with the approaches presented in the Civil and Common Law systems which were studied before permitted the comprehension of the strengths and weaknesses of the IBA Rules and the needs for the further introduction of the rules. Next the analysis of the arbitral discretion permitted the further comprehension of the complex relationships between values such as efficiency, fairness, flexibility and predictability in arbitral proceedings. Finally the results of this study led to the conclusions 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 of the arbitral proceedings.

The thesis is set out in five chapters.

Chapter I discusses the clash of cultures in international commercial arbitration, explains the Civil law-Common law division and its background, discusses the differences of approaches and briefly describes the main differences in terms of taking of evidence, which then will the discussed in more details in Chapter III when discussing the evidence in international arbitration.

Chapter II discusses the need of harmonization of the evidentiary rules in international arbitration, the sources and character of some institutional rules and illustrates the approach toward the harmonization of rules, among which the IBA Rules are the most successful example. This chapter also discusses the determination and application of evidentiary rules in

international commercial arbitration, underlining the role of parties autonomy and the tribunal discretion as well as the impact of cultural background.

Chapter III widely discusses the IBA Rules on Taking of evidence in International Arbitration and the Civil Law and Common Law approaches to each of the evidence. Firstly, the document production is broadly discussed, the need and reasons for discovery, the tribunal's power to order the parties to produce unfavorable documents and the scope and requirements of document production. Then the parties' refusal to produce documents and the adverse inference the tribunal may draw is discussed. Following that the chapter discusses the issue of e-discovery and the problems related to that, including the institutional rules, guidelines and protocols, scope and form of e-discovery. To conclude this section of Chapter III benefits of discovery and efficiency of the proceedings is discussed. Secondly, the witness evidence is discussed, describing the differences of approaches in Civil and Common Law and the harmonization in IBA Rules, including written statements, oral testimony, evidentiary hearings and cross-examination. Thirdly, the expert evidence is discussed, including the division into tribunal and parties appointed experts, the reasons why they co-exist, expert report and expert witness's examination.

In Chapter IV the admissibility and assessment of the evidence is discussed, underlining the tribunal's discretion in determining the relevance and admissibility of evidence. Then the privilege and secrecy is discussed. Finally

the tribunal's discretion in determining the burden of proof, the standard of proof weight of evidence will be discussed. After that the confidentiality in terms of evidence, the circumstances in which the tribunal takes the decision to adopt special measures to protect confidentiality and the measures of confidentiality in terms of absolute or relative confidentiality will be briefly discussed.

Finally, Chapter V stresses the necessity of balancing the variety of different principles, relationships and different legal backgrounds while shaping the evidentiary rules in order to obtain a satisfactory and broadly accepted result. It discusses the role of the arbitrator in balancing and handling the opposite interests, principles and values existing in international arbitration, as well as the need for the default rules.

CHAPTER I. International arbitration as a clash of legal cultures.

Economic globalization has lead 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 the 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 a different legal background and culture international commercial arbitration inevitably causes the possibility of conflicts and misunderstandings. The differences between the parties' approach, legal background and expectations are often so significant that international commercial arbitration becomes a true clash of legal cultures.[1]

As culture influences the behavior, values, attitude, legal background and many other aspects of life, the cultural differences between the parties of international arbitration have a strong impact on the arbitral proceedings. The expectations not only of the parties, but also of the arbitrators and counsels regarding the international arbitral process vary depending on their legal background. The participants of international arbitration process

[1] Bernardo M. Cremades, Powers of the Arbitrators to Decide on the Admissibility of Evidence and to Organize the Production of Evidence, ICC International Court of Arbitration Bulletin Vol. 10 No. 1, 1999, pp.49.

naturally expect to have the conflicts resolved according to the values and norms familiar to them. Hence, the cultural legal background determinates the approach of the participants of the international arbitration, as they expect the arbitration to be similar to what they are used to in their legal system. This is particularly evident when it comes to procedural issues related to the international arbitration.

The differences in the legal systems are well pronounced not only between cultures but also between the 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 for the 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[2], Non-Arab African Countries, Latin American Countries, East Asian[3], however the cultural clash in relation to the international arbitration is mainly observed between Common Law and Civil Law.

The divergences between Civil and Common Law in international arbitration influence the whole proceedings but they particularly affect the evidentiary issues. Taking evidence is one of the most important part of the

[2] For detailed description of the legal system of Arab Countries and Shari'a *see* Ibrahim Fadlallah, Arbitration Facing Conflicts of Culture, Arbitration International, Kluwer Law International 2009 Volume 25 Issue 3, pp. 303 – 317.

[3] For detailed description of the legal system of Non-Arab African Countries, Latin American Countries, East Asian and Arab Countries *see* Lara M. Pair, Cross-cultural arbitration: Do the differences between cultures still influence international commercial arbitration despite harmonization?, Journal of International & Comparative Law, Fall, ILSA 2002, L 57.

proceedings as it has a direct impact on the outcome of arbitration. The approach adopted in the procedures of taking evidence, methods of presentation, admissibility, relevance and weight of documentary and oral evidence are of a great importance for the parties taking part in the dispute resolution. Evidentiary rules and procedures vary significantly between Civil Law and Common Law traditions. The differences are the most pronounced when it comes for preparation and submission of documentary evidence, oral evidence such as witness of fact and expert witnesses, the actual conduct of evidentiary hearings, but also 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. Counsels 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 recognize the mutual 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 counsels 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 him from his legal background. However, in order not to oversimplify, it must be underlined that the experienced lawyers, with the knowledge of the differences in the legal cultures, will most of the times try to adopt an international approach towards the 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, expertise will definitely play a role in the approach adopted by them in terms of evidence. This transnational approach is the result of the recent attempts to harmonize the arbitral proceedings[4] and the fact that to some extent they successfully have reduced the gap between Common and Civil Law in terms of evidentiary rules. Nevertheless, the issue of cultural differences in international arbitration is still relevant today, as the clash of cultures continues to exist. Despite the increased globalization and flow of information about other legal systems, culture continues to play a role. There are still issues which need to be resolved, which will be discussed in the further chapters of this thesis, and the need for mutual understanding is a subject of a great importance. In order to overcome cultural problems emerging in international arbitration with particular

[4] In particular, the IBA Rules on the Taking of Evidence in International Arbitration adopted by the International Bar Association Council on the 29th of May 2010, available on http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

emphasis on evidence, one should understand the differences, their source, 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 the problems in cross-cultural international arbitration might be avoided and resolved. This chapter will discuss the main characteristics of Common and Civil Law, their sources, historical background and differences in terms of procedure with the emphasis on the evidentiary matters.

1.Civil and Common Law diversity in terms of procedure and the approach to facts 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. This chapter will discuss the procedural differences in taking evidence, but also the general approach adopted by each legal system and the source of those differences, the knowledge of which essential to understand the conflicts that may arise in international arbitration as a result of the cash of different legal cultures. The analysis will not cover the substantial law.

The main fields in which the differences are observed are the methodology of the approach in each of the systems, the role of the judge/arbitrator, role of counsel, pleadings, the way the evidence is introduced including document discovery, fact witnesses, but also the other aspects of the legal proceedings such as the ethics of the counsels. The differences apply to both national litigation and national arbitration in the two of the systems, as the 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 common for the countries belonging to the particular legal family. The most common determinants 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 precedents. In this thesis the two main systems will be discussed with

regards to the USA and England on one side and European counties on the other side as the representatives of two legal cultures, even though some differences in the procedure from country to country apply.

1.1.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 determinates the participants expectations in terms of procedure, since it is the core element which influences all the 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 organized.

Common Law is characterized by the adversarial approach, where the judge does not play an active role in the dispute before him. His 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 originate 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 judge.[5] The adversarial approach influences all stages of the proceeding, determining the rules of evidence presentation, exclusionary rules and the role of the

[5] Laurent Vercauteren, Note and Comment: The taking of documentary evidence in international arbitration, The American Review of International Arbitration, 23, 2012, pp.341.

counsel. This system obligates the parties to present all the relevant evidence in their possession, including evidence which is adverse to their own interest.[6] Common Law system also developed elaborated rules of evidence and exclusionary rules which was partly due to the fact that historically for centuries evidence was judged by the juries composed of lay persons often not even literate and with no legal background.[7] For this reason the Common Law is mostly oriented towards the oral evidence and the hearings as the evidence were discussed and accessed orally which permitted the jury to fully understand and evaluate them. Further result of the adversarial approach and the presence of the jury is the division of interlocutory proceedings and the hearing. Historically the counsels had to select and properly present information and gather evidence, because the jury composed of laypersons might have considered irrelevant evidence or fail to evaluate it correctly. The jury did not receive any information before the proceeding since the members of the jury were not being selected yet. Therefore, all the information needed to be introduced to the jury again.[8]

Civil Law is characterized 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. His role is to investigate

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[6] Jeffrey Waincymer, Approaches to Evidence and fact Finding in Procedure and Evidence in International Arbitration, Wolters Kluwer, 2012, pp. 746.

[7] Robert Hans Smit, Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence in Planning Efficient Arbitration Proceedings and the Law Applicable in International Arbitration, ICCA Congress series no. 7 ,Wolters Kluwer 1996, pp. 161.

[8] Lara M. Pair, op.cit., L 62.

the case, establish all the facts and the law while the parties and their counsels assist him in this process. This approach also influences all the other issues of the proceedings, mainly the rules of evidence. The parties are not required to present all the relative evidence, they can determine which evidence they wish to rely on without being forced to present the evidence not in line with their interest. The active participation of the judge/arbitrator in the proceedings is linked to the historically roots of Civil Law, when in the Roman Law the judges where highly educated and trained magistrates, capable of assessing the case and the evidence correctly. As a consequence the Civil Law gives much emphasis to the written evidence and documents since there was no need for the oral explanation of the evidence to the judges during the hearings, as opposed to the Common Law jury. Furthermore, as in 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 phase.

The approaches presented above reflect different view of each of the legal system on the search for the truth. For the Common Law participants of the proceedings, the main goal of the process is the search of the factual truth which is determinant for the final decision.[9] 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

[9] Matthieu de Boisseson, Comparative introduction to the systems of producing evidences in Common Law countries and the countries from Roman Law tradition *in* Taking of evidence in international arbitration proceedings, ICC Publishing S.A.1990, pp.101.

parties, in line with the Roman Law rule *da mihi factum, dabo tibi jus* [10]. Thus the factual aspects are the exclusive domain of the parties whereas domain of the judge are the legal aspects. The only truth is the truth that emerges from the proceedings, which can be seen as a relative truth in comparison to the objective truth found in the Common Law.

[10] Give me the fact, I'll give you the law, *see* Alexis Mourre, 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, 2011, pp.88.

1.2.Pleadings.

The approach taken by each of the legal systems presented above influence the other aspects of the proceedings. This is the case when it comes for pleadings. Generally pleadings stage is the first step of the proceedings in which a party brings its suit. Pleadings are formal written statements which are filed with the court and which include party's claims or defences to another party's claims. According to the approach taken in each of the legal systems, the importance given to pleadings is different.

In Common Law tradition, pleadings have less value, since the preference is given to oral presentation of the case. A pleading is a brief pre-hearing statement of a claim or defense, possibly combined with counterclaim. [11] The Common Law lawyers tend to prepare pleadings in a very limited, almost bullet-point form [12], 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 historical fact that the jury was composed of the lay persons, often illiterate where the oral persuasion was more efficient and the paper documents were less persuasive than the 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

[11] Urs Martin Laeuchli, Civil and Common Law contrast and synthesis In international arbitration *in* American Arbitration Association Handbook on International Arbitration Practice, Juris 2010, pp.40

[12] Julian D.M. Lew, Laurence Shore, International Commercial Arbitration: Harmonizing cultural differences *in* American Arbitration Association Handbook on International Arbitration Practice, Juris 2010, pp.6

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

In 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 orally presented 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.

1.3. 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. Hearing and trials are much longer in Common Law countries, which is a consequence of the historical factors specified in the former pages of this thesis. As Common Law system gives greater importance to the oral submissions and the presentation of the evidence to the jury, the hearings are crucial part of all the proceedings. Pleadings do not contain many details on the case and evidence or the legal arguments hence during the hearing the most important facts of the case are revealed. Having historically developed tradition of oral advocacy, hearings permit the counsels to fully express his tactical and strategic capacities. A Common Law hearing starts with the limited opening statements, followed by the examination and cross-examination of witnesses which may last for days or weeks, to close with the limited closing arguments of the counsels where they sum up all the evidence presented during the trial. [13]

Hearings in Civil Law countries, where the pleadings contain detailed description of facts, legal arguments and attached document evidence and where the couple of rounds of written submissions between the parties takes place, are not the central part of the proceedings. In some cases, where the

[13] Bernard Hanotiau, The conduct of the hearings *in* Lawrence W. Newman, Richard D Hill (edited by), The leading arbitrators' guide to international arbitration, 2 ed., JurisNet, 2008, pp. 361.

crucial facts can be established based on the contacts 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 take 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 the hearing is related to the methods of examination of oral evidence, namely the witness and experts. In Common Law the 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 of oral proceedings and the jury deciding on the facts of the case on the basis of what they heard from the witnesses and counsels' oral submissions. In Civil Law countries, there is a general mistrust towards the witness testimony and greater weight is given to the documentary evidence, since the professional judge could hardly be influenced by the aggressive tactics of the counsel typical for Common Law or emotional testimony of the witnesses, which may be effective in case of the jury. In this context the tactics and methods of witness examination in both of the legal systems are significantly different.

1.3.1.Witness evidence in Common Law system.

Common Law lawyers, in particular the US lawyers, are well trained in tactical witness examination as it is considered the focal point of the trail. This is related to the fact that in the adversarial approach to the proceedings the judge is not the protagonist and do not lead the examination of the witness, leaving its conduct to the counsels. The court controls the mode and order of the interrogations but does not ask the questions itself. The examination of witness can be divided into the examination-in-chief (or direct examination) and cross-examination. The main difference is that the examination-in-chief refers to the examination of the witness called by the same party who is examining the witness whereas the cross-examination refers to oral questioning of the witness called by the opponent party. The 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 counsels are different. The counsels are specifically trained in the techniques and prescriptive rules of questioning which form part of advocacy and are acquired through experience, forming a set of skills which is crucial for the Common lawyer's practice.[14] The techniques serve the purpose of complying with the rules of examination-in-chief and cross-examination and of developing the capacity of questioning the witness in a way particular for each of the examinations, that is in a logical, readily comprehensive and

[14] famous Ten Commandments of Cross Examination proclaimed by Irving Younger, a scholarly state judge in New York, teacher of trial advocacy, see Robert Hans Smit, Cross-examining witnesses before Civil Law arbitrators *in* T. Newman, W. Lawrence, Ben H. Sheppard, Jr. (Editors),Take the Witness: Cross-Examination in International Arbitration, JurisNet, 2010, pp. 246.

ultimately persuasive manner in case of the examination-in-chief or in more aggressive manner, aimed to reveal error, uncertainty or falsity in case of cross-examination. [15] The prescriptive rules of examination state what is permitted and what is prohibited in cross-examination of the witness. The most fundamental rule universal in Common Law jurisdictions, which also defines the basic difference between the direct examination and cross-examination, is that referring to leading questions. Leading questions are generally prohibited in direct examination and permitted (and most often desired and widely used by counsels) in cross-examination, which is due to the fact that in direct examination the counsel is examining the witness called by the party he represents so he should not suggest the answers, presumably helpful for his case, by leading questions. In cross-examination leading questions are one of the most important tactics, together with aggressive, adversarial and destructive attitude.

[15] Bernardo M.Cremandes, David J.A.Cairns, Cross-examination In International Arbitration: Is it worthwhile? *in* T. Newman, W. Lawrence, Ben H. Sheppard, Jr. (Editors),Take the Witness: Cross-Examination in International Arbitration, JurisNet, 2010, pp. 227 and next.

1.3.2.Witness evidence in Civil Law: the example of Poland

Witness examination in Civil Law countries is not as important part of the proceedings as in Common Law tradition, due to the written documents being a preferred form of evidence. A main difference in terms of witness examination is the fact that in Civil Law tradition the proceedings are conducted in accordance with the inquisitorial approach, hence the judge is the protagonist of the interrogations. In some jurisdictions the judge is the only person who can directly ask questions to the witness, without the intervention of the counsels, in others the counsels may ask questions only after the judge has finished the interrogation himself. In Poland, the rules of civil procedure codified in the Civil Procedure Code (Kodeks Postępowania Cywilnego - hereafter KPC [16]) contain the provisions regulating the oral evidence. There are three classes of persons that may give oral evidence, namely parties, witnesses and experts and rules relating to their evidence differ as to the manner of presentation, subject matter of the evidence, neutrality of the witness and rules of weighting their evidence.[17] Accordingly, parties and witnesses may be examined as to the facts of the case and the expert as to their knowledge, the evidence from the parties and witnesses can be exclusively oral whereas the expert opinion is in writing, witness testimony might be given under an oath, but not the parties', as their evidence is taken only if after the investigation of all other evidences there are still facts which need clarification. The rule governing the mode of

[16] Ustawa z dnia 17 listopada 1964 r.- Kodeks Postępowania Cywilnego, Dz.U. 1964 nr 43 poz. 296, available at http://isap.sejm.gov.pl/DetailsServlet?id=WDU19640430296
[17] Articles 258 to 304 of KPC

examining the witnesses is codified in article 271 of KPC which states that the witness gives his oral testimony starting from answering the questions of the judge about what he knows about the case and from which source, then the judge and both parties may ask further questions. The general rule is that the court asks all his questions first, then the party which called the witness may ask questions and then the opponent party examines the witness. The judge however may in any moment interrupt the questions of the counsels and ask again his own question. 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, which generally shall not be leading questions, include comments or ask for witness' opinion, however there is no codified rule as to the content of the questions asked by counsels. It is not a common practice, as opposed to the Common Law tradition, to examine the witness in a aggressive, tricky and confusing manner, as the oral evidence is not a crucial mean of establishing the fact hence the sophisticated methods and techniques of advocacy are not the main part of a Civil Law counsel practice. On the contrary, the aggressive approach of the counsel tending to embarrass, trick or bully the witness is not well seen by the judge and might result in judge admonishing the counsel as to the modality of questioning.

Those distinctive differences in the modality of examining the witnesses are due to the fact that in each of the legal systems there is a different audience- in Civil Law countries professional judge will not be

impressed by persuasive and aggressive advocacy whilst the jury composed of lay persons in Common Law may be influenced by the techniques and testimonies hereby obtained.

1.3.3 Expert witnesses

In Common Law traditions 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 the expert of its choice as there is no official list of expert held by the courts. The expert issues a written report on the issue in question and is then examined in the similar way to witness, as he does not act as the party advocate. [18] The cross-examination of the expert 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 party 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. In Polish Civil Procedure Code-KPC, the provisions relating to the experts are contained in articles 278 to 291. 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 the matter requested by

[18] David Brown, Oral evidence and experts in arbitration *in* Laurent Levy, V.V. Veeder (editors), Arbitration and Oral Evidence, ICC Publishing, 2004, pp. 80.

court and the parties may formulate questions and issues they consider important to be covered by the report. After the issuing of the report the parties have the opportunity to make written comments on the report and to request to summon 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 costs of the expert report are covered directly by the court, however the 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 they must persuade that the expert lacks competence or the report has some significant inconsistencies and might not be relied on.

1.4. Documentary evidence.

Documentary evidence and the approach toward it is the aspect in which the two legal systems vary the most. In Common Law proceedings historically based on the oral submissions and evidence due to the presence of the jury, less weight was given to the documentary evidence. However, since the jury often was illiterate, the documentary evidence had to be gathered beforehand, selected and assessed by the counsels in order to present it later to the jury. This led to the pre-hearing stage of the proceedings to evolve 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 document evidence is the key feature of the pre-trial stage of the proceedings. The approach for 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 favorable for the case. The documents are the prevailing evidence being produces in the discovery stage, including correspondence, emails, notes and others, however all the other physical evidence is also included. The Common Law counties, especially USA permits extremely broad discovery of documents, often being a cause of time and cost consuming proceedings. This is less true in case of other Common Law jurisdictions, for example, England.[19] In fact, the so called “fishing expeditions” are often used by the Common Law counsels as a tactic to exhaust or burden the opposite party.

[19] Pierre A. Karrer, The Civil Law and Common Law divide: An international arbitrator tells it like he sees it in AAA Handbook on International Arbitraiton and ADR, second edition, Juris 2010, pp. 53.

The documentary evidence gathered during the discovery is then being assessed by the counsels and only the documents relevant to the case are then being presented as evidence in the proceedings. The written evidence in Common Law tradition is introduced and authenticated by the counsel and explained by the witness during the hearing.

In Civil Law tradition the legal and factual arguments are preferably supposed to be proved by the documentary evidence, which is submitted with the pleadings at early stages of the proceedings. As judges are professional lawyers and they are conducting the proceedings in the inquisitorial way they can quickly assess the case based on the attached documentary evidence. The judge conducts his own enquiring into the issues of fact and law[20]. 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 incriminate themselves by producing the unfavorable evidence to the opposite party. There is almost no discovery in the Civil Law countries, which limits the time of the proceedings and the costs. The only possibility of limited discovery and forced document production may take place in case of the third party being in possession of the document essential for the case or the specifically identified document in the possession of the

[20] Robert B. Davidson, Werner Müller, Stefan Riegler, Procedural matters checklist *in* Grant Hanessian, Lawrence W. Newman (editors), International Arnbitration Checklist, 2 ed., Jurisnet, 2009, pp. 90.

party which is relevant in the course of the proceedings. In those cases the court may order the production of 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 the state organs is greater than that given to any other evidence.

1.5.Ethics

The legal culture also influences the ethics of the counsels, since there are different standards and approaches to the conduct of the proceedings. It is an usual and desired practice for Common Law lawyer to prepare a witness to testify. The preparing witness is commonly known as horseshedding [21]. A failure to adequately prepare a witness both for direct and cross-examination may be regarded as a professional misconduct. The necessity to prepare the witness for the testimony is due to the adversarial approach taken by the Common Law procedures. While documentary evidence is important, their evaluation and organization is given by the oral testimony. In the highly developed technical and tactical cross-examination of the witness the counsel may not conduct this process without knowing what the witness will say and what will be said by the opposite party witnesses.

What is a common practice in Common Law tradition, is being seen as unethical and prohibited in the Civil Law tradition. Preparing of witness is prohibited for Civil lawyers and for English as well, even though they come from Common Law tradition. In the most of continental European countries the counsel may approach and interview witness, but cannot prepare him to testify (e.g. Austria, Germany, Sweden), however in other Civil Law countries the Rules of conduct of the Bar included in ethical codes prohibit the

[21] Horseshedding being the instruction of a witness favorable to one's case about the proper method of responding to questions Chile giving testimony. For more detailed description of the practice of preparing witness see Robert S. Rifkind, Practice of the horseshed: Preparation of the witnesses by counsel in America *in* Laurent Levy, V.V. Veeder (editors), Arbitration and Oral Evidence, ICC Publishing, 2004, pp. 55.

counsel to interview witness (e.g. Belgium, Italy, France).[22] The professional misconduct is subject to the disciplinary sanctions of Bar Authorities.

Another difference in relation the ethics is the obligation of English lawyers to refer the relevant case law both favorable and unfavorable, whereas in Civil Law tradition the counsel may refer the law and the precedent court decisions but is not obliged since the judge is actively involved in the search for truth and applies the law. Moreover in German tradition the counsel can speak in confidence with the opposite party counsel without revealing the details of this communication to the client whereas in Common Law tradition the counsel cannot have secrets towards his client. [23]

It has been shown above that Civil Law and Common Law vary significantly in terms of procedure, taking evidence, approach and techniques. Understanding the differences and knowing the sources of them is a key to the mutual comprehension when it comes for transnational disputes and international arbitration proceedings where the two cultures clash.

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[22] Hans van Houtte, Counsel-witness relations and Professional misconduct In civil law systems, *in* Laurent Levy, V.V. Veeder (editors), Arbitration and Oral Evidence, ICC Publishing, 2004, pp. 106.

[23] Jeremy B.Winter, Lawrence W. Newman, Cultural factors and language *in* Grant Hanessian, Lawrence W. Newman (editors), International Arbitration Checklist, 2 ed., Jurisnet, 2009, pp. 80.

CHAPTER II. The need for harmonization of procedural rules

Having analyzed the main differences between Common and Civil Law tradition it becomes clear that the expectations of 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 the key matters, starting from the approach adapted, the role of the judge, the conduct of the proceedings, search for the truth , counsel position and his practice, to evidentiary means. It seems that the major differences are seen in terms of 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 the major influence on the outcome of the dispute, since it permits to gather all the necessary proves 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 procedural rules has become the crucial issue for the international practitioners and institutions taking part in international arbitration. However, since the legal traditions vary so significantly, the major problem was the choice of such procedural rules which would satisfy both traditions and would not particularly favor any of the approaches. Hence, harmonizing procedural rules of international arbitration proceedings has become the particular problem in international society. Harmonizing such different approaches is

not an easy task and may lead to various results, as combining some of the rules and approaches may not be fully satisfactory for neither of the sides. Many institutions have set their own procedural rules to provide the parties of international arbitration with specified provisions which facilitate the conduct of the international arbitration. The development of international arbitration in recent years has led to amendments of rules and certain harmonization of the practices used in the conduct of the proceedings, however with diverse effects. The main procedural rules will be briefly described below.

1. Sources and characteristics of evidentiary rules in commercial international arbitration

1.1. UNCITRAL, ICC, LCIA Rules

The rules according to which the international arbitration will be conducted are usually not the subject of arbitration agreement between the parties, since during the process of signing the contract parties focus on only few provisions as to the international arbitration such as the seat of arbitration, language, the number of arbitrators, only sometimes deciding on the institutional rules governing the proceedings. However most of the times even if they do choose the institutionary rules they are not familiar with them and do not fully realize how the proceedings will be conducted. Usually only after the dispute arises, the parties start to realize that there are many significant differences between their legal traditions influencing their expectations. Depending on the rules chosen the extend of parties autonomy and arbitrators powers as to the conduct of the proceedings differ. In most of the times the institutional rules are silent when it comes to detailed conduct of the proceedings, especially in relation to evidentiary matters. The procedural institutional rules are characterized below.

UNCITRAL Arbitration Rules (as revised in 2010)

The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules[24] provide set of procedural rules upon which parties may agree for the conduct of arbitral proceedings. The Rules cover such aspects of the arbitral process as procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, establishing rules in relation to the form, effect and interpretation of the award. The UNCITRAL Arbitration Rules, as revised, have been effective since 15 August 2010. They include provisions dealing with multiple parties arbitration and joinder, liability, and a procedure to object to experts appointed by the arbitral tribunal. A number of innovative features contained in the Rules aim to enhance procedural efficiency, including revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs, a review mechanism regarding the costs of arbitration, more detailed provisions on interim measures. The UNCITRAL Arbitration Rules, regardless the fact that they do contain rules as to the conduct of the proceedings, do not contain very detailed provisions in relation to taking of evidence. Article 17 of the Rules provides that the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate provided that the parties are treated with equality and that at an appropriate stage of the

[24] UNCITRAL Arbitration Rules as revised in 2010, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html

proceedings each party is given a reasonable opportunity of presenting its case. This is a generic provision which leaves the tribunal much power to conduct the proceedings according to his discretion. Moreover, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials. Article 27 provides that "each party shall have the burden of proving the facts relied on to support its claim or defence. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party. Unless otherwise directed by the arbitral tribunal, statements by witnesses, including expert witnesses, may be presented in writing and signed by them. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." The UNCITRAL Arbitration Rules contain also article 28 as to the hearing and 29 in relation to the expert appointed by the tribunal. The Rules are quite generic on the evidentiary matters and they do not provide the specific solutions and detailed provisions which are the area of interest of the parties coming from different traditions and which may arise in case the conflict as to particular

issues of evidence taking. In practice they are not very helpful for the parties coming from different legal traditions in overcoming the differences of expectations and approaches.

The International Chamber of Commerce (ICC) Rules of Arbitration[25]

ICC Rules are in force as from 1 January 2012. They regulate the conduct of the proceedings submitted to the International Court of Arbitration of ICC. They regulate the filing of claims, the constitution of arbitral tribunals, general conduct of proceedings, rendering of decisions and determination of costs. The ICC International Court of Arbitration is the only body authorized to administer arbitrations under the Rules. The Rules provide that the proceedings shall be governed by the Rules and where the Rules are silent, by any rules that parties or, failing them, the arbitral tribunal may settle on, whether or not the reference is made to the rules of procedure of national law to be applied to the arbitration. Hence, the Rules give much flexibility and freedom to the parties and to the tribunal in shaping the procedural rules in case of lacking provisions in the Rules. However, this freedom may not be desired in case of conflict between the parties as to some points of taking of evidence, on which the Rules are silent. According to article 22 of the Rules ”in order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any

[25] International Chamber of Commerce, Rules of Arbitration in force as of 1 January 2012, available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/

agreement of the parties. In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case. The parties undertake to comply with any order made by the arbitral tribunal.". With respect to the taking of evidence, the Rules set only one article concerning establishment of facts. Article 25 states that the arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means. Moreover, the arbitral tribunal studies all the documents relied upon by parties and may decide to hear witnesses and experts. At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence. The Rules do not precise in which way the witnesses shall be questioned, do not mention witness statements or precise the discovery of documents, its scope and the other procedural details concerning taking evidence. The Rules provide for a hearing which may be held by the tribunal which is in full charge of its conduct. The Rules do not precise any other details of the hearing. Although the flexibility the Rules leave to the parties in fixing the details of the proceedings is vast, it may not be a positive solution once the parties coming from different backgrounds cannot find a compromise and conflicts arise. More precise and detailed provisions in this field would be more satisfying.

London Court of International Arbitration (LCIA) Rules[26]

The LCIA Arbitration Rules, apart from the procedural rules relating to the establishment of the arbitral tribunal, contain some provisions concerning taking of evidence. The Rules give the parties a great flexibility in structuring the proceedings before the tribunal. Unlike the ICC Rules, they permit the parties to fit the procedural provisions to their circumstances without being bound by some obligatory procedural requirements like terms of reference or the submission of procedural time table which are characteristic for ICC proceedings. The LCIA Rules provide for the written submissions with documentary evidence attached together with the written witness statements either as a signed statement or as a sworn affidavit. The procedure of submission of written statements of case is quite detailed. The Rules provide for the witnesses to be questioned by tribunal and the counsels, whereas the tribunal may ask questions in any time of the proceedings. Moreover, the Rules explicitly state that it is not improper for the counsels to interview the witnesses. Hence, the Rules address the issue of ethical conduct of the counsels. They also state that any individual intending to testify to the Arbitral Tribunal on any issue of fact or expertise shall be treated as a witness notwithstanding that the individual is a party to the arbitration or was or is an officer, employee or shareholder of any party. This provision also considers the differences in traditions of the parties. The Rules sets for that “unless the parties at any time agree otherwise in writing, the Arbitral

[26] London Court of International Arbitration Rules effective 1 January 1998, available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#article14

Tribunal has the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant." Hence, the Rules provide for the discovery of documents, upon previous agreement of the parties, but they do not provide a specific procedural mechanism whereby parties may seek and obtain disclosure. The other institutional rules grant similar authority to tribunals but in far less express terms. Notwithstanding that, the LCIA Rules still are not as much detailed in terms of taking evidence as one may expect in order to avoid the conflict of legal traditions.

From this brief characteristic of the main institutional rules of arbitral proceedings it is evident that all the rules provide only general provisions in terms of 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 establishing facts of the case, they usually contain only few generic articles, leaving the details to be set by the parties or the tribunal. In case of the parties coming from difference 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 lack of parties' agreement, if the tribunal in its authority sets the rules governing the taking of evidence, one of the

parties may feel unsatisfied or even deprived of its right to be heard and present the case in the situation that the tribunal applies the rules familiar to his legal background and the opponent party background. Hence, the more detailed rules of evidence are required. In this respect the International Bar Association Rules on the Taking of Evidence in International Arbitration come into scene.

1.2. IBA Rules on the Taking of Evidence in International Arbitration

As it was noticed, the principal institutional rules do not provide detailed provisions as to the taking of evidence allowing parties flexibility in deciding on the evidentiary proceedings. However, this gap in the rules can cause conflict between the parties on how the evidence taking should proceed. These problems may arise when the parties come from different legal background and when they are not experienced in international arbitration.

The international community has recognized those problems and provided a solution to fill the gaps in the institutional rules. The international Bar Association has set the guidance for the parties in relation to the taking of evidence in international arbitration. Since the IBA Committee is composed of practitioners from all over the world 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 harmonization of the procedures of taking of evidence in international arbitration. With time, new problems and new procedures had developed in international arbitration, since it became more popular as a dispute resolution device. As a result, the Rules were updated in 1999 as IBA Rules on the Taking of Evidence in International

Commercial Arbitration. Also this version of the rules was well accepted and received as a useful harmonization of 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 (deleting from the title the word “commercial” so that the Rules could also be used in the investment arbitration apart from commercial arbitration).

The IBA Rules of Evidence contain procedures initially developed in Civil Law system and in Common Law system, which is why they are widely used in both institutional and ad hoc international arbitration proceedings. The Rules may be adopted by the parties and the tribunals as a whole or in part, they may also be used just as guidelines. The Rules are not intended to substitute the institutional rules such as ICC, LCIA or UNCITRAL Rules, as they do not contain the rules of the whole international arbitration procedure, they just fill some gaps in terms of the procedure of taking evidence. The Rules have been considered as a harmonization of the differences in international arbitration procedure, however, it can be disputable whether the Rules actually satisfy the needs and the expectations of the participants of the arbitral proceedings by creating a harmonized set of rules originating from Common and Civil Law tradition or they just create a hybrid system which is still not fully answering the existing issues in an efficient way. This problem will be discussed in Chapter III while the provisions of IBA Rules will be analyzed.

2.Determination and application of rules of evidence.

2.1. Parties' autonomy and arbitrators discretion to organize evidentiary procedures and to decide on admissibility of evidence.

One of the reasons why international arbitration is a preferred mean 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 being the subject of the dispute and decide on the legal background they want the arbitrator to come from. 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.[27]

Although the parties have the powers to decide the procedural rules, including the taking of evidence, applicable to arbitration when drafting the

[27] Martin Hunter, Alan Redfern, Law and Practice of International Commercial Arbitration, Third Edition, Sweet and Maxwell, 1999, pp. 1-2.

substantive contract and the arbitral clause, they rarely do that, choosing only, if any, the institutional rules 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 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 a freedom to parties and the tribunal in setting some more specific rules and in the absence of the agreement between the parties, the tribunal has the discretion to set such rules. Even in the 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 the situation of conflict it is sometimes impossible. The parties may also agree upon particular rules during the proceedings or before the hearing. In the event of no agreement between the parties, the arbitral tribunal has a discretionary power to decide about the procedure, admissibility, materiality and weight of evidence, however the tribunal has to consider the right of the parties to be heard, 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 shall seek to find an efficient and appropriate solution suitable in given circumstances. Since the tribunal might be also influenced, involuntarily, by his own legal background and the rules of evidence familiar to him, it is particularly important that it decides the rules carefully and with highest 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 if they have not come to any agreement as to the procedures of taking evidence. 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 rules governing the evidence or only in some parts, as well as guidelines not strictly bounding the tribunal. The IBA Rules are to be considered supplemental to the legal provisions of the institutionary rules, *ad hoc* rules or other rules chosen by the parties, hence they do not influence the application of those rules as they fill in gaps intentionally left in those procedural framework rules 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 extend. In case of conflict between any provisions of the IBA Rules of Evidence and the institutionary rules, *ad hoc* rules or any other procedural rules established by parties or the tribunal, the tribunal shall

apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish the purposes of both those rules the and the IBA Rules of Evidence, 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 Rules accordingly to their purpose and in a manner most appropriate for 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 case when the IBA Rules and the institutional or other agreed rules are silent on some matter concerning the 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 invites 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 taking of evidence is due to the parties autonomy since they have the freedom to set the rules of taking of evidence tailored for their specific case and circumstances. In the event of not selecting any rules of evidence and failing to reach the agreement the parties are subject to the discretion of the tribunal in relation to evidentiary rules. The other limitation to parties autonomy are the norms of due process, fairness and the mandatory rules of the applicable law and institutional

rules selected. However, even in the event of the tribunal 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 powers always have 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 means of evidence. Since the national rules on admissibility do not bind the tribunal the 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 those evidence, but in international arbitration they would not be excluded, unless the parties have explicitly agreed on admissibility of some means of evidence. The parties must be aware not to place reliance upon the technical rules concerning admissibility during the proceedings[28], especially when the tribunal is composed of arbitrators coming from different background than theirs. The reason why the arbitrators are extremely reluctant to limit the evidence that can be submitted and normally permit the parties to present evidence, including the

[28] Martin Hunter, Alan Redfern, Law and Practice of International Commercial Arbitration, Forth Edition, Sweet and Maxwell, 2004, pp.296.

introduction of materials of questionable relevance, is that they are concerned that their award will be refused to be recognized or enforced by the national court because the party was unable to present her case.[29] Notwithstanding that, some evidence might not be admissible due to the violation of public policy, protection by privilege, 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 have been admitted does not have a probative value or has a little value. Given that, a question may arise as to how the arbitral tribunal actually assess 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? Does some evidence weight more than other? The aspects of the admissibility and assessment of the evidence by the tribunal will be discussed in more details in chapter IV of the present thesis.

[29]George M. von Mehren, Claudia Salomon, Submitting Evidence in an International Arbitration: The Common Lawyer's Guide, Journal of International Arbitration, Kluwer Law International 2003 Volume 20 Issue 3 , pp. 288.

2.2. Cultural diversity 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 will have the similar view on most of the evidentiary matters, the prevalence of the documentary or oral evidence, the method of examining 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 in the event if both of the parties and their counsels are not experienced in international arbitration. Additional problem might arise if the arbitral tribunal will be composed only of the arbitrators coming from one party's legal background and will be inexperienced in disputes between parties representing opposite legal traditions. The legal and cultural background are not to be underestimated as they do matter even in case of arbitrators. They 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 apply the principles familiar to him then conducting the proceedings and addressing some particular issues. This can constitute a serious problem for the parties and their counsels in preparing their case and trying to ascertain what legal approach will be taken by the tribunal and how his background may affect the conduct of the proceedings. To that extend the knowledge of the differences, approaches and expectations of the participants of the international arbitration is of a fundamental importance.

The counsels 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 harmonize the legal traditions, methods, approaches and views on the taking of evidence. However, as it will be argued in the further chapters, the Rules are not just the compilation of the rules present in different legal traditions and their harmonization, but rather a new, hybrid system which includes some of the features of both of the system, but also creates its own procedures, far from that of Civil Law or Common Law tradition. The IBA Rules contain procedures which are not present in the national courts. Moreover, some of the issues which are the source of conflict between the two legal traditions, are not covered or just slightly mentioned in the IBA Rules. For those reasons it is discussible whether the IBA Rules are actually a satisfying compromise and whether they are sufficiently adjusted to the needs of parties coming from different backgrounds, which will be the subject of the next chapters.

CHAPTER III. Taking of evidence in international commercial arbitration- Civil and Common Law divide and the IBA Rules.

As stated before, the differences between Common and Civil Law traditions in terms of procedure are the cause of conflicts when it comes to international arbitration proceedings and in particular to taking evidence. Expectations of each of the parties coming from different legal systems are based on their background, experience, knowledge and procedural principles familiar to them in their national system. The clash of cultures which takes place in international arbitration proceedings needed to be overcome by constructing a mechanism of proceedings which would satisfy both sides and lead to effective, accurate and fair dispute resolution. The result of such attempts are the International Bar Association Rules on the Taking of Evidence in International Arbitration, mentioned in chapter II. The Rules provide a guidelines for the tribunal and the parties on how to conduct the evidentiary proceedings and serve to fill in the gaps in the procedural rules or serve as a point of reference for the parties and the tribunal in shaping their own proceedings. They can be adopted as binding rules in a whole or partially, or only as an accessory mean of guidance in case of conflicts between the parties in evidentiary matters. The IBA Rules are widely used by the participants of the international arbitration since they are so far the most helpful, detailed and consolidated set of rules in the field of taking evidence combining both Common and Civil Law procedural elements and tools. However, it is disputable whether the IBA Rules are a mechanism

which harmonize the differences and the rules typical for both of the legal systems or they are a new, hybrid system which contain procedures and legal devices particular only for international arbitration and which are not present in Common or Civil Law system in such form as provided in the Rules. The doubt that may arise relates to the fact that in case of a new hybrid system the parties may still not find the proposed solutions attractive and satisfactory, even though they constitute a compromising solution. Additionally, some issues related to the taking of evidence which are not still covered in IBA Rules remain pending and can still be a source of conflicts between parties. The particular provisions of IBA Rules and their connection with each of the legal system, the issues that need to be covered which may lead to conflicts will be analyzed in this chapter, considering each of the means of evidence and related matters in terms of cultural clash and balancing of legal approaches.

According to 2012 International Arbitration Survey entitled "Current and Preferred Practices in Arbitral Process" conducted by School of International Arbitration, Quinn Mary, University of London, The IBA Rules are considered a useful tool in international arbitration proceedings, being used in 60% of arbitrations, but most of the times are used as guidelines (53%) rather than binding rules (7%). However, according to the survey, some experienced interviewees, pointed out that in practice there is little difference between the adoption of the IBA Rules as guidelines or binding

rules because, even when adopted as binding rules, they provide enough leeway for arbitrators to depart from them.[30]

[30] 2012 International Arbitration Survey sponsored by White&Case may be fund at http://arbitrationpractices.whitecase.com/

1.Document production.

1.1.Civil Law approach and Common Law approach.

The approach to documentary evidence and document production differs significantly in Common and Civil Law traditions, as it was analyzed in Chapter I. While documentary evidence is a main source of establishing facts of the case in Civil Law tradition, Common Law gives more attention to oral evidence and witness examination, however documentary evidence is also an important part of the process of taking of evidence in this legal tradition. The form and approach to documentary evidence is significantly contrasting and it constitutes the major feature of distinguishing the two legal traditions. The approach to documentary evidence and document production is also the main element of conflicts and procedural difficulties in international arbitration between parties coming from Civil and Common Law systems. The Civil Law provides for document production in a form of submitting documentary evidence by the parties in support of their cases after or together with filing of the pleadings. The documents produced are only such documents that the party relies on in pursuing her case according to the burden resting on the party to prove the facts upon which the claim is based. The party is not obliged to provide the documents penalizing her or provide all the existing documents in her possession relating to the case, being bound to produce additional document only on the request of the court in particular situations. In Common Law however, particularity in the

USA, the parties produce documents in the pre-trial phase of the proceedings called discovery, providing the opposite party with all the documents and other information in their possession which relate to the case, both being incriminating or favorable for their own case. The production in this initial phase is mandatory and parties exchange the documents in their possession in support of their claims and defense[31]. The U.S. discovery also includes the request to parties and non parties to produce documents. The requests are usually far reaching and are time and cost consuming for the party obliged to produce. The request relates to specific documents or categories of documents and information in the possession, custody and control hence not only physical possession but also a legal right to obtain a document. The scope of the discovery is very broad including any matter which might be relevant to the claim, apart from privileged ones.[32] The requested documents need not be admissible at trial if only the discovery appears reasonably calculated to lead to the discovery of admissible evidence. [33] Hence almost all requested materials are discoverable as long as they relate to the case. The requested materials may include documents, writings, drawings, graphs, charts, photographs, phone records, and other data compilations as well as electronically stored information and documents. The mechanism of requesting and production of

[31] Lucy Reed, Ginger Hancock, US Style discovery: good or evil? *in* Teresa Giovanni, Alexis Mourre, Written evidence and discovery in International Arbitration, New issues and tendencies, International Chamber Of Commerce, 2009, pp.343.
[32] Louis B. Kimmelman, Dana C. MacGrath, Document Production in the United States *in* ICC Bulletin, Special Supplement 2006: Document Production in International Arbitration, pp.47.
[33] The USA Federal Rules of Civil Procedure, Rule 26 (b)(1)

documents starts with the request of one party served to the other party after the case is filed. The written request is made directly to the party, without the court participation and it must include the description of the documents being requested either by individual item or by category and with "reasonable particularity", as set forth in Rule 34 of the Federal Rules of Civil Procedure. The requests should also specify the time, place and manner in which the documents shall be made available to the party. The requested party has to serve a written response to the request within 30 days after the receipt of the request stating whether she will make the requested documents available or objects to its production and on which grounds. The grounds on which the party can object to the production include being overly broad, unduly burdensome, unreasonable duplicative of other requests or not calculated to lead to the discovery of admissible evidence. The failure to object and state the grounds of the objection constitutes a waiver of the objection, even as to the documents that might be privileged. As a result of the objection the parties may meet and try negotiating the scope of the discovery, however if they are unable to resolve the conflicts, the requesting party can file a motion to the court to compel production.

The mechanism of pre-trial production of documents permits the parties to get the knowledge of the facts and issues in question before the actual trial. The parties built their case after receiving all the documents from the opponents hence in particular cases they may initiate the proceedings without even being in possession of strong evidence supporting their case, hoping to find them during the discovery. Such approach is

unknown in Civil Law tradition, where each party has to gather evidence supporting its case before bringing the claim, otherwise the party will not be capable of supporting its case by relevant evidence.

In international arbitration, where no rigid and binding rules exist in terms of taking of evidence unless the parties agree otherwise in the agreement or before/during the proceedings, the parties coming from different legal backgrounds encounter difficulties in conducting the taking of evidence and particularly the production of documents in a way which they are familiar with in their legal system simply because the other party approach is different and the expectations and methods vary. The party from Civil Law tradition will be surprised and will consider it a violation of her privacy when requested to produce the documents damaging her own case and supporting the other party claims while the party from Common Law tradition will consider the lack of discovery as a violation of her rights to present the case since in has no access to the documents supporting it and being in possession in the other party. Those problems are the most frequent and are costs and time consuming. According to the 2012 International Arbitration Survey mentioned above, the document production in an important source of evidence in international arbitration, since 62% of the respondents of the survey said that more than half of their arbitrations involved the requests for production, while only 22% said that less than one-quarter of their arbitrations involved such requests. The survey also confirms that the document production is an area of international arbitration where the differences in cultures clash the most. It was shown

that, as widely considered to be true, the requests for document disclosure occur more frequently in the common law world involving common law parties: 74% of common lawyers compared to only 21% of civil lawyers said that 75-100% of their arbitrations in last 5 years involved such requests.[34] The Survey also shows that the disclosed documents are crucial for the outcome of the case in a statistically significant percentage of arbitrations: 59% of respondents said that the document obtained through document production materially affected the outcome of at least one-quarter of their arbitrations. The results of the survey confirm that document production is a one of main sources of evidence in international arbitration and that the differences between cultures are the most evident in this field.

The questions regarding documentary disclosure that arise between parties relate to whether the disclosure should be the element of international arbitration, what kind of disclosure shall be allowed, to what extent, whether the parties can know in advance if the disclosure will be needed and how should those conflicts of approaches be resolved.

The IBA Rules are said to constitute a good compromise between the Civil and Common Law approaches to document production. However, even with IBA Rules guidance it is still not predictable to what extent the production of documents will be granted. Moreover, IBA Rules contain provisions which are neither Civil nor Common Law approach but rather a hybrid system.

[34] op.cit. pp. 20.

Before discussing the document production in international arbitration under the IBA Rules, it has to be specified that the terms discovery and disclosure, which are often used in relation to document production, are not synonymous. Discovery is a term reserved for the Common Law practice of requesting the opposite party to produce documents in a pre-trial phase and the obligation to produce documents both favorable and harmful for the part's case, which enables the requesting party to discover the evidence useful for the case. Disclosure, on the other hand, can mean the production of documents upon request of the court or the party. A document disclosure can take place also in Civil Law tradition upon request of the court of a specific document which has become relevant and indispensable in the proceeding. Discovery is hence inevitably related to the Common Law broad mechanism of parties exchanging all relevant documents of the case. For this reason the term "discovery" is not used in the IBA Rules and in most of the arbitration rules, in order to avoid the comparison and relation to the broad document production which takes place in Common Law countries. The term "disclosure" does not bear the connotation of burdensome American discovery hence it is used more frequently when relating to international arbitration. The language of the IBA Rules and other procedural rules usually refers to the "document production".

1.2.Document production under IBA Rules. Arbitral discretion.

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 take 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 shall be a guidance for the parties inexperienced in the proceedings and the tribunal on how to proceed[35], 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 shall the tribunal follow in assessing the failure to act in good faith. It has been suggested that 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

[35] Georg von Segesser, The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010, ASA Bulletin, Kluwer Law International 2010, Volume 28, Issue 4, pp. 741.

stage of the proceedings.[36] 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 to the other side 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.

For the sake of fair, efficient and economic proceedings the arbitral tribunal shall consult the parties at the earliest stage of the proceedings and invite them to consult each other. This rule is set forth in article 2 of the IBA Rules and its aim is to give the parties the opportunity to decide on some procedural matters to be adopted and prepare the schedule of the proceedings. Paragraph 2 of the same article provides that the consultation on the evidentiary matters may address the scope, timing and manner of taking evidence, including, among others, the requirements, procedure and format applicable to the production of documents. During such a consultation the tribunal may set the time limits for the submissions of documents and whether the parties will be obliged to produce documents.

It is in the discretion of the tribunal to decide upon the evidentiary matters including the production of documents, however upon the consultation with the parties. Whether the disclosure of documents will be

[42] Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker, Thomas Rohner, IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of evidence in International Arbitraiton, Schulthess, 2012, pp.5.

considered depends on several factors, in particular on the circumstances of the case. The nature of the case is an important factor, hence in the dispute which relates to legal issues, such like the interpretation of the contract it is less likely to be required to mandatory produce the documents upon the request of the other party than in a case where the facts are uncertain and the request to produce documents may be essential in establishing the facts of the case.[37] Another important factor which influence the disclosure is the amount in dispute. Since the request for production is linked to cost and time induction, in cases where the amount in dispute is not significant, it is advisable to limit the requests for document production in light of the principle of efficiency and economy of the proceedings. In some cases the nature of the claim may play a rule when deciding upon the document production request since an accurate assessment of the case may depend only on the documents in possession in one of the party. In such cases the broader disclosure is desired in order to reach an accurate results of the dispute resolution, however the tribunal shall take into consideration the fact that the party coming from Civil Law background may feel that such request violets her privacy rights while she has to produce harmful evidence for its own case to the opponent. In fact the background of the parties is another factor which plays a role in considering the request for disclosure and its extent. While the participation of two parties from the same legal background will not constitute a significant problem since probably their

[37] D.Brian King, Lise Bosman, Rethinking Discovery in International Arbitration: Beyond the Common Law/Civil Law Divide, ICC International Court of Arbitration Bulletin Vol. 12 No. 1, 2001, pp.31.

view on the documentary disclosure will be similar, it does provoke conflicts when different legal traditions are represented by the parties. Hence the tribunal shall consult with the parties as to the desired form and extent of the disclosure, since the parties has the power to tailor their proceedings and only failing the agreement of the parties the tribunal shall upon its discretion decide on the scope of disclosure tending to balance parties' approach. The IBA Rules give quite a lot of discretion to the tribunal in deciding on the order or exclusion of the disclosure stating little limits of the scope of disclosure. As will be mentioned below the Rules provide methodical procedure for handling requests for disclosure and checklist as to what can be permitted or refused by the tribunal. [38]

Documentary evidence often plays a major role when compared to other means of evidence.[39] The document production under IBA Rules is governed by article 3 of the Rules. It provides for various forms of production, including the submission of documents and set the detailed requirements for the requests of production and mechanism of compelling with that request or an objection. The Rules distinguish between the documents that the parties wish to submit and which are at its own disposal, the documents that are in the possession of the other party or a third party and the requesting party wants to use as evidence and the

[38] Peter Scott Caldwell, Do arbitration rules give tribunals too much freedom to conduct international arbitration as they think fit? *In* Kaj Hober, Annette Magnusson, Marie Ohrstrom (editors), Between East and West: Essays in honour of Ulf Franke,Juris 2010, pp.82.

[39] Nathan D. O'Malley, Document production under art. 3 of 2010 IBA Rules of Evidence, International Arbitration Law Review, 5/2010, pp.186.

documents that neither party has submitted but that are considered by the tribunal as relevant and material. The "document" in the IBA Rules is described as "a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means". The scope of the definition is very broad and include all kinds of documents such as letters, minutes, instructions, emails, notes and others, making reference also to electronically stored documents, which is an amendment in respect of the 1999 IBA Rules. The electronically stored documents will also include the metadata, meaning data about electronically stored data. [40]

The first form of production of documents is set in paragraph 1 of article 3 of the Rules, which states that "within the time ordered by the arbitral tribunal, each party shall submit to the other party all documents available to it on which it relies, including documents and those in public domain, except for any documents that have already been submitted by another party". Submitting the documents on which the party relies in support of its case is a general principle present both in Civil Law and Common Law tradition. It is also a common practice in international arbitration to submit the documentary evidence that the party wants to use as evidence to the other party and to the tribunal[41], hence in his field the rule does not provide any exception. The wording of the provision states clearly that the parties shall only submit the evidence in support of their case, hence they are not

[40] Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker, Thomas Rohner, op.cit.,pp.29.
[41] Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, Redfern and Hunter on International Arbitration, 5th edition, Oxford 2009, N.6.101.

obliged to submit the documents harmful for their case. On this occasion the Rules have not adopted the approach present in Common Law countries, but rather this of Civil Law in accordance with the principle that each party shall prove its own claims. Hence, not submitting harmful documents will not be seen as a violation of a good faith principle and will not result in negative consequences for the party. The time limits as to the submission of documents are to be set upon the tribunal's discretion. Often the documents are submitted with written submissions. All the documents upon the party relies on shall be submitted within the time limits in order to avoid the surprise of the other party and in accordance with the principles set in the Preamble of the Rules. Article 3 in paragraph 11 provides for the second round of the submissions of documents, which may be necessary when the other submissions has take place, such as witness statements or expert report, raising some new issues and the party in a rebut needs to submit additional documents. Also in this case it is in the discretion of the tribunal to set the time limits for such submissions. The broad discretion of the tribunal in deciding the time limits of submissions is in accordance with the principle of flexibility which permits the tribunal with the consultation of the parties to construct the schedule of the proceedings in a best suitable way for the particular case circumstances.

1.3. The request for document production. The scope of disclosure.

Apart from the document production in a form of a submission by the party of the documents it relies on, the IBA Rules also provide the possibility to request the other party to produce the documents in its possession. This procedure is not present in Civil Law countries and has more in common with the Common Law tradition of discovery. However, in international arbitration the discovery is not accepted in order to avoid time and cost which are inevitably related to the American style discovery. Moreover, this solution serves to avoid the so called “fishing expeditions” which are aimed to find whatever possible evidence in the event of lack of strong evidence to support one’s case. In Civil Law countries the court may order the production of a specific document in the event if it is necessary for the establishing of the facts of the case and the outcome of the dispute and the parties have not provided it. Hence the IBA Rules provision as to the document production provide a certain compromise between the two legal traditions, however by setting a new hybrid system based on the features present in both systems with some changes. The Rules give a strong position to the tribunal and authorize it to order the production of documents that are in possession of the parties. [42] According to article 3 paragraph 2 of the IBA Rules, the party may submit to the arbitral tribunal and to the other party the request to produce, within the time ordered by the tribunal. The

[42] W. Laurence Craig, William W. Park, Jan Paulsson, International Chamber of Commerce Arbitration, third edition, Oceana Publication, Inc., 2000, pp. 449.

request is primarily a request to the other party[43], the tribunal gets involved into the process in the event of the objection to produce and the failure of the parties to resolve the conflict between themselves. The time limits of the filing of request to produced are to be decided by the tribunal with the consultation of the parties and preferably set in the proceedings timetable. There are different possibilities as to when the requests should occur. The first possibility is to present the requests in the initial part of the proceedings, before the exchange of written submissions, however this stage seem to be too early since the tribunal may not have enough knowledge of the case to be able to evaluate such a request. The other possibility could be in the advanced stage of the proceedings after the exchange of the written submissions, however this could result in the risk of delay of the proceedings. [44] A widely accepted view stands on a position that the best time for the requests to produce is after the first exchange of submissions and before the second round provided by the IBA Rules. The reasoning for this is that at this stage the parties and the tribunal are aware of mutual claims and it becomes clear which documents might be still necessary for one or the other party to satisfy the burden of proof lying upon it.[45] However, the precise timing of the filing of request for production shall be adjusted to particular proceedings upon the discretion of the tribunal. The failure to file

[43] Georg von Segesser, op.cit., pp. 743.

[44] after Alexis Mourre, Differenze e convergenze tra Common Law e CIvil Law nell'ammministrazione della prova: Spunti di riflessione sulle IBA on Taking of Evidence in I.S.S.A. (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, Roma, 2011, pp. 94.

[45] Bernard Hanotiau, Document Production in International Arbitration: A Tentative Definition of "Best Practices", Special Supplement 2006: Document Production in International Arbitration, ICC International Court of Arbitration Bulletin 2006, pp. 216.

the request to product within the time limit established by the tribunal will result in rejection of the request by the tribunal on formal grounds. A similar result may be reached if the party files the request too soon, as the tribunal will not find the sufficient information whether the requested documents will be necessary and may deny the request, at least provisionary, as "wide and speculative" like in the Waste Management v. Mexico case[46], while accepting the possibility that the request might be admissible at the later stage.

The scope of the disclosure is defined by the requirements which shall the fulfilled by the request to produce. The main determinants of the scope of the document production include the specificity of the documents, relevance, materiality, burdensomeness, confidentiality and privileges. As the scope of the disclosure is a subject of conflicts between the parties coming from different traditions the determinants of it are particularly important. The request to product must fulfill specific requirements according to article 3 paragraph 3 of IBA Rules. In particular, the request shall contain a description of each requested document sufficient to identify it or a description in sufficient detail of a narrow and specific requested category of documents that are reasonably believed to exist. In case of electronically stored documents the requesting party shall identify the specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner. The purpose of those requirements is to prevent costly and timely proceedings in the event of the requested party cannot easily identify the requested documents or has to

[46] Waste Management v. Mexico, ICSID Case No.ARB(AF)/00/3

search numerous resources in order to find unidentified document. Moreover the provisions prevent “fishing expeditions” and permit the requested party to decide whether to comply with the request or to object. It also enables the tribunal to check whether the request is admissible in the light of further provisions of the rules. The description of the document should consist of the name of the document, the author and the content of it.[47] If the party is not capable of describing the precise date, author and the name of the document, but nevertheless can identify with some particularity the nature of the documents and the general time frame in which they would have been prepared, the request still may qualify as admissible as a "narrow and specific category of documents”.

The detailed description of the content of the documents permits the tribunal to decide whether the requested documents are relevant for the outcome of the case. In case of electronically stored documents, if the party agree on such a form of document disclosure or the tribunal orders its production, since their production is more burdensome, the request for production shall be more detailed and provide the search terms, specific files and other information sufficient for their search. The production of electronic documents will be discussed in more details in the further parts of the thesis. Apart from the requirements identifying the documents, which also serve in defining the scope of the request of production, the requesting party shall also include a statement as how the documents requested are relevant

[47] Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration of 1999 IBA Working Party & 2010 IBA Rules of Evidence Review Subcommittee, pp. 9.

to the case and material to its outcome, a statement that the requested documents are not in the possession of the requesting party or why it would be unreasonably burdensome for that party to produce the documents. Furthermore, the request shall also include the statement as to reasons why the party assumes that the documents are in the possession, custody or control of the other party. Hence, the party has to state what kind of alleged facts it tends to establish based on the requested documents and why it believes that the documents are useful for such establishment. Moreover, it has to precise the why it believes that the other party is in the possession of the documents and for what reason the party itself cannot produce the document. In particular it is possible for the party to request the documents to which a reference has been made in documents already produced by one of the parties. An example can be find in case SeaCo Inc. and Islamic Republic of Iran[48], where the tribunal granted a request for the production of the documents specified in identifies in one of the requested party own exhibits.

The relevance and the materiality of the document requested are the mandatory requirements for the request to be admissible. The relevance of the document means that the document is likely to prove the fact from which the legal conclusions are drawn. [49] The document is material when it is necessary to allow the complete consideration of a legal issue by the

[48] SeaCo Inc. and Islamic Republic of Iran, Partial Award on Agreed Terms no. 422-260-2(31 May 1989), in 22 IRAN-U.S.CL.TRIB.REP.370 (1990).
[49] Gabrielle Kaufmann-Kohler, Philippe Bärtsch, Discovery In International Arbitration: How much is too much?, SchiedsVZ 2004, Heft 1, pp. 18.

tribunal.[50] Hence, if the fact can be proved by the 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 party shall clearly indicate the factual allegations it wants to establish by the documents. For those reasons, as stated above, it is important that the request for the production is filed in a precise phase of the proceedings, permitting the tribunal to familiarize with the case and claims and the evidence which 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" of the request.[51] 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.[52] The relevance and materiality of the documents is related to the burden of proof for the factual allegation criterion. As stated underlined by Yves Derains "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

[50] Ibidem, 18.
[51] Virginia Hamilton, Document production in ICC Arbitration, Special supplement 2006 "Document production in International Arbitration", ICC International Court of Arbitration Bulletin 2006,pp. 69.
[52] Bernard Hanotiau, Document Production in International Arbitration: A Tentative Definition of "Best Practices", Special Supplement 2006: Document Production in International Arbitration, ICC Practices", ICC International Court of Arbitration Bulletin 2006, pp. 117.

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."[53] The author also pointed out that the arbitral tribunal often grants the request for document production if only they appear relevant to the case and material to the outcome of the disputes, disregarding the fact that if the party making the request actually bears the burden of proof. Hence, a request for the document production shall be denied when a party fails to indicate the allegations it wants to prove and to explain that without the documents its burden of proof cannot be discharged. In such case 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 burdensomeness of the document production is another issue to be considered. As stated in the article 9 paragraph 2 letter c of IBA Rules the request 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 the request that is too broad will cause unreasonable burden for the requested party in identifying and producing the document, hence such request shall not be granted. However, the tribunal shall in each case take into consideration the

[53] Yves Derains, "Towards Greater Efficiency in Document Production before Arbitral Tribunals-A Continental Viewpoint", Special Supplement 2006: Document Production in International Arbitration, ICC Practices", ICC International Court of Arbitration Bulletin 2006, pp. 87

importance of the document for the fact finding process and balance it with burdensomeness.

Article 9 paragraph 2 letter d) and e) relate to privilege and confidentiality as grounds for denying the request to produce, relating also to the scope of the document production. The requested party shall indicate that the requested documents include privileged and confidential documents if it wants the request to be denied. Privilege is a concept which is well developed in the Common Law countries and is related to documents as well as the testimonies, confidentiality of the counsel's work, the relationship between the counsel and the client. Civil Law tradition lacks so developed legal grounds for the exclusion of the evidence. The issues related to privilege and confidentiality and the differences between the legal traditions will be discusses in the further chapter of this thesis. In relation to the request for production of documents, the IBA Rules do not precise in detail which privilege shall be taken into consideration leaving it to the discretion of the tribunal and the parties. Hence, the tribunal shall carefully consider any allegations of privilege and confidentiality filed by the party. The tribunal may handle the issues of privilege and confidentiality in various ways in consultation with the parties, such as granting the request to produce such documents on condition that it will not be spread by the party outside the arbitral proceedings, or to ask an independent expert to review the document and indicate the parts of the document which are relevant for the case. The tribunal shall take into consideration the interest of both parties and the

need to safeguard the confidential documents, balancing the efficiency of the procedures with the principles of fairness and accuracy.

If the requested party does not object to the request of production, it shall produce the documents to the other party within a time ordered by the tribunal. It has to be underlined that the Rules does not require the party to produce the documents to the tribunal. The production to the tribunal shall take place only if the tribunal orders it. This solution, in line with the principle of efficiency, relieves the tribunal from the overload of documents which at the end may not be necessary for the outcome of the case and permits it to receive only the documents which the requesting party considers useful in support of its case. The lack of the objection from the party is understood as an agreement to produce, hence a waiver of its right to object. Hence, the party shall carefully consider the time limits set by the tribunal.

1.4. Objection to the request. Order to produce.

A party may object to the request to produce in relation all or some of the documents requested by filing a written objection to the tribunal and the requesting party within the specific time frame specified by the arbitral tribunal. The grounds for the objection may include the failure to satisfy the requirements stated in article 3 paragraph 3 of the Rules as mentioned above which are often called procedural grounds or the reasons set forth in article 9 paragraph 2 of the Rules known as substantial grounds some of which has been discussed above and which include lack of sufficient relevance to the case or materiality to its outcome, legal impediment or privilege, unreasonable burden to produce the requested evidence, loss or destruction of the document that has been shown with reasonable likelihood to have occurred, confidentiality, political or institutional sensitivity, procedural economy, proportionality, fairness or equality of the parties. The list of the substantial grounds is not exclusive and may be tailored according to the specific case. The conflicts of the parties as to the requests to produce the documents are often dealt with on the side meetings where the parties encouraged by the tribunal search to limit the scope of the discovery and reach some agreement as to the requested documents. Alternatively or in addition to the meetings, it is common to use a technique called a “Redfern Schedule”, named after a prominent arbitrator, the author of the mechanism, which comprises of a spreadsheet listing all the issues in

dispute. [54] The Schedule comprises of four columns, in which the first states the list and description of the requested documents, the second the justification for the request, the third column states the reasons for the requested party refusal and the fourth column is left blank for the tribunal to make a final decision as to grant the request. The requesting party is often permitted a brief period of time in which to respond to objections. [55] The advantage of this technique is the efficiency permitting the avoidance of discussions and handling the meetings or hearings.

After the receipt of the objection the tribunal, as mentioned above, consult the parties with a view to resolve the objection. If the parties fail to reach an agreement, the tribunal, upon the request of the parties to rule on the objection, decides on its discretion as to the admissibility of the request of production and the objection. The tribunal will grant the request of production if it satisfies the formal requirements, there is no substantial ground for the objection and the issues that the requesting party searches to prove are relevant and material for the case and its outcome.

The party has to comply with the order to produce the documents if the tribunal decides that the request shall be granted. According to article 3 paragraph 8, in exceptional circumstances however, if the question as to the objection may be determined only by the review of the document, the tribunal may decide that it shall not see the document itself, but an appointed independent and impartial expert. In such case the expert shall be

[54] Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, Law and Practice of International Commercial Arbitration, Sweet&Maxwell,London,2004,pp.301.
[55] Gary Born, Disclosure and Discovery in International Arbitration - in Gary B. Born , International Commercial Arbitration, Kluwer Law International, 2009, pp. 1899.

bound to confidentiality and review such document for the purpose of reporting to the tribunal on the objection. If the tribunal upholds the objection, the contents of the document reviewed by the expert shall not be reviled to the tribunal and the other party.

When deciding on the ordering to produce the tribunal shall take into consideration, apart for the requirements discusses before, a few elements such as the principle of proportionality, efficiency and the backgrounds of the parties. Especially when the parties come from different legal traditions and the requested party is a Civil Law party the tribunal shall consider its expectations and what extend the party may not be prepared to discover that when agreeing to arbitrate it became obliged to produce the types of documents which in its own legal tradition would not be forced to produce. This particular provision of the IBA Rules might not be satisfactory for the Civil Law parties and their respective counsels if coming from the Civil Law tradition as well. The arbitral tribunals often might be reluctant to order an obligatory disclosure in cases like this because the disclosure of the unfavorable information for the party requested is seemed controversial and viewed as a violation of privacy in some Civil Law systems. Tribunal would find itself in front of the need to justify as to how the disclosure can be helpful for the process of fact finding and the efficiency of the proceedings. The parties choice to arbitrate is often based on the assumption that the proceedings are cheaper and faster, and permit to avoid the broad discovery which would be adopted by the Common Law national courts shall the party be constrained to undertake the proceedings in the national court of its

opponent, hence the disclosure ordered by the tribunal might not be in line with those assumptions. Additionally, especially when the tribunal comes from the Civil Law background it finds itself in the position that it is not familiar with the broad scope of disclosure and find it difficult to define such scope and enforce the disclosure order. Hence, the ordering of the document production shall be well tailored in each arbitral proceeding using the guidance present in IBA Rules, which however in certain circumstances might be itself a subject of conflicts between parties. The tribunal shall also consider the principle of proportionality when deciding to grant the order to produce. The value of the document in comparison to the burden imposed on the producing party shall be taken into account. As to the efficiency, the tribunal shall balance the benefits that the produced document may cause with the time and cost that it causes.

Apart from the order of the tribunal to produce the document requested by the other party, the tribunal has the power to request the party to produce documents or request the party to use its best efforts or itself take any steps that it considers appropriate to obtain document from any person or organization. The party may object to such a request for the same substantial reasons as in case the objection to the request to produce from the opposite party. This provision permitting the tribunal to take part in establishing the facts and searching for the documents itself is close to the inquisitorial approach common in the Civil Law traditions. The right of the tribunal to request the production of documents in connection to the

principle that the tribunal may establish the facts by all means it considers appropriate, which is present on most of the procedural rules. The request of production on the part of tribunal has to fulfill the requirements of materiality and relevance. The tribunal may also ask the party to take the best effort to obtain certain documents, in the event when the party is in better position to obtain such documents in case the entity in the possession of documents is in the home country of the party. Another possibility may be related to the fact that the documents are in the possession of the entity with which the party has the relations permitting it to obtain such documents.

When it comes for the form of the produced document the IBA Rules permit the parties to produce copies which conform to the originals, unless the tribunal requests the originals for inspection. The party is not obliged to produce the multiple copies if they are essentially identical unless the tribunal decides otherwise. The parties may also apply to the tribunal to issue an order to produce an original document in case of doubts as to the conformity of the copy with the original. In the event of non complying with the request to produce the originals the tribunal may draw negative consequences for the party in question. Moreover, as may be the case when parties from different legal backgrounds and countries are involved, the translations of the documents shall be submitted together with the originals and be marked as translations with the original language identified. The Rules do not specify however whether the translations are required and in what circumstances, whether the translation shall be made by an official

national translator or any translator, whether the documents and which ones can be translated only in part and how to resolve disputes between parties regarding the translations. As to the production of electronically stored documents, it will be discussed in further points below.

1.5. Refusal to produce. Adverse inference.

After the order of the tribunal to produce the documents the party shall obey with the order and within the time limit produce the requested documents. However, since the arbitral tribunal lacks the powers to enforce its orders unlike the national courts, the party may be tempted not to comply with the order and refuse to produce requested document in the event when the document is damaging for its case. A possible solution as to what a tribunal can do about the refusal could be a use punitive measure in form of ordering costs allocation to a refusing party, which however would not be satisfactory for the requesting party and would allow the refusing party to get advantage in the case just by paying additional costs, hence this is not a right choice. Another possibility could be requesting the judicial assistance from national courts, however arbitral tribunals are reluctant to follow this practice since it is expensive, uncertain and imposes the delay of the arbitral proceedings. As the refusal of a party to produce a particular document brings in mind a presumption that the requested document if produced would confirm the allegations made by the requesting party or contradict the claims of the requested party, hence the reason why the party is refusing is because the documents are harmful for its case. In this regard the presumption would justify drawing an adverse inference from the refusal of the party. A threaten of drawing such an inference could serve as an encouragement for the party to produce the documents and would induce the production while facilitating the party's right to present its case and the

process of fact finding. Such a solution has been adopted in the IBA Rules, which in article 9 paragraph 5 provide that "if a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party". The Rules provide for drawing the adverse inference also in the event of failing to produce upon the request to which the party has not objected in the time defined by the tribunal. Apart from providing for the possibility to draw adverse inference, the IBA Rules do not contain any guidelines as to how and when the inference might be drawn, what kind of inference to draw in a case where a large volume of material has been refused to be produced and there is a possibility that some of them could be harmful and some supportive for the refusing party's case. The Rules use a broad expression of party's failure "without satisfactory explanation", however they do not precise as to what would the satisfactory explanation be. [56] The possibility to draw adverse inference in the event of not filing the objection to the request to produce in due time may also raise some doubts in the event if the party has filed the objection but too late and the objection is correctly justified and merits granting. In such situation in would be difficult to access what kind of adverse inference justifiably draw from such a failure. The lack of guidance in IBA Rules as to the adverse inference may

[56] Jeffrey Waincymer, Apporaches to Evidence and Fact finding *in* Procedure and Evidence in International Arbitration", Wolters Kluwer, Alphen aan den Rijn, 2012, pp.777.

be a source of conflict between the parties and their dissatisfaction from the proceedings. It may also lead to a challenge of the award in the event of unjustified drawing of the adverse inference.

For the scope of determining the conditions on which the adverse inference might be drawn the doctrine has identified the requirements that the tribunal shall take into consideration before drawing the adverse inference in order to ensure the correct application of this instrument. [57] The party seeking the adverse inference shall satisfy five criteria. First of all, the party shall produce all available evidence corroborating the inference sought.[58] Secondly, the requested evidence must be accessible to the inference opponent. Third, the inference sought must be reasonable, consistent with facts in the record, logically related to the likely nature of the evidence withheld. Fourth, the party seeking the adverse inference must produce *prima facie* evidence and lastly, the inference opponent must know, or have reasons to know, of its obligation to produce evidence rebutting the adverse inference sought. The tribunal shall inform the refusing party about the possibility to draw the adverse inference in order to give the possibility to produce the requested documents. Although those guidelines are useful, since the Rules do not imply the obligation to draw the adverse inference but leave it to the tribunal discretion, using a word “may”, the arbitrators

[57] Jeremy K. Sharpe, Drawing adverse inference from the non-production of evidence, vol. 22 Arbitration International, 2006, pp. 549.

[58] In William J. Levitt v. Islamic republic of Iran case, the tribunal refused to Draw the adverse inference, even though the requested party refused to produce the requested documents, because the claimant failed to produce the evidence corroborating the inference sought. William J. Levitt v. Islamic Republic of Iran, Award no. 520-210-3 (29 august 1991), 27 Iran-U.S. CTR 145.

reluctantly draw adverse inference or apply the criteria in an unrealistic way which approaches the denial of justice. [59] The reason for this may partly lie in differences of the backgrounds and attitudes towards the process of disclosure, since the arbitrators skeptical to it, particularly those coming from Civil Law background, the mandatory production of unfavorable documents is not a practice, may reluctantly draw the adverse inference as a manifestation, unintentional, of their attitude towards the disclosure. Such an approach is however not in line with the common sense of the probative value of the refusal of the party to produce, since if the party violates the order to disclose the documents, showing also its bad faith by not applying to the promise to arbitrate and follow the procedure accepted by it in advance, it shall bear the consequences of its refusal by the drawing of adverse inference.

The drawing of adverse inference shall not be seen as a punishment for a refusing party, since it is a logical and reasonably drawn consequence of a presumption involving a process of decision making under certain circumstances. It constitutes a rule of evidence, which shall be taken into consideration together with other rules and gathered evidence. The party can prevent applying the rule if it fulfills the requirement of the request to produce the documents, since the tribunal informs the parties about the possibility to draw the adverse inference, giving them an opportunity to present their standpoint on this matter.

[59] Gary Born Disclosure and Discovery in International Arbitration *in* Gary B. Born , International Commercial Arbitration, Kluwer Law International, 2009, pp. 1921.

The failure to produce the requested documents not always result in the drawing of the adverse inference by the tribunal, not only because of its reluctance or approach but also because of the circumstances of the case and the fact that there is not always a case of an adverse inference issue. As introduced by Simon Greenberg and Felix Lautenschlager [60], depending on the requesting party's case and the nature of the withheld evidence, the arbitral tribunal can draw different conclusions which, in turn, vary in their nature. There are cases when no adverse inference issue is present, even though no document has been produced. This takes place when one of the parties has discharged its burden of proof while the other has failed to produce the evidence which would discharge its burden of proof. The conclusion that the first party proved its case is not drawing an adverse inference, but simply assessing the existing evidence and a non providing of any evidence by the opponent. The arbitral tribunal does not need to draw adverse inferences against a party that already bears the burden of proof for the fact in issue and does not discharge it. The above mentioned authors distinguish the cases of improper adverse inference and a proper adverse inference. The case of improper adverse inference occurs when both parties have submitted evidence in support of their case but upon the request of one of the party to produce a document confirming the requesting party allegations, which however is in the possession of the requested party. The refusal of the requested party to produce will not cause a gap in the

[60] Simon Greenberg, Felix Lautenschlager, Adverse inferences In International Arbitral Practice, ICC International Court of Arbitration Bulletin, Vol.22/Number2-2011, pp.45. The article gives a broad review of cases in which the adverse inference issues have been raised.

evidentiary material, however will influence the weight of the conflicting evidence. In the light of the refusal to produce the documents the arbitral tribunal will give more weight to the evidence of the requesting party, without drawing an actual adverse inference. The refusal however influence the tribunals decision anyways, because it considers the evidence provided by the requesting party as stronger one. Hence, the improper adverse inference influence the weight given to the existing evidence. The case of proper adverse inference takes place in situations when the requesting party's case on a particular point is incomplete because of the lack of the document requested. The refusal of requested party to produce documents leads to the presumption that the documentary evidence would be in the requesting party favor. A proper adverse inference is not used to put more weight on the existing evidence, but rather to substitute for a piece of missing essential evidence. The adverse inference fills the gap in the evidentiary material.

It should be underlined that a the adverse inference alone is not the basis alone for the party to win the case. An award must be justified by all the evidentiary material and the arguments sustained by the winning party while the adverse inference is one of the elements which enables the tribunal to take the final decision. It is the discretion of the tribunal to balance the submitted evidence and the adverse inference drawn with the principles of due process. The IBA Rules do not give much guidance to the tribunal in relation to the issue of drawing the adverse inference and its application.

1.6. Electronically stored documents.

Electronically stored documents have started to play an increasing role in the process of taking or evidence in international arbitration. Nowadays it is difficult to imagine a business or a law firm which would not use the electronically stored documents such as emails, letters, faxes, memoranda, contracts and other documents used on every day basis. The devices of storage of the electronic documents consist no longer only of the computers or hard drives but also cellular phones, Blackberries, iPhones, iPads, iPods and other similar devices. With the increase of available methods of storage, communication and production of electronic documents, the amount of data which can potentially be produced in international arbitration has increased dramatically. Hence, the issue of production of electronically stored documents and information is playing an important role in the process of taking of evidence and the document production.

1.6.1.IBA Rules and e-disclosure.

The provisions of IBA Rules relating to document production apply also to electronically stored documents. The specificity of the electronically stored documents however makes it more problematic to apply the provisions in the same way since there are many issues characteristic only to the electronically stores documents which do not exist in case of paper documents. In this regard a question arise whether the IBA Rules can sufficiently cope with the new reality of e-disclosure. The IBA Rules in

defining the meaning of “document” includes also the electronically stored documents as it states that it is “a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means”. The Rules also make a reference to electronically stored documents in article 3 paragraph 3 letter a) (ii) when setting forth the requirements of the request to produce states that “in the case of documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner”. Moreover, article 3 paragraph 12 letter b) states that “documents that a Party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients, unless the Parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise”. The existence of provisions relating to electronically stored documents may encourage the parties to use this form of production of documents and make the requests including such documents. However, the lack of further guidance causes doubts as to how the production of electronically stored documents should be conducted. This is particularity important in the event when the parties of the arbitration come from different legal background, as the practice, expectations and methods very significantly between Common and Civil Law system, and particularly for the party coming from Civil Law tradition the electronically stored disclosure may be particularly complex considering the

fact that such party is not very familiar with the concept of broad disclosure and in addition may have never come across the electronically stored information disclosure. Additionally, many conflicts between the parties may arise in relation to such a disclosure which is by its character very broad and might be burdensome, time and cost consuming. For those reasons the provision in IBA Rules do not seem sufficient for the satisfactory conduct of the e-disclosure.

The production of electronically stored documents may give raise to issues of efficiency and fairness, as well as jurisdictional problems. [61] Since the documents stored in electronic form may be very large in volume, the process of their collection, the data search and retrieval, their presentation and management may cause delays in the proceedings and induce cost increase. Additionally, the assessment of such materials will also cause further delays and costs. While the electronically stored documents may include practically any location in the world, the problems of jurisdictions and various national laws as to their gathering, production, privacy issues, transfer restrictions of foreign legislation and approach of conflict rules arise. Another problem might be related to the multiple copies of the documents and their production in the light of the IBA Rules provisions as to the production of copies and originals upon the request of the tribunal. Since the Rules do not specify whether the documents shall be produced in electronically form of printed, the production may be very burdensome in the

[61] Jeffrey Waincymer, Documentary evidence *in* Procedure and Evidence in International Arbitration, Wolters Kluwer, 2012, pp. 847.

event of the requirement of paper form of the electronically stored documents. Moreover there are challenges in relation o the character of such documents, since a document which can be generated and modified in a few clicks, creates problems as to its evaluation. A contract can be drafted on a computer, printed out and signed by the different parties but only produced as evidence in its electronic shape. A problem arises as to how to deal with the situation then such contact has been modified more than once and where the arbitral tribunal has to determine which document was the one the parties communicated or agreed on.

The disputes may arise also around questions related to the origin of an electronic document, its time of generation, transmission and receipt. In the current state of the IBA Rules those problems are not faced leaving them to the discretion of the tribunal and the parties, which however may not be able to deal with them. In relation to the provision of IBA Rules which sets forth the ground for refusal of the request of production, particularly the specificity of the requested document the problem may arise as to how to specify the name, date and content of the document if it has been changed several times, titled with diverse names, deleted and recovered etc. In this regard the useful way of identifying the document may be a use of key word search which is provided in the article 3 paragraph 3 of the Rules, however it may lead to a very broad scope of found documents which will cause a time and cost induction apart from the possible allegation of an attempt of “fishing expedition” or a unreasonably burdensome request. Similar

problems may arise in relation to confidentiality and privileged documents, as in the broad search in becomes more difficult to localize such documents and assess their character, not to mention different national rules of the place of the storage of the documents in relation to confidentiality and privilege. An important issue not to underestimate is the production of metadata, being a data about the data and including “information about a particular data set or document which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted.".[62] Metadata helps to establish what amendments have been made to a documents, by whom and when, which may be a crucial element in establishing facts of the case.

It would be advisable for the tribunal to encourage the parties to an early consultation in relation to the problems that may arise with the production of electronically stored documents and to appoint an independent IT expert for the purpose of assisting in the process of e-disclosure.

[62] The definition from the Sedona Principles Glossary, Sedona Conference Working Group on Electronic Document Retention and Production, Sedona Principles: Best Practices Recommendations and Principles for addressing Electronic Document Production, second edition, 2007.

1.6.2. Guidelines and protocols.

In the absence of guidelines in the IBA Rules, the parties may seek the solution in the guidelines of some institutions. One of them is the International Centre for Dispute Resolution Guidelines for Arbitrators Concerning Exchange of Information (the ICDR Guidelines)[63]. Another good source of guidelines is the CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (the CPR Protocol)[64]. The protocol suggests that the parties shall adopt one of four modes for electronic disclosure and consult each other early in order to discuss the e-disclosure issues. A detailed set of guidance for dealing with several aspects of e-disclosure is provided in The Chartered Institute for Arbitrators Protocol for E-disclosure in Arbitration (the "CIArb Protocol)[65]. The guidelines may be helpful particularly if the parties incorporate them in the arbitration agreement or the tribunal will implement them when deciding the conduct of the proceedings. Attention shall be paid also to Sedona Principles[66], which were developed by a working group composed of practice lawyers and a select group of consultants. The aim of the Working group was to "develop 'best practices' for addressing requests for production of computer-based data in civil litigation", as stated in the introduction of the Principles. They

[63] International Centre for Dispute Resolution Guidelines for Arbitrators Concerning Exchange of Information, issued by the centre in 2008.
[64] CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration issues by the International Institute for Conflict Prevention and Resolution in 2009.
[65] The Chartered Institute for Arbitrators Protocol for E-disclosure in Arbitration Issues by the Chartered Institute for Arbitrators in 2008.
[66] Sedona Principles, op.cit. note 69.

contain various principles relating to electronic disclosure in particular principle 9 and 12, which mention in which form electronic information should be maintained, how the receiving party can access this information and the matter of deleted, shadowed, fragmented or residual data or documents. [67]

[67] Laurent Vercauteren, Note and comment: The taking of documentary evidence in international arbitration , 23 American Review of International Arbitration, 2012, pp.352.

1.7. Document production and efficiency of the proceedings.

Document production is an important part of evidentiary proceedings which cannot be overestimated. It can be stated that documentary evidence are of primary importance in international arbitration, similarly as in Civil Law system. The documents provide a great source of information about the facts of the case and often are only evidence which is necessary to establish facts and allow the accurate award. The main purposes of document production is to present the documents in possession of the party in support of party's claim, allow the parties to get informed about the evidence on which the other party intends to rely on and to provide the parties with the documents relevant for the case which are not in their possession. In Common Law country, even if the role of oral evidence is underlined, documentary evidence are a primary source for the parties to get the general view about the case in the pre-trial phase without which the counsels consider it impossible to build the case. There is, however, a big difference between the two proceedings since international arbitration combines mechanisms relating to documentary evidence present in both Civil and Common Law countries. IBA Rules create a system which is not a mix of both legal traditions but a new hybrid mechanism which comprises of some particular elements and also contains some new ones. It does not permit a broad discovery characteristic for Common Law tradition, however it allows the requests to produce from the other party or third parties. The scope of the documentary disclosure is not as wide as in American style discovery

and there is no obligation of producing all the documents in party's possession in the pre-trial phase, moreover there is no requirement to produce both favorable and incriminating documents. The IBA Rules, which are driven, among others, by the principle of efficiency, prevent the so called" fishing expeditions" which can make the proceedings expensive and long lasting. However, the Rules allow the request for production which, even if refused, can lead to an order of the tribunal to produce the documents. In this regard, there is a possibility that the party will be obliged to produce documents unfavorable for its case. In addition, the requests to produce, if relating to large volumes of documents, may delay the proceedings and influence the costs of the arbitration. In the worst scenario, the document production, especially if it relates to the electronically stored documents, may harm the principle of efficiency and destroy one of the major advantage of the party's choice of international arbitration. It is not acceptable for the parties to be forced to wait for the justice too long because of the prolonged document production issues. As the IBA Rules contain elements and provisions which are not the reflection of the mixed national rules but rather a new system, and to not contain provisions in all critical matters being a point of conflict between Common and Civil Law, they may not be fully satisfying the expectations of the parties in relation to document production matters. The different approach and expectations towards document production may cause internal conflicts, apart from the main dispute, causing additional wastes of the time and costs.

It is crucial that the benefits, which come from the document production in establishing the facts of the case, are not wiped off by the costs and delays that the production may cause. The parties may sometimes be tempted to make a broad requests for production in an attempt to receive some valuable documents in case of lack of strong arguments which may lead to an unnecessary flood of documents. It is important that the international practitioners, both playing a role of tribunal and party's counsels, make the effort to reach a reasonable balance between due process and efficiency of the proceedings. Some of the provisions of IBA Rules, discussed above, serve to prevent such problems. The request to produce shall fulfill the requirements of specificity, relevance, materiality, do not cause unreasonable burdensomeness, violate the confidentiality and privileges of documents. Even though the Rules do not precise what kind of privilege shall be taken into consideration, the tribunal shall adapt the proceedings and the requirements of document production to particular circumstances of each case. In order for the proceedings to be efficient the tribunal shall play a pro-active role. One of the ways to effectively manage the proceedings is an early communication with the parties, establishing the timetable for the requests for production and the submissions of documents and applying strictly the criterions of the request for production mentioned above. The parties shall know in advance what kind of requests will be denies in order to avoid delays in the procedures related to filing, objecting, and deciding on denial of the prohibited request by the tribunal. It is advisable to adopt the "Redfern Shedule" in the process of assessment of the

request and objection to produce. In permits the parties to present their arguments in a clear manner and permits the tribunal to take the decision in an efficient way. In case of complex and extensive issues related to document production, especially when it comes for e-disclosure, it might be helpful to hold a separate hearing in order for the parties to discuss their positions, making sure that they are correctly understood and to clarify disputed issues. In any event, in order to promote an efficient way of managing the document production it is essential that the tribunal plays an active role and adopts the solutions required for a particular case and circumstances, taking into consideration the backgrounds of the parties.

2. Witness evidence and IBA Rules.

The international arbitration proceedings are characterized , among others, by the principle of flexibility in order to allow the interests, expectations and approaches of the parties to be satisfied. The witness evidence is an element of arbitral proceedings which is particularly controversial among the parties coming from different legal backgrounds. The parties may have different views and conceptions on the importance and the role of witness as a source of evidence. The success of international arbitration lies in the possibility to overcome the differences and provide guidelines as to the possible solutions. As mentioned in the first chapter of this thesis, parties coming Civil and Common Law background have a very different approach towards witness evidence. In Common Law, for historical reasons, there is a profound believe in the significance of the witness testimony and in the evidentiary weight of such a testimony. Civil Law, by contrast, is characterized by a distrust towards witness as a mean of evidence, viewed as a not very trustworthy source and rather a subsidiary evidence in respect of documentary evidence. A distrust toward witness in international arbitration from the Civil Law party may also be deepened by the fact that while in the national proceedings the witness is obliged to tell the truth either under oath or not but still with the awareness that under the national law regulation not telling the truth in a testimony is a crime, in international arbitration the tribunal has no power over the witness and even in the event of lying the witness bears no consequences. However,

since international arbitration has to cope with various legal traditions and approaches, also the IBA Rules include a set of rules concerning the witness evidence and the mechanism of taking such evidence. In this field, in the light of substantially different approaches, many conflicts, misunderstanding and problems may arise, hence it is important to deal with them in a way that each of the parties coming from different backgrounds can feel satisfied. Below it will be discussed how the IBA Rules provide for the taking of witness evidence and whether it deals with all potential problems that may arise.

The IBA Rules provide for witnesses as a mean of evidence to be introduced by parties in the process of taking evidence. Article 4 paragraph 1 provides that each party, within the time ordered by the tribunal "shall identify the witnesses on whose testimony it relies and the subject matter of that testimony". The rule permits the management of the proceedings by the tribunal and allows the parties to be informed as to the existence of a witness, its identification and a subject of its testimony. It prevents the surprise and tactical conduct of some parties which may tend to surprise the other party with a new evidence. Paragraph 2 of article 4 provides that any person may present evidence as a witness, including a party or a party's officer, employee or other representative. The question of who can be a witness is an issue which causes controversies between the Common and Civil Law. In Civil Law tradition usually there are some exclusions as to who cannot be a witness, in particular a party is not considered a witness, since

nobody can be a witness in its own case, but rather give a statement or provide information in relations to certain facts. the Rules do not distinguish between the party and non party witness, as in would be difficult to accept for some participants of international arbitration that a party cannot be treated as witness. In this case, all persons can be witnesses however it is upon the tribunal discretion whether to give weight and if so, what weight, to such testimony.[68] The same situations as in case of parties applies in some jurisdictions to Directors of a party that they represent.[69] Some jurisdictions may however not imply any restrictions as to the employees of a party, treating them as a witness. The difficulty may also arise in identifying who a party representative would be, as different jurisdictions apply different standards. The acceptance of any person as a witness promotes efficient and fairness of fact-finding. [70] In some cases, a party may not have access to any other witnesses apart from its own officers and employees who could provide testimony in support of its position, hence it would be unfair to deny that party the opportunity to present its case. Moreover, it may be essential for the tribunal to hear such testimony in order to gain a complete understanding of the facts of a case.

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[68] In *Harris International Telecommunications, Inc. v. The Islamic Republic of Iran, et al.* , case No. 323-409-1 (2 Nov. 1987), 17 Iran-U.S. C.T.R. 31, 63, Iran –U.S. Claims Tribunal has Award Claims Tribunal has specifically noted that it may attach different "weight" to information provided by party representatives, as compared to the testimony of witnesses.

[69] Similarly, In the ICC case No. 7313, Collection, p. 96, in a decision rendered on 30 October 1992 it was stated that the Director, as party representative, cannot be a witness; the party that wished to present the Directors as witnesses was represented by Irish counsel; the party opposing this was represented by French counsel; and the Sole Arbitrator who decided the issue was German.

[70] Michael Bühler, Carroll Dorgan, Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration - Novel or Tested Standards?, Journal of International Arbitration, Kluwer Law International 2000 Volume 17 Issue 1, pp. 0009.

2.1.Witness statements and its preparation.

In relation to a witness testimony some Civil Law jurisdictions provide for written witness statements to be submitted, while others permit no such possibility, admitting solely a personal testimony in front of a state judge. [71] Common Law generally also is based on oral testimony however provide for submitting of affidavits. In a consistency with those practices IBA Rules provide for submission of written witness statements before the oral witness testimony. According to article 4 paragraph 4 the arbitral tribunal may "order each Party to submit within a specified time to the arbitral tribunal and to the other parties Witness Statements by each witness on whose testimony it intends to rely". The advantage of the witness statements include the possibility to narrow the issues to be addressed at the evidentiary hearing, assisting the tribunal and parties in preparing the evidentiary hearing and determining if the particular testimony is relevant to the dispute or whether a the matter is already sufficiently proved by another evidence and there is no need to hear the witness,[72] enhancing in this way the efficiency of the proceedings. Submission of witness statements may significantly reduce the examination of the witness during the evidentiary hearing as the opposing counsel and the tribunal may be prepared to focus on particular matters of the testimony in comparison to the case then the

[71] In French procedure the "declarations de tiers" are allowed-see art. 199ss of the Nouveau Code de Porcedure Civile, whilst in Polish legal system no other testimony rather than oral is allowed from a witness –see art. 258 and next of Kodeks Postępowania Cywilnego

[72] Anne Véronique Schlaepfer, Witness Statements, Dossier of the ICC Institute of World Business Law: Arbitration and Oral Evidence, 2005, pp.65.

testimony is provided for the first time during the hearing. Moreover, written statements may be particularly useful in case of parties and arbitrators coming from distant parts of the world. Moreover, the Rules provide that the if the witness statements are submitted, any party may, within the time ordered by the arbitral tribunal, submit to the arbitral tribunal and to the other parties revised or additional witness statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another party's witness statements, expert reports or other submissions that have not been previously presented in the arbitration. Such additional statements are often called rebuttal statements as they permit the parties to refer to some new matters raised by the other party and to add some new descriptions of the facts mentioned in such statements or introduce new witness and its statement in response to the other party's arguments. However, it is not permitted to add new descriptions of facts unless in response to the other party witness statement.

The IBA Rules provide a general framework of requirements regarding the form and content of a witness' written statement , which are helpful in avoiding errors and omissions when drafting witness statements. According to article 4 paragraph 5 each witness statement shall contain the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the

statement, This requirement is important both for the parties and the tribunal to know who the witness is and what is his relation to the party. Apart from that the witness statement should also include a full and detailed description of the facts and the source of the witness's information as to those facts, sufficient to serve as that witness' evidence in the matter in dispute. The full description of the facts means that the witness shall give a statement as to full perception of the fact upon which he is called, without omitting certain facts relating to it. Instead, a requirement of detailed description relates to the fact that the witness statements may substitute the direct testimony hence it should be detailed enough, however, it shall be underlined that too detailed description relating facts which took place long before the statement may give raise to some doubts as to the plausibility of such a statement. Moreover, the documents to which the witness relies in the statement that have not already been submitted shall be provided. The witness statement shall include the statement as to the language in which it was originally prepared and the language in which the witness anticipates giving testimony at the evidentiary hearing. This requirement serves as indication whether the language of the statement is the witness mother tongue and justify some possible errors in the statement and also permits to prepare for the hearing to be held with the assistance of the interpreter if needed. Moreover the witness statement shall include the affirmation of truth of the statement and the signature of the witness together with the date and place. Hence the witness statement is an unsworn and voluntary declaration of the witness as to certain facts. The witness who provides a

written statement will confirm the statement during the hearing on which he shall normally appear. The relationship of written witness statements to oral testimony at a hearing is stated in paragraphs 7 and 8 of article 4 of the Rules. If a witness whose appearance has been requested pursuant to article 8 paragraph 1 (by any party or by the tribunal) fails without a valid reason to appear for testimony at an evidentiary hearing, the arbitral tribunal shall disregard any witness statement related to that evidentiary hearing by that witness unless, in exceptional circumstances, the arbitral tribunal decides otherwise. Hence, in the event of non appearance of the witness without a justified reason, the witness statement must not be taken into consideration. A valid reason can be understood as a serious illness, very long distance from the place of the witness home country and the hearing, difficulties with the travel. However, even in case of non justified non appearance, the tribunal has a power, in exceptional circumstances, to admit the witness statement as a valid evidence. From this provision in relation with article 8 paragraph 1 it can be understood that each party has a right to cross-examine the witness who has issued the witness statement (the opponent's witness, not its own witness). If the party waives its right of cross-examination of the witness by non requesting its appearance on the hearing, the other party cannot request the hearing of its own witness. [73] It might be requested by the arbitral tribunal on its own discretion even if none of the parties have requested its appearance on the hearing. If the appearance of a

[73] Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker, Thomas Rohner, op.cit. note 42, pp.101.

witness has not been requested, none of the other parties shall be deemed to have agreed to the correctness of the content of the witness statement. Hence the parties may challenge the content of the witness statement produced by the other party by any other evidence.

An important issue which is not mentioned in the IBA Rules in relation to witness statements is the problem of hearsay. There is no provision disallowing hearsay evidence,[74] even though it is generally not permitted in most of the legal systems in a an explicit or non explicit way. The problem of hearsay will be mentioned in the further part of this thesis when the oral testimony will be discussed.

The preparation of witness statement is related to a very controversial issue between the parties coming from different backgrounds, namely the interviewing the witness and discussing with him his prospective testimony. It is a common practice in international arbitration that the witness statements are prepared with the assistance of the party's counsel. As stated in the first chapter of this thesis, the ethical rules which bind the counsel are very different from country to country and the contacts of the counsel with the witness is often seen as forbidden. This is the case especially when taking into consideration Common and Civil Law counsels. Drafting a witness statement requires the direct contact with the party's witness and interviewing him and worse, drafting the statement. In some countries of

[74] S. I. Strong and James J. Dries, Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?, *Arbitration International*, Kluwer Law International 2005 Volume 21 Issue , pp. 306.

Civil Law tradition it may be seen as a very serious misconduct and disciplinary proceedings may be commenced against such counsel. The usage of witness statements on international arbitration may raise particular problems in case of such counsels. Apart from the ethical doubts the counsel may not be experienced in drafting such statement given the fact that he has never done that in its home jurisdiction, hence the problems of equal treatment may arise. The arbitral tribunal shall ensure that the parties are familiar with the modality of preparing witness statements and that the same rules apply in relation to the preparation of the statements. In practice, the counsel help the witness to focus on relevant issues in the witness statement and drafts the statement on the basis of the story told by the witness, who eventually reviews and signs the statement. The statements shall be written using the wordings of the witness, since it would not be credible if the statement was drafted in difficult legal language not understandable for the witness itself. Drafting the statement by the counsel can also be a ground for skepticism towards the whole idea of witness statements in international arbitration on the part of Civil Law lawyers who may see such a statement as unreliable and having little in common with the independent witness testimony [75], which in any case is already seen as a less credible source of evidence that documentary evidence. Hence, implementing the witness statements in the IBA Rules and allowing for their drafting by the counsel may not be positively evaluated by the Civil Law

[75] John A. Wolf, Kelly M. Preteroti, Written Witness Statements: A Practical Bridge of the Cultural Divide *in* Lawrence W. Newman, Richard Hill (editors), The Leading Arbitrators Guide to International Arbitration, Second Edition, Juris Publishing, 2008, pp. 209.

lawyers and parties. The IBA Rules expressly permits the witness interviewing by stating in article 4 paragraph 3 that it shall not he improper for a party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them. This provision gives permission for such practices to Common Law lawyers familiar with interviewing witnesses and preparing them for the examination hence placing them in the advantageous position. Civil Law lawyers, even if permitted by the Rules, may find it difficult to overcome their ethical rules and grounded principles in drafting witness statement, which may place them in a disadvantageous position, especially if they are not experienced in international arbitration.

2.2. Evidentiary hearings. Oral testimony and cross-examination.

Evidentiary hearings are the part of the arbitral proceedings which are present almost in every case. It is difficult to find an international arbitration where the establishment of the facts is based only on documentary evidence and the hearings are not necessary.[76] Even in such cases it is a common practice to have a brief hearing in order for the counsels to make oral submissions. The conduct and details of the hearing shall be tailored by the tribunal after the consultation with the parties depending on the particularities of the case. It is advisable that the main features of the hearing are taken into consideration in the initial part of the proceedings when the parties can discuss with the tribunal the organization, location, duration and other similar issues in advance. The location of the hearing is an important issue since it may influence the conduct of it, hence the parties shall ensure that the location has all the necessary facilities for a hearing and the examination of witnesses. The exchange of views may help the tribunal to organize the procedural timetable accordingly. When the need for the evidentiary hearing arises, the tribunal in consultation with the parties shall fix the date, time and the schedule of the hearing. In the event of complex cases which require long hearings lasting few days, it can be helpful to organize a pre-hearing conference in order to discuss all the necessary details concerning the hearing. Such conference may serve for clarification

[76] Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, Law and Practice of International Commercial Arbitration, Sweet&Maxwell,London,2004,pp.315.

of the issues still to be discussed, the schedule of submissions of documents and other evidence, written submission, the schedule of witness examination, whether there will be a need for translations, desirability to appoint an expert. [77] The tribunal shall discuss with the parties the type of evidence they want to present at the hearing. As stated above, the common practice is to produce witness statements which, upon the request of the party or the tribunal, will lead to the witness cross-examination. The hearing may focus on the examination of the witness or experts. It shall be decided whether one round of oral testimony is necessary of the second time to rebut is needed. For the purpose of permitting the parties to examine the witnesses on equal opportunities basis, the total period of time for each party for the examination can be fixed. As calculating how much time can be needed might be difficult, a method called the "Böckstiegel Method" can be applied.[78] The method was introduced by the president of Iran-U.S. Claims Tribunal at The Hague, Karl-Heinz Böckstiegel. It consist of agreeing a total time allotted for the hearing and establishing total periods available for each party for its oral pleadings and witness and experts examination. The period may be equal for each party, but depending on the number of witness that each party wants to examine, the periods may vary. Within the total time at the party disposition, it can freely decide how much time to dedicate for each of the witness, by counting similar to a chess clock. This method can be useful

[77] The list of topic for a pre-hearing conference established by the Iran-U.S. Claims Tribunal Report 18 at 98, set out in (1983) VII Yearbook Commercial Arbitration 255.

[78] Karl-Heinz Böckstiegel, Presenting, taking and evaluating evidence in international arbitration, in Carbonneau, Thomas E. (executive editor) - Jaeggi, Jeannette (assistant editor) - Partridge, Sandra K. (assistant editor) , Handbook on International Arbitration and ADR, JurisNet, 2010, pp.87.

in arbitrations where the parties come from different legal backgrounds, since each of the counsels of the parties have different approach to witness examination, oral opening and closing statements, how much time to use for each witness, and this method permits more flexibility and equity of the proceedings. [79] When planning the evidentiary hearing and considering a list of all witnesses the parties want to examine it may be useful to consider the relevance of the testimony in the light of the duration of the proceedings, taking into consideration possible redundancy of the list of witnesses. "*The arbitrator should have full authority to limit their appearance on the grounds of irrelevance or redundancy… including the right to limit or deny the right of a party to examine, cross-examine or re-examine a witness if he determines it to be unlikely to serve any further relevant purpose".* [80] However, the attention shall be always paid on the balance between the efficiency and due process.

Oral Testimony and cross-examination.

The IBA Rules provide guidance as to how the hearing should be conducted. Article 8 paragraph 2 states that the arbitral tribunal shall at all times have complete control over the evidentiary hearing and it may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably

[79] More about the advantages and risks of this method see Richard Kreindler, Cross-examiniation against the clock in Lawrence W Newman, Ben H. Sheppard (Editors) Take the Witness: Cross-Examination in International Arbitration, JurisNet, Huntington, 2010,pp.113.

[80] Jan Paulsson, Planning Efficient Arbitration Proceedings, International Council for Commercial Arbitration Congress Series No. 7, , pp. 119.

burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. of the Rules. Questions to a witness during direct and re-direct testimony may not be unreasonably leading. Moreover, the Rules establish the order of the witness examination stating in article 8 that the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses. After the direct testimony any other party may question such witness in an order to be determined by the arbitral tribunal. The party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other parties' questioning. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth. If the witness has submitted a witness statement, the witness shall confirm it. The parties may agree or the arbitral tribunal may order that the witness statement shall serve as that witness's direct testimony.

The rules provide the flexibility of the proceedings, allowing that if the arbitration is organized into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the parties may agree or the arbitral tribunal may order the scheduling of testimony separately for each issue or phase. Moreover, this order of the hearings may be changed upon the request of the party or the tribunal's own motion. Witness conferencing is also allowed. When it comes for the questions, the arbitral tribunal may ask them at any time. The management of the hearing is left in the hands of the tribunal, who is playing an active role, similar to a Civil Law

judge in the national proceedings. Hence, it may be said that the hearing is conducted in an inquisitorial way, with much freedom left to the parties. In particular, the conduct of the witness examination can be adopted to the particular case and the approaches presented by the parties. Pursuant to the Rules, the tribunal may request any person to give oral or written evidence on any issue that the arbitral tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the arbitral tribunal may also be questioned by the parties.

The question may arise whether the arbitrators have the power to summon the witness to appear and testify as witness. As the third party has no legal relationship with the proceedings and the arbitrator does not possesses any binding power over it, it has to be concluded that there is no actual mean to force a witness to appear before the tribunal. The third party appearance is voluntary and might be motivated by the underlying interest.[81]

The differences between the approaches towards witness examination and oral evidence have been discussed in chapter I. The intent of Common Law lawyers when preparing to the witness examination is to gradually narrow the propositions with which the witness is agreeable in order to arrive to the point the witness cannot disagree with an ultimate proposition which is crucial for the opposing party. [82] It shall be underlined that whilst some of the Common Law lawyers tend to conduct the cross-examination in

[81] Antonias Dimolitsa, Giving evidence: Some reflections on oral vs documentary evidence and on the obligations and rights of the witnesses in Arbitration and oral evidence Laurent Levy, - V.V Veeder, Arbitration and Oral Evidence , ICC Publishing, 2004,pp.16.

[82] Sophie Nappert, Christopher Harris, The English appoeach to cross-examiantion in international arbitaration, *in* Lawrence W. Newman, B.H.Sheppard, editors, Take the witness: Cross-examination in international arbitration, Juris, 2010, pp. 256.

a aggressive manner, the purpose of the examination of a witness is not to bully the witness and some codes of conduct, even in Common Law countries forbid asking questions in a way which is principally to humiliate the witness. [83] In any event, the general approach toward the cross-examination of Common Law lawyers and Civil Law lawyers is different, as the former see the hearing and cross-examination as a main point of the proceedings and oral testimony as the most important evidence, preparing themselves using various techniques sometimes for many days for the oral submission and the cross-examination, being a proactive party in the hearing, while the latter tend to give less attention to witness testimony, being accustomed to the judge examining the witness in the first place and themselves asking only some additional questions. The IBA Rules combines the two approaches, including some of the elements of both systems, such as inquisitorial rule of the arbitrator, the direct and cross-examination by the parties, allowing the witness interviewing. Although the Rules permits flexibility, the general principles provided shall be maintained, prohibiting unreasonably leading questions and an American style cross-examination methods, including aggressive tactics which are not well seen in international arbitration especially by the Civil Law arbitrators. The reaction of a Civil Law arbitrator to an aggressive cross-examination may result in

[83] "A barrister when conducting proceedings in Court (...) must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify insult or annoy either a witness or some other person" , English Bar Code of Conduct, Rule 708 (g), available at https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-vii-conduct-of-work-by-practising-barristers/

protective approach towards the witness and hostility towards the lawyer.[84] The Rules allows witness conferencing which permits the reduction of time in complex arbitration involving many witnesses and experts. The reduction of time allows the reduction of costs and expenses of the proceedings. Also the general approach taken in the witness conference is different than in the cross-examination allowing more relaxed atmosphere and the avoidance of aggressiveness of some counsels, permitting the arbitrator to run the proceedings in a neutral and friendly manner. [85] The witnesses can also be examined in *confronto* method of tandem witness examination which provides for the witnesses to be heard simultaneously and they are then asked to explain the possible differences in their testimonies. Depending on the legal background, the arbitrator may wish to ask the questions first leaving less time to counsel which may not be welcomed by some lawyers. [86]

As mentioned above while discussing the preparation of witness statements, the interviewing and preparing of witness before the hearing is allowed by the Rules, since they state that it shall not be improper to discuss their prospective testimony with the counsel. In this regard Civil Law counsels may not feel very comfortable in a situation that their ethical code prohibit them to interview or prepare the witness before the hearing.

[84] For practical examples as how the particular cross-examination was dealt with by arbitrators and their reaction to various methods of examination see Arthur W. Rovine, Polite cross-examination: a symbolic step towards further uniformity in international arbitration, in T. Newman, W. Lawrence, Ben H. Sheppard, Jr. (Editors), Take the Witness: Cross-Examination in International Arbitration, JurisNet, 2010, pp. 77.
[85] Hilmar Reaschke-Kessler, Witness conferencing, Lawrence W. Newman, Richard D. Hill, The leading arbitrators' guide to international arbitration, 2 edition, JurisNet, 2008, pp.415.
[86] Paul A. Gelinas, Evidence Through Witnesses, in Laurent Levy, V.V. Veeder, Arbitration and Oral Evidence, ICC Publishing, 2004, pp. 41.

Whether the restrictions apply in the conduct of the arbitral proceedings in which counsels from different countries which provides the restrictions is a matter for determination under applicable local law. [87] The result allowance of the witness interviewing by IBA Rules may be that those counsels will be disadvantaged in the process of preparing the witness statements and not so throughout in as they would be without the influence of the restrictions they are bound with in their jurisdiction. It is also not defined to what degree the contact with the witness is allowed and where is the limit between a simple interviewing and preparing witness for the hearing meaning giving some guidelines as to how the hearing looks like, what kind of possible questions may the opponent ask, interviewing the way the witness behaves, his level of stress, and so called "coaching" the witnesses meaning telling witness what to say or what not to say, performing the mocking cross-examination and influence the witness. In the event unequal standards as to the preparation of the witness occurs in international arbitration between the parties coming from different background, taking into account little guidance from the Rules as to how the interviewing may look like, the counsels finding themselves in a disadvantageous positions shall demonstrate the fact of coaching the witness by the other party to the tribunal and rely on its discretion in determining the weight of such evidence, which however may lead to uncertain results.

[87] Lawrence W. Newman, The arbitration hearings, International Arbitration Checklist, Second edition, Jurisnet, 2009, pp. 143.

Hearsay

The IBA Rules are silent on the problem of hearsay, which is an important issue in the Common Law tradition related to the witness testimony and is one of the area where the disputes between the parties may arise. The issue of hearsay is not common in the Civil Law tradition due to the non-adversarial proceedings. Hearsay is defined as a statement that is made by someone other than the person testifying at the hearing and offered to prove the truth of the matter stated. [88] Sometimes, a hearsay statement may include "double hearsay", such as when witness who is present at the hearing reports what person who is not at the hearing reported about a statement made by person who is also not at the hearing. [89] In Common Law tradition hearsay of any kind is considered unreliable because there is no way to examine the absent person which allegedly was a witness of fact in question and ascertain the credibility of the witness present at the hearing. Hence, the Common Law jurisdictions do not consider hearsay as evidence.

The hearsay issues may affect the arbitral proceedings since they may cause conflicts between the parties coming from different legal backgrounds. While Common Law lawyers will argue that hearsay shall not be admissible as evidence, the Civil Law lawyers will not consider it as inadmissible and unreliable. Common Law lawyers may raise objections to the admission of

[88] Civil Evidence Act 1995, s. 1(2) , England, defining hearsay as "a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated"
[89] S. I. Strong and James J. Dries, op. cit., pp. 302.

some hence Civil Law lawyers must be prepared to answer such challenges. On the other hand the Civil Law lawyers may use advocacy tactics against the Common Law lawyer, being aware of the hearsay introduced by an opponent and challenging it asking the tribunal to give proper weight to hearsay testimony. Since IBA Rules are silent on hearsay, it is crucial that the arbitrators be aware of the hearsay problem and weigh the evidence in a fair manner. They can use the other expressed provisions set in the IBA Rules in order to deal with hearsay, such as article 8 paragraph 2 which allows the tribunal to limit or exclude any question, answer, or appearance of a witness if it considers it to be irrelevant, immaterial, burdensome, duplicative or covered by any reason stated in article 9 paragraph 2. Moreover, party may raise an allegation that allowing hearsay evidence lead to unequal treatment of the parties when only one party has access to hearsay evidence and the other party has to possibility to cross-examine the persons' credibility. The party may argument that hearsay is unsubstantiated by other witnesses and unsupported by documents.

However, the exclusion of a hearsay may also depend on the background of the arbitrators since their Civil Background may influence their view on hearsay as evidence. For this reasons it would be advisable that IBA Rules include an expresses provision in relation to hearsay in order to avoid conflicts and doubts.

The IBA Rules provide for the order of the hearing and the order in which the parties shall cross-examine the witnesses. They give the arbitrator the power to change this order upon its discretion. The tribunal shall pay attention not to limit party's right to present its case when deciding on the order of the proceedings and giving the right to the final word, however, balancing this right with the established international arbitration practice. A good example of such problem is *Margulead Ltd. vs Exide Technologies* [90] case, where the arbitrator has not permitted the Claimant's counsel to reply in the last word at the final hearing. The Claimant, who lost the case, has challenged the award, stating that he was not permitted to have the last word which was a normal procedure in the law of seat of arbitration, which was London, when the Claimant had the burden of proof. Since no such rule was applicable in arbitration, the national court uphold the award stating that neither procedural rules, IBA Rules adopted by parties nor finally the English Arbitration Act say anything about who shall speak last, leaving it to the discretion of arbitrators. Moreover, the High Court has indicated that the leading treatise [91] did set forth the rule that the parties in international arbitration have a right to equal number of submission. Hence, permitting the last word to the Claimant would result in two submissions against one submission of the Respondent. In the courts' view the failure in

[90] *Margulead Ltd. vs Exide Technologies* , Hight Court of Justice, (QB, Commercial Court), 16 February 2004, EWHC 1019, cited by William W. Park in Arbitration of International Business. Studies in Law and practice, Second edition, Oxford 2006, pp.640.

[91] See Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, Law and Practice of International Commercial Arbitration, Sweet&Maxwell,London,2004,pp.323. *as indicated by* William W. Park in Arbitration of International Business. Studies in Law and practice, Second edition, Oxford 2006, pp.640.

allowing the Claimant to have last word was in line with the established international arbitration practice.

3. Expert evidence and IBA Rules.

The approach to expert evidence is another example of potential clash of cultures between the parties of international arbitration. As mentioned in Chapter I, Civil and Common Law differs in the ways of treating the expert evidence and the conduct of the proceedings involving expert . In Civil Law countries the experts are appointed by the court, upon the request of a party, or in some case on the judges' discretion. The experts are chosen from the list of expert formally approved by the state. There is normally only one expert, however, the parties may challenge the result of experts' report and apply to the Court to appoint another expert. The expert are impartial and independent, and the party normally has no influence on the particular expert choice. The expert issues the report which can be challenged by the parties and upon their request the expert might be examined on the hearing, where the parties have a right to ask some questions in relation to the report, however the examination is not extensive and usually limits to some issues or views in the report which may raise doubts rather than general questioning the expert about all his report.

On the other hand, the Common Law approach toward expert is different, where the parties are entitled to appoint their own experts, upon their own preference. The expert issues a report and his competence is tested during the cross-examination. The expert assists the party in some

particular issues and acts as a witness , however his report have to be impartial in relation to the requested issue. Cross-examination in fact serves verifying the experts' impartiality and competence. Since each party has a power to appoint its own expert and cross-examine the opponent's expert, it can lead to some delays in the proceedings having in mind the extensive a long lasting style of Common Law examination.

3.1. Party appointed experts.

The IBA Rules tend to combine the two approaches and satisfy the expectations of both sides. The provisions in Articles 5 and 6 clearly define the conduct of the proceeding in relation to experts allowing both types of experts in the arbitral proceedings to be appointed. A party appointed experts can be identified in case the specific issues need to be addressed. According to article 5 of IBA Rules the party shall indentify, within the time ordered by the tribunal, the expert upon whose testimony it wants to rely and a subject matter of such testimony. The expert shall submit an expert report, containing the full name and address of the expert, his relationship with one of the parties, the counsels and the tribunal, his background, qualification, training and experience. Those details permit the tribunal to assess the competence and impartiality of the expert, whether he might be biased or have interest in party's case. Furthermore, the report shall contain the description of the instructions pursuant to which the expert gives his opinion. The reliability of expert report might be higher if the makes it

transparent that kind of instructions he received from the party. The report shall also contain a statement of independence from the parties, the legal advisors and the tribunal, a statement of the facts upon which the expert bases his opinions and conclusions and the opinions and conclusions itself together with the description of methods, evidence and information used in arriving at the conclusions. If the expert has relied upon documents that have not been submitted, they shall be provided. Similar as the witness statement, the expert report must state the original language of the expert, if the report has been translated, and indicate the language in which the expert intends to give his testimony. Moreover, the expert report shall be signed, with date and place and contain the affirmation of expert's genuine belief in the opinions expressed in the report. In the event when the expert report was prepared by more than one expert and signed by them, the report shall also contain the attribution of part of entirety of the report to each author. It clearly results from those provisions that the Rules tend to avoid surprises in direct evidence from expert witnesses by emphasizing the need of expert repot setting out the evidence in advance of the hearing, similarly as in case of witness statements.

After the submission of expert reports, any party can submit to the tribunal and the other party the revised or additional expert report, including reports form experts not previously appointed by parties, however only on condition that such revisions or reports respond only to the matters contained in another party's witness statement, expert report or other submission which have not been previously presented in the arbitration. The tribunal may

order that the expert who provided the expert reports on the same or related issue meet in order to confer on such issues. The aim of such meeting is to reduce any differences between the expert opinions to a possible extent and to narrow down the scope of issues on which the expert testimony will be given during the hearing. Similarly as in case of witness statements, if an expert whose appearance was requested fails to appear without a valid reason, the arbitral tribunal shall disregard its report, unless it decides otherwise in exceptional circumstances. Moreover, if the appearance of an expert on the hearing was not requested, the parties are not deemed to have agreed to correctness of the content of expert report. As to the examination of the expert, the Rules state that the claimant shall present the testimony of his party appointed expert followed by the respondent presenting the testimony of his party-appointed expert. Moreover, the party who initially presented the party-appointed expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other parties' questioning. The tribunal may order or the parties may agree that the expert report will serve as a direct testimony.

3.2. Tribunal appointed experts.

The IBA rules, combining the different legal approached, allow the tribunal appointed experts to be used in international arbitration, which is an approach adopted from the Civil Law tradition, in opposition to the Common Law approach adopted in case of party appointed experts. Pursuant to article 6 of IBA Rules, the tribunal may appoint one or more independent experts on its own motion, after the consultation with the parties. The tribunal-appointed expert shall, before the acceptance of the appointment, submit to the tribunal and the parties a description of his qualifications and statement of independence. This is to allow the parties to verify whether there are no obstacles for the appointment of the expert as to his independency and qualifications. The party may object to the tribunal, which decides upon the acceptance of such a objection. After the appointment of the expert the party has a right to object only if the reason of the objection was known to the party only after the appointment of the expert. The tribunal may request the party to provide the information or access to any documents, goods, samples, property, machinery or systems, processes or site for inspection to the extent that it is relevant and material for the case. Moreover, the Rules give the expert the same authority to request such information or access as the arbitral tribunal. The documents and information requested by the tribunal may not be limited only to the

ones submitted in the arbitration. Hence, the authority of the expert is very far reaching and the tribunal must assure that the request does not go beyond the scope of the case. Moreover, a request from the expert may include the documents which may serve the other party's case. In this regard the expert shall avoid the such situation in order not to shift the burden of proof. This is in the discretion of the tribunal to make sure that such situation does not occur.

The requirement of the tribunal-appointed expert's report are the same as in the case of party-appointed expert. After the submission of the expert report the tribunal shall send a copy of the report to each party, which can examine any documents or other evidence which served the expert in issuing the report and any correspondence between the tribunal and the expert. The parties have the opportunity to respond to the report in a submission or through the witness statement. Upon request of any party or the tribunal, the expert shall be present at the hearing in order to be questioned by the parties or the party-appointed expert on issued raised in the report, in parties' submissions, witness statements or the party-appointed expert's reports. The tribunal may assess the expert report with due regard to all the circumstances of the case. It has to be underlined that the tribunal is not bound by the conclusions of the expert report and shall not delegate its powers to decide the case to the expert. The tribunal shall avoid basing its final decision on the outcome of the expert report, as it shall be independent and not influenced by the expert. The tribunal must bear in mind not to

treat the expert as an additional arbitrator and distinguish it role from the role of arbitrator.

The procedures of taking of oral evidence according to IBA Rules are quite detailed and permit to combine the main features of the proceedings from Common and Civil Law traditions. There are few issues which are not mentioned by the Rules, such as hearsay, the ethical problems of preparing witness statements and interviewing witnesses which may need some more regulation in order to avoid conflicts and allow the parties an equal treatment. The arbitral tribunal should in this regard use their discretional power in order to conduct the proceedings with respect of the principle of due process. The experience of the arbitrators aware of the expectations of parties from different legal cultures should serve as a guardian of the fairness of the proceedings.

CHAPTER IV. Admissibility and assessment of evidence according to IBA Rules.

The IBA Rules in article 9 paragraph 1 provide that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence. The assessment of the evidentiary material depends on many elements which may influence the value and credibility of the evidence. This chapter will discuss potential factors which are important for the assessment of the gathered evidence by the arbitral tribunal.

1.Admissibility of evidence

One of the major concerns of the parties and the lawyers, especially those coming from Common Law traditions, in relation to taking is whether the evidence will be admissible. However, in the international arbitration the 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 party agreement. In the party adopt some evidentiary rules, such as IBA Rules, the admissibility may be governed by them, however, in most of the cases, the evidentiary rules give a little guidance as to the admissibility, stating only the main principles,

leaving the decision to the arbitrator in a particular case. 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. The arbitrators might be reluctant to refuse the admitting of 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 the light of the fact that the 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, shall consider the efficiency principle and avoid allowing the massive document production which may not be relevant, which causes the 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 the procedural ground rather than on the substantive. They might reject the evidence submitted after the deadline or after the time limit rather than on the ground that it is not admissible for some substantive reasons. The standards of admissibility in case of Civil Law arbitrators are lower than those coming from Common Law tradition. Hence, the result as to the admissibility may depend on the composition of the tribunal. The practitioners coming from different legal background shall keep that in mind, that in case of Common Law tribunal the practitioners from Civil Law tradition should bear in mind not to rely only on the evidence which in the tradition of the arbitrator might be

inadmissible. Similarly, the Common Law lawyer shall be prepared that a Civil Law tribunal might not take into consideration the evidentiary rules regarding admissibility. However, an experienced tribunal, especially that composed of mixed legal traditions, will take an international flexible approach and will focus on establishing the facts of the case which are necessary for establishing the issues between the parties rather than being limited by rules of evidence and its legal background. [92]

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

Some standards of admissibility of the evidence by the tribunal is provided in article 9 paragraph 2 of the Rules, which however is not exclusive and does not include some of the issues which in some jurisdictions are considered as limiting or excluding the admissibility of the

[92] Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, Law and Practice of International Commercial Arbitration, Sweet&Maxwell,London,2004,pp.296.

evidence. One of such issues is hearsay, which as stated in the previous chapter, is not admissible in Common Law jurisdictions. The tribunal allowing the hearsay as evidence shall ensure that the witness is accurately examined and the weight of such an evidence shall be balanced with other evidence which may confirm its credibility. It shall be noted by the parties that even if the evidence will be admitted, it does not mean that it will be considered as having a probative value.

Article 9 paragraph 2 states that the arbitral tribunal shall, at the request of a party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: the lack of sufficient relevance to the case or materiality to its outcome, legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable, unreasonable burden to produce the requested evidence, loss or destruction of the document that has been shown with reasonable likelihood to have occurred, grounds of commercial or technical confidentiality that the arbitral tribunal determines to be compelling, grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the arbitral tribunal determines to be compelling and considerations of procedural economy, proportionality, fairness or equality of the parties that the arbitral tribunal determines to be compelling. In the following sections each of the grounds for exclusion of the evidence, will be discussed.

2.Legal Privilege and secrecy.

The IBA Rules do not specify what how a tribunal might determine which legal or ethical rules are applicable which may be considered as legal impediment or privilege. Such a generic provision may be a source of conflicts since Common and Civil Law traditions have a different approach towards legal privilege. The evidentiary privilege is understood as the rules that allow a party not to produce a document of other evidence to the other side of the proceedings or in certain investigation or dispute. The most common privileges concern the counsel-client communications, communications or documents created for purposes of preparing for the proceedings, notes made by the lawyer. In Common law tradition the protection of certain communication or documents is being privileged, while in Civil Law countries it is generally referred to as confidential.[93] In Civil Law tradition other forms of communication protected by the confidentiality relate to the communication with the doctor, between the close family members, confession before the priest. In case of international arbitral proceedings the most common privilege issues concern the communication between the counsel and client, counsel work products, the attempts of settlement, concerning all the communication which is titled with "without prejudice" phrase.

[93] Jeffrey Waincymer, Approaches to Evidence and fact Finding in Procedure and Evidence in International Arbitration, Wolters Kluwer, 2012, pp. 801.

In Common Law jurisdictions, the discovery in the pre-trial phase of the proceedings, do not involve the documents related to the work of the counsel and his relations with the client. The communication with the external counsel is privileged, however in some jurisdictions the communication with in-house lawyers do 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 Civil Law tradition the party is not obliged to provide any documents which 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 his client and all documentation submitted in the process of legal advising are protected by professional obligation of secrecy. The Civil Lawyer is obliged by the ethical rules and codes of conduct to maintain in secrecy all the information that came to his knowledge during the professional conduct. The lawyers can refuse to give an evidence which relates to the communication with client and his representation of legal advising even in the court proceedings. [94] This obligation does not however bind the client, who cannot refuse to give the testimony in case of the proceedings against the lawyer or

[94] Fabian von Schlabrendorff, Audley Sheppard, Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution, Liber Amicorum in honour of Robert Briner, 2005, pp. 752.

other proceedings when asked to give evidence about the legal advice received.

In the event of international arbitration between the parties coming from Common Law and Civil law, some conflicts as to the privilege may arise. Since the privilege and confidentiality have different scopes in each of the traditions, a question may arise as to which privilege rules shall the tribunal apply in order to provide fair proceedings. It would seem unfair if one of the parties would benefit of privilege and the other not. As the IBA Rules do not give an answer to such questions , 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 acceptable to legal reasons, to apply different rules of privilege to different parties. [95] The expectations of the parties shall be taken into consideration and the most appropriate solution is application of the most favorable privilege. As the parties shall be treated with consideration of the equality and fairness, the arbitral tribunals shall determine which privileges may be applicable to each party and allow any party to claim the same legal privilege as available to the other party. This approach seem to be acceptable for both of the sides and the risk of challenging the award will be lowered. Moreover, the arbitrators shall not consider the wide privilege adoption as an obstacle in a truth finding since generally even in the national litigation the courts do not need such communication between the

[95] Op.cit.771.

lawyers and clients as a indispensable mean of establishing 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.

Other reasons for evidence exclusion.

Among other reasons to exclude the evidence the IBA Rules mention the lack of materiality and relevance, which has been discussed when considering the documentary evidence. The tribunal may exclude any irrelevant evidence as to which the it assesses that it has no evidentiary value for proving the facts or which lack materiality meaning the necessity of the particular evidence for establishing the facts.

The evidence which is unreasonable burdensome will also be excluded from the proceedings. Such burdensomeness may include large quantity of the evidence required, difficulty to obtain or access (in case of witnesses), or the existence of the other evidence which is sufficient for establishing the facts. [96]

The destruction of evidence may be considered as a reason for exclusion if the act of destruction was not intentional, the party did not have a duty to preserve the evidence, the destruction was not foreseeable, cannot

[96] Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker, Thomas Rohner, IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of evidence in International Arbitraiton, Schulthess, 2012, pp.178.

be attributed to the party or its agents. Otherwise the tribunal may draw adverse inferences from the destruction of relevant evidence.

The exclusion of evidence may also take place on the grounds of commercial or technical confidentiality, special political or institutional sensitivity or considerations of procedural economy, proportionality, fairness or equality of the parties. The four last principles will be discussed in the final chapter of this thesis.

3. Burden of proof, standard of proof and weight of evidence.

Burden of proof.

The burden of proof is considered to be an important element in presenting evidence. In most legal traditions a party bears burden of proof meaning the burden of proving the facts upon which the party relies on in support his its claims. In other words the party has to prove its own allegations. In international arbitration the burden of proof is less important than in the national courts and the arbitral rules are often silent about it. The IBA Rules do not mention the burden of proof that the party shall bear. The reason for this is that international arbitrations concerns parties coming from different legal backgrounds and it would be difficult to combine the particular rules relating to burden of proof. In the absence of the rules, the tribunal enjoys a 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”) that the burden of proof lies on the person making the particular assertion. The burden of proof is highly relevant in deciding the case. As the parties submit a wide range of evidence without regard who bears the burden of proof, the tribunal may consider the burden of proof at the end of the proceedings when a clear and convincing answer as to the factual question will not be found. [97]

[97] Karl-Heinz Böckstiegel, Presenting, taking and evaluating evidence in international arbitration, in Carbonneau, Thomas E. (executive editor) - Jaeggi, Jeannette (assistant

The Standard of Proof

Similarly as the burden of proof, the standard of proof is also not expressly referred to in the IBA Rules. It is also rare to find the arbitrators to make reference to the standard of proof applied by them. A standard of proof defines the criteria to consider something as proven. It can also be referred to as the level of prove. [98] In international arbitration the application of strict rules is not implemented in favor of a more flexible approach. Where in the rare case the arbitrators relate to the standard of proof they are applying, they tend to do it in accordance with the approach of their legal culture. In Common Law legal systems, the standard of proof in civil litigation is generally the comparative one of balance of probabilities, which version selected is more likely true than any other. In Civil Law systems, the laws and legal doctrine refer to non-comparative concepts of the "conviction of the judge". [99] In international arbitration the standard of proof applied can be summarized as a "balance of probability".

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editor) - Partridge, Sandra K. (assistant editor) , Handbook on International Arbitration and ADR, JurisNet, 2010, pp.81.

[98] Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker, Thomas Rohner, IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of evidence in International Arbitraiton, Schulthess, 2012, pp.169.

[99] Phillip Landolt, Barbara Reeves Neal, Burden and Standard of Proof in Competition Law Matters Arising in International Arbitration in Gordon Blanke and Phillip Landolt (eds), EU and US Antitrust Arbitration: A Handbook for Practitioners, (Kluwer Law International 2011) pp. 160.

Weight of evidence.

Since in international arbitration many evidential rules present in national jurisdictions do not apply, such as some admissibility rules, burden of proof or standard of proof which are crucial in national litigation, the weighting of evidence is an important part of the process of decision making by the tribunal. The weight given a documentary evidence is slightly higher than that given to the witness evidence. The tribunal also gives less weight to the evidence which has been gathered in circumstances of hearsay, even if there is no rule which forbids the hearsay as evidence, 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 the witness statement, cross-examination of the witness 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 weighted in order to give them a proper evidentiary value in the consideration of principles of fairness and equality. In the process of weighting evidence the tribunal distinguishes the 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.[100] As stated by the International Court of Justice in the *Corfu Channel case*[101]*: "This 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."*

[100] Robert Pietrowski, Evidence in International Arbitration, ARBITRATION INTERNATIONAL, Vol. 22, No. 3, LCIA, 2006

[101] International Court of Justice, [1949] Rep. 18

4.Confidentiality of the proceedings.

The confidentiality of the proceedings in international arbitration is important in relation to evidence. Since some rules applicable in national litigation in relation to secrecy and privilege do not apply in international arbitration is shall be imperative that in the event that the party are forced to produce such documents or other evidence which violates the rules of secrecy in their own legal jurisdiction, they can be assured that the evidence submitted will not be stead outside the international arbitration proceedings. The success of arbitration in international trade is due to neutrality and efficiency, while confidentiality is often left out. With the grow of number of international arbitration the parties seem to care less about the confidentiality of the proceedings treating them similarly to court proceedings. The parties of international arbitration shall be protected from the third parties taking advantage of documents produced in proceedings. Moreover the problem arises when the party may be tempted to use evidence presented in the proceedings for other purposes. Trade secrets could be used illegally in order to improve the party's position or use it in a harmful way in other proceedings or for other scopes.

The concern of the confidentiality of the proceedings is related more to the internal relations between the parties and the usage of produced evidence than with the outside world getting know about the results of the international arbitration and the dispute.

Confidentiality relates to both document, witness testimony and any other evidence which may influence the party's interest.

The IBA Rules in article 9 provide that the tribunal may exclude any document, statement, oral testimony or inspection if they consider this to be justified on grounds of commercial or technical confidentiality. Moreover, the Rules allow arbitrators to make arrangements to ensure appropriate protection of confidential evidence. However, in order for the tribunal to make such arrangements there must be a serious reason for that, hence in the event of irrelevant evidence or lacking materiality, the arbitral tribunal may not adapt the measures of protection. If the arbitral tribunal takes the measures in order to protect the confidentiality, it can do it by preventing the party having the access to the information to use it outside the proceedings. The tribunal usually specifies to which named individuals the disclosure of information is limited, which will constitute a case of relative confidentiality.[102] The choice of these individuals will depend on the needs of the party which is being allowed to access the information. The party might be allowed the access to the confident information due to the fact that the other party is producing the information on its own will or because it is forced to do so by the request of the other party. The accessing party is allowed to examine the information in the necessary extend together with its lawyers and the experts if needed. The protective order is usually a temporary one, which hardly ever can be converted into the permanent one.

[102] Yves Derains, Evidence and Confidentiality , ICC Special Supplement 2009: Confidentiality in Arbitration: Commentaries on Rules, Statutes, Case Law and Practice, 68.pp.

In relation to the confidentiality of the site inspections similar solutions are adopted.

In the event of the refusal of the party to produce the evidence on grounds of confidentiality, and if the arbitrator is convinced that only by examining the evidence it will be possible to resolve the dispute, it can order a protective measures such as appointment of an expert who will have the access to confidential nature of the information, examine the information, answer the specific questions asked by the arbitrators. Such confidentiality can be described as absolute confidentiality. The expert report issued upon the access to the information could be subject to the discussion between the parties and the tribunal, however, it would be quite limited as the report would contain the matters not to be described in details to the parties or the arbitrator. It is possible that the expert provides the arbitrators with a fuller version of the report, however that could be seen as contrary to due process since it would allow the arbitrator to determine the merits of the dispute upon the information not available to the one of the parties. In case the information that requires full protection being crucial to the outcome of the dispute, it could be discuss with the parties to have an independent expert access the information in order to at least provide the description of the characteristic of the information to the parties and the tribunal.

CHAPTER V. Balancing the differences of legal cultures, relationship between efficiency and fairness, flexibility and predictability as an essential requirement for the successful implementation and broad acceptance of evidentiary rules.

Flexibility of the arbitral proceedings is one of its main features, permitting the adjustment of the proceedings to different expectations, traditions and approaches of the parties. The lack of rigid rules of procedure, the autonomy of the parties and the discretion of the arbitral tribunal are the main guaranties of procedural flexibility. However, flexibility may also be a source of unfairness or abuse[103], especially in case the arbitral tribunal adopts the rules which do not guarantee both parties the same equal treatment or at its discretion decides about the proceedings without taking into consideration the parties will and interests. The limits of the flexibility and tribunal's discretion are set by the principle of fairness, which is expressed in all of the arbitration rules[104]. The principle of fairness assumes

[103] Edoardo F. Ricci, Evidence in International Arbitration: A Synthetic Glimpse in Miguel Ángel Fernández-Ballesteros, David Arias (editors), Liber Amicorum Bernardo Cremades, La Ley, 2010, pp. 1029

[104] art. 15 of UNCTRAL Rules, provides arbitrators with the power of ruling the proceeding as deemed more appropriate, "provided that the parties are treated with equality and that at any stage of the proceedings each party is given full opportunity of presenting his case"; art. 14.1 of LCIA Rules -arbitral tribunal has "(i) to act fairly and impartially as between all parties giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute"; art. 22.4 of ICC Rules provides that "in all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".

equal treatment of the parties, their right to be heard and to present their case before the unbiased tribunal. It is the obligation of the tribunal to ensure due process, the impartiality and independence. Unequal treatment and the denial of the party's right to present its case is often the cause of the refusal of enforcement of the arbitral award by national court. The principle of fairness plays a major role when it comes for taking of evidence, where questions as to equal opportunity to submit evidence arise. The tribunal has the discretion to determine the deadlines for the submission, however it has to ensure that prior to the deadline, both parties had equal and full opportunity to submit evidence. In Avco Corp v Iran Aircraft Industries[105] case the Iran-US Claims Tribunal, by misguiding the claimant as to the evidence submission, has undermined the fairness of the proceedings. The claimant has sought guidance from the Tribunal as to the submission of hundreds of invoices on which he based some of his claims. The Tribunal was reluctant to get the voluminous piles of documents to review and it was understood that it permitted the production of audited certificates confirming the existence and the amounts of the invoices. However, after three years and with different Chairman, eventually the Tribunal rejected the claims on the ground that the audited certificates could not substitute for the invoices themselves. By non intentional misleading of the claimant the Tribunal has deprived him of the possibility to present his case, breaching the principle of fairness, which was then the reason of the refusal of the

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[105] Avco Corp v Iran Aircraft Industries, Award 377-261-3 (18 July 1988), reprinted in 19 Iran-USCTR 200,214 (1988-II), http://www.iusct.net/

Iran's request of the enforcement of the award by the federal court of New York. [106]

Apart from institutional rules which express the principle of fairness, the IBA Evidence Rules contain numerous provisions which ensure the fairness of the process of taking evidence. They provide detailed guidance as to the submissions of documents, document production and tribunal's power to order their production, other aspects of written evidence, conduct of the hearing, witness and expert examination, on-site inspection, which will be discussed in details in next chapter of this thesis. Those provisions ensure the proceedings in which the flexibility principle is balanced by the principle of fairness. However, the search for fairness may also lead to further abuse or conflicts since the standards of due process, the right to be heard and the possibility to present the case may be understood in different ways by the parties coming from different legal background. What is seen as due process by the Common Law lawyer, i.e. document discovery, might be seen as unjustly burdensome and causing delay by the Civil Law lawyer. The procedural rules and IBA Rules give the tribunal guidance as to the conduct of the proceedings, however in the absence of precise and binding rules the main task of the tribunal is to balance carefully the right of the parties to due process and another principle of the arbitral proceedings, namely efficiency. One of the main features of international arbitration is the efficiency of the proceedings, meaning faster and less expensive process in

[106] Iran Aircraft Industries el al v Avco Corp, 980 F 2d 141 (2d Cir 1992), http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=1148

comparison to the national litigation. The principle of efficiency is expressed in the preamble of the IBA Rules, where it is stated that the Rules are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions. Moreover, article 2 of the Rules states that the arbitral tribunal shall consult the parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence. The principle of efficiency is also mentioned in article 3 in relation to the request for document production, in particular to the documents stored in electronic form, according to which the search for the documents shall be conducted in an efficient and economical manner. Efficiency is important for the parties as it is one of the reasons behind their choice of international arbitration over the national litigation. However, the demand for efficient proceedings vary on the basis of the stage of the proceedings and the situation of the party.[107] At the moment of signature of the substantial contract, both parties' main objective is to resolve possible future dispute as quickly and less costly as possible. However, when the dispute arise, the parties' main preoccupation is to resolve the dispute in an accurate and fair way, with the sufficient degree of efficiency. Moreover, the party whose case is weaker may seek put less attention to the efficiency principle, searching for fuller opportunity to present its case and regardless the time and costs of

[107] William W. Park, Arbitration's discontents: Of Elephants and Pornography, *in* Arbitration of International Business disputes, Studies in Law and Practice, Oxford, 2006, pp.451.

the proceedings, while the party with stronger case may want the proceedings to be more efficient and may see the attempts of the other side as unjustified delay and cost inductive. Thus, the balance between the fairness and efficiency is often the problem which can be dealt with by the careful and thoughtful discretion of tribunal. When deciding on the party request to submit new evidence or a claim the tribunal has to take into consideration both the right of the party to present the case and the principle of efficiency. The fair and equal presentation of the case make the proceedings longer, fair examination of the witness also makes the proceedings slower and more expensive, however the tribunal and the parties have to keep in mind the main goal of the arbitration- to resolve the dispute. In the event of extremely high amount in dispute the speed and cost of the proceedings will definitely not be the main objective of the parties, but the fair and accurate award. However, a fair and accurate award will not be satisfying if it will be made after too long proceedings, where the parties will be involved in the dispute for many years, as "justice too long delayed becomes justice denied"[108]. Fairness requires some measure of efficiency, and vice versa, efficiency requires some measure of fairness in order to deliver the desired result. An accurate award, meaning a lawful and correct decision is what both parties desire, however with respect of fairness and efficiency principles, therefore the tribunal has to counterbalance accuracy with fairness and efficiency. Accuracy in the international disputes means

[108] William W. Park, The procedural soft law of international arbitration *in* Arbitration of International Business disputes, Studies in Law and Practice, second edition, Oxford, pp.635.

examining the views of each party and find a correct and true version of the events in dispute applying the right norms in order to resolve the conflict. Fact finding and applying law to the results based on documentary and oral evidence is a task of the arbitrator which requires time if the principles of accuracy and fairness are to be abided. The law applicable to the merits of the dispute is usually the one chosen by the parties, while the procedural matters, if not decided by the parties in advance, are subject to the wide discretion of the tribunal. In case of matters which contain both procedural and substantial elements, such as dissenting opinions, arbitrators bias, rates of interests, currency of awards, res iudicata, lis pendens, the arbitrators have to search for the transnational norms.[109] Where no single fixed legal system applies, arbitrator for the sake of accuracy and fairness needs to synthesize translational norms from various legal systems, norms articulated by scholars, found in cases and published awards. As the arbitral tribunal is not bound by the previous awards of different tribunal the existing awards may seem of little value. However, they are an important source of transnational rules and principles applying to the international disputes and the expectations of parties. Arbitrators may seek confirmation of their approach or a guidance as to specific matters in previous awards which provide knowledge as to how the similar problems were resolved between parties coming from different legal system and what is the approach of the international community to specific issues. While no precedence in a

[109] See William Park, Arbitrators and Accuracy, Journal of International Dispute Settlement, Vol. 1, No. 1 (2010), pp. 45.

sense known in Common Law exists in international arbitration, the awards do serve in pursuing the principle of accuracy. Transnational norms are an indicator of the expectations of parties coming from different legal traditions and serve as a fair and accurate mean to resolve a dispute in case of clash of cultures. Finding a right balance between the efficiency, fairness and accuracy entails reconciliation of different legal traditions and rules by the tribunal upon its discretion but with respect of the procedural and evidentiary rules, which to some extend provide the solutions, despite some gaps that still need to be filled.

1. Discretion of the arbitral tribunal

The discretion of the arbitral tribunal, as it has been pointed out, plays a major role is balancing the issues relating to efficiency, flexibility and fairness of the procedure. Striking the right equilibrium between those values is a difficult task and requires high level of expertise and experience from the arbitrators. International arbitration is a blend of principles, powers and rights, which connect and influence one another. The discretionary power of the arbitrators is not absolute and is limited and tempered by the parties' autonomy and their rights, whereas the principles and main features of the proceedings are the result and at the same time the main goal of the arbitral proceedings. The parties' rights of due process are the limits to the arbitrator's discretion, the arbitrator has a duty to ensure them and at the same time the rights are guaranteed by the discretion of the arbitrator in the event of attempts of 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 of time and cost, party rights, accuracy of facts and legal norms, impartially and independently.

In case of evidentiary matters, the discretion of the arbitral tribunal in relation to efficiency, fairness and flexibility is directly expressed in article 9.2. g) of IBA Rules, which states that the arbitral tribunal shall, at its own motion or upon the request of one of the parties, exclude from evidence or production any document, statement, oral testimony or inspection for the

considerations of procedural economy, proportionality, fairness and equality of the parties that the arbitral tribunal determines to be compelling. Hence, the tribunal, in order to ensure that the process is efficient, can exclude the evidence that is submitted after the fixed deadline or reject the late request for document production. However, in this regard the tribunal must also balance the rights of the parties of due process, since it would be against the rule of fairness and accuracy to exclude the vital evidence of the party bearing the burden of proof. On the other hand, when admitting the late evidence, the tribunal shall also consider the rights of the party who respected the deadlines and has an interest in obtaining an efficient procedure. In addition, it must also be mindful when deciding whether to admit the request of this party to answer the late submitted evidence, in order to guaranty due process. Fairness of the proceedings implies the equality of arms, where no party is to be disadvantaged. The efficiency and fairness of the proceedings are always related and it is the duty of the tribunal to use its discretion wisely. The proportionality of the proceedings is another ground upon which the tribunal may deny the admission of the evidence, by determining that while the evidence is relevant, it would be unreasonably burdensome and its evidentiary value does not warrant the effort required to submit it. Applying by the tribunal the principle of equality in relation to the admission of evidence does not necessarily means that the tribunal shall admit equal number of requests or equal volume of submitted documents. The equality means equal opportunity for each of the party to

present their case and to maintain the general balance between the parties, as treating equally does not always mean treating in the same way.

In respect of the evidentiary proceedings, treating the parties equally may be performed in various ways. In terms of time permitted for the witness examination it may be the case that one of the parties intends to examine more witnesses than the other hence applying a chess-clock system would not be according to the principle of equality, despite the fact of allowing the parties the same amount of time. Similar situation occurs when one of the parties is a native speaker of the language of the arbitration proceedings whereas the other is not and requires more time for the examination of the witness or even requires the help of the interpreter.

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. The very difficult aspect of the equal and fair treatment 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 party in respect of its legal background. The differences of the approaches are seen especially in case of evidentiary procedure, gathering of evidence, document production, witness examination, use of experts, written and oral submissions. The IBA Rules are helpful and provide guidelines however they leave a vast discretion to the tribunal in most of the cases when the conflict could arise and the approaches are difficult to combine. The gaps in the Rules are to be filled by the discretion of the tribunal, which however 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 for the other. The counsels of the parties are very often influenced by their national legal system and the actions they perform before the national courts, resulting in different expectations and behavior when performing before the arbitral tribunal. Apart from the genuine differences in the legal systems and approaches the arbitrators face the dilatory tactics used by the counsels, which may tend to delay the proceedings in order to benefit their clients. Such actions shall not be permitted in the arbitration proceedings hence the arbitrator's task is also to prevent them and to use his discretion in order to ensure the fairness and efficiency of the proceedings. The tribunal shall act firmly and reasonably against dilatory tactics in order to avoid the delays and obstruction of the proceedings. However, the tribunal shall also bear in mind that what may be a dilatory tactic in one case, may become necessary in the other, due to the needs of the party such as the necessity of translations which delays the proceedings or the need for the advice upon foreign law by one of the parties. Hence, the arbitral tribunal must ensure that on each stage of the proceedings it takes into consideration and balance the efficiency, fairness, proportionality and equality of the proceedings together with the cultural backgrounds of the parties.

The arbitration proceedings depend on the quality and proficiency of the arbitrators. In order for the arbitral tribunal to be able to administer the proceedings properly with respect of the abovementioned values it must be composed of the experienced and professional arbitrators. The necessary

factors are independence, impartiality and diligence. As described by A. F. Lowenfeld, international arbitration can be compared to a "two-way mirror" resulting in a comparative procedure: the participants in a legal system see themselves as others see them, and at the same time, they get an idea of how others approach tasks similar to their own.[110]

The main idea of this view is that the approach which takes an arbitrator in the conduct of the proceedings is influenced by the values and principles of his legal background and culture. As this is the case with the counsels, the same relates to arbitrators, who are also trained lawyers in their national jurisdiction. The influence of the legal background on the arbitrator may be unconscious and not realized by the arbitrator, however it is a natural consequence of legal training and the transmitted values. The result of such influence might be that the arbitrator will adopt the approach similar to his home legal system and also to those of the parties of the proceedings or a mixed approach as a combination of legal backgrounds of the participants. Arbitral tribunal may be also composed of arbitrators who come from different legal backgrounds among themselves. That may also affect the procedures since the cultural bias will determine the approach of each arbitrator towards evidentiary issues. Arbitrators from Civil Law traditions may consider appropriate to deny a document production request if it requesting party has the burden of proof, whereas the Common Law

[110] Quoted by Klaus Peter Berger in The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction.A German Perspective, in Arbitration International, Vol. 25, No. 2, LCIA, 2009, pp.217 : A. F. Lowenfeld, The Two-Way Mirror: International Arbitration as Comparative Procedure in (1985) 7

arbitrator would consider it as a violation of due process. The legal background of the arbitrators does matter, as it may influence the proceedings both procedurally and substantively. In those circumstances balancing the core principles and values in international arbitration by the discretion of the arbitrators is not enough and shall be supported by more specific rules as to the conduct of the evidentiary proceedings.

2. Default rules.

The arbitral process is regulated by institutional rules and conducted by the arbitral tribunal using its discretional powers. Since little rules exist in relation to taking of evidence, guidance such as IBA Rules were created in order to fill the gaps left by the institutional rules, the statutes or agreements. Their goal is also to guide the arbitral tribunal in taking the decisions relating to particularities of evidence taking. However, the guidelines are not specific enough to provide an answer to a number of issues which arise between parties in relation to evidence. In this regard it is left to arbitral tribunal and its discretion to decide how to resolve them, which also serves to maintain the flexibility of the proceedings. However, as it was observed, it may not be enough to leave the decision to the tribunal since it might be influenced by its own legal background when taking the decisions about the process of taking of evidence, it may lack enough experience or competence. Another problem is also the lack of predictability in case of too vast freedom left to the tribunal to decide the problematic issues which the parties may expect when deciding to arbitrate. The lack of precise rules leads to the possibilities in which the same situation of the parties may be treated in a different way and the result of a dispute may depend not on what actually is accurate but on the person of the arbitrator who is deciding the case.

The level of compromise and harmonization reached by some guidelines, in particular by 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 sole discretion of the tribunal is often not enough to achieve the goals of the arbitration and to ensure fairness, efficiency and equality. The growth of guidelines in respect of the procedure is often criticized as harmful for international arbitration, being opposite to its main advantages. Some commentators fear that setting more rules, the so called judicialization of the arbitral process[111], will be contrary to the principles of flexibility, will put constraints on the arbitral autonomy and its discretion and will result in the destruction of the advantages of arbitration being flexibility and efficiency, changing the arbitration into international litigation similar to that one before the national courts with all its disadvantages. The main arguments against introduction of more specific rules are the decrease of efficiency of the arbitration, turning into long proceedings, full of formalities, and the decrease of flexibility and party autonomy. In the result, the international arbitration will no longer be a good alternative to national litigation and the parties will no longer be

[111] Günther J. Horvath, The Judicialization of International Arbitration: Does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes? in Stefan Michael Kröll , Loukas A. Mistelis , et al. (eds), International Arbitration and International Commercial Law: Synergy, Convergence and Evolution, (Kluwer Law International 2011), pp. 251 – 271.

interested in using international arbitration as an instrument of dispute resolution. The author of this thesis does not share this view and believes that more specific rules are desired. The adventures of international arbitration will not necessarily be destroyed by the introduction of more specific rules. To quote W. Park: "the procedural formality is often another term for due process"[112]. The balance between the fairness and efficiency can be achieved also due to the procedural rules with set the limits for the efficiency for the sake of fairness, which always shall come first. The lack or as little amount as possible of the procedural rules is said to be the main advantage of the arbitration and the factor of the arbitrator' s discretion which enables him to adapt the proceedings to the needs of the particular case. However, the discretion of the arbitrators will still exist regardless of the more precise rules, the same way it does exist in the case of institutional arbitrations. The more precise rules shall be adopted in order to regulate the specific areas of the proceedings, especially in the field of evidence, which are problematic and cause conflicts and lack of predictability. The discretion of the tribunal is often not a sufficient guaranty for the fairness of the proceedings. What the participants of international arbitration want is definitely the accurate 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 the uncertainty whether their case will be dealt with in an accurate and fair manner if no prefixed rules exist. The efficiency

[112] William W. Park, Arbitration of international business disputes, Studies in Law and Practice, Oxford University Press, 2006, pp. 49.

of the proceedings and its flexibility and capacity to adapt to the needs of the participants is definitely not to be undermined, however it cannot outbalance the goal of the arbitration which is an accurate award. The more precise rules shall act as the guidelines and default rules, so there is no danger that the proceedings will evolve into international litigation, since the parties would always have a power to decide whether to adopt them. Such default rules would exist as an option for the parties which however could be decided not after the dispute is already in question or during the proceedings but on the *ex ante* basis. The discretion of the arbitrator which currently exists permitting him to decide the procedural rules in way it considers the most appropriate does not prevent the possibility that the approach adopted by the tribunal is not in accordance with what one of the parties considers a due process. Too much flexibility, discretion and insecurity of the parties about the procedure to be adopted may as well act as an deterrent for the parties of a dispute to initiate international arbitration. This would be the case especially when it comes for the parties from different legal backgrounds who may have different visions of due process and the procedure to be adopted. The IBA Rules provide a set of solutions which combines various approaches, and is in many parts successful and broadly used by the international arbitration participants. However, as it was seen in the previous chapters of this thesis, there are still some questions which are not answered and left to the discretion of the tribunal, which may in consequence lead to conflicts and dissatisfaction. This relates to the issues such as legal privilege, hearsay, timing of the production of documentary

evidence, applying adverse inference, specific issues regarding electronic disclosure or the burden and standard of proof. In this matters the IBA Rules are quite generic or silent and leave them to the discretion of the arbitral tribunal which might not be satisfactory for the parties, or at least one of them. The application of ad *hoc rules* which are not known to the parties in advance may lead to the challenges of the proceedings on the basis of the unfairness of the proceedings. The broad arbitral discretion without a prefixed procedural rules may be welcome in the proceedings which involve the parties coming from the same legal background and which do not differ in the perception of procedural fairness, evidentiary procedures and the conduct of the proceedings. However, international arbitration most of the times involves the parties from different legal backgrounds, in particular from Civil and Common Law traditions, who may not appreciate as much the arbitral discretion as they do appreciate the certainty and predictability of the procedure to be adopted. They may not be satisfied with the solution that the rules as to how to proceed will be adopted only when the problem already arose in the course of the proceedings. The existing rules, such as IBA Rules, have provided and promoted some level of consensus and best practices, which are broadly accepted and which combine the two opposite approaches. This is the case when it comes to the broad acceptance of the written witness statements by both parties coming from Civil and Common Law traditions, the value of oral examination or oral statements. In other fields in relation to evidence, however, the difference of expectations still remain. In this regard, rather than leaving those issues to the discretion of

the tribunal and creating the uncertainty for the parties the more precise rules could be adopted, either by the amendment of the existing IBA Rules and the inclusion of the solutions for the matters which it does not cover, or by way of the setting a default rules in the form of protocols or guidelines which could be applicable before the commencement of the proceedings on the "opt" in or "opt out" basis.[113] That would prevent the creation of the stiff and binding procedural rules leading to the feared transformation of arbitral proceedings into transnational litigation but will at the same time provide some certainty for the parties who will know in advance of the proceedings which rules will be adopted. The parties would still have the full autonomy as they could adopt the procedures to their needs however this would be done before the arbitration starts and not at some stage of the proceedings as it usually happens nowadays in case of discretional powers of the arbitral tribunal in deciding on an *ad hoc* basis the proper procedure to be adopted. The protocols or guidelines could be prepared and adopted by leading arbitral institutions which could include such protocols to their procedural framework enabling the parties to adopt them even at the moment of the drafting of the contract, promoting best practices. In case of the failure of the parties to include such provisions in relation to evidence in the contract, they could do so before the commencement of the arbitration or at the beginning of it. It could be also the arbitral tribunal that would adopt one of

[113] see Amy F. Cohen, Options for approaching evidentiary privilege in international arbitration in Teresa Giovanni, Alexis Mourre, Written evidence and discovery in International Arbitration, New issues and tendencies, International Chamber Of Commerce, 2009, pp.423-445; William W. Park in William W. Park, Arbitration of international business disputes, Studies in Law and Practice, Oxford University Press, 2006, pp. 467.

such protocols upon the consultation with the parties. The protocols would address the main issues which remain unsolved now and could contain different sets of rules to be adopted in a different circumstances, such as when both parties come from the same legal background and when the parties come from different legal backgrounds. The options for the parties would be to accept some of the provisions or all of them on an *ex ante* basis so that they would be certain as to the rules according to which the questionable issues would be dealt with and the arbitration conducted. The setting of such rules would involve finding the common ground upon some of the issues which could be done by the use of a method similar to the Most Favored Nation rule. They could contain a collection of rules present in both different legal systems of the parties, those which provide the widest protection and secures the most of the rights of the parties in the process of taking of evidence. The drafting of such rules might not be an easy task and would require the practitioners to take the effort to establish the most preferable rules in the problematic issues, which for now is left in the hands of the arbitrators. It would involve the promotion of best practices and result in the predictability of the proceedings, which would be beneficial for the parties of the arbitration. Moreover, such a solution would increase the efficiency of the proceedings, since the parties and the tribunal would not waste the time for the solution of the problematic issues arising from conflicts of the approaches and expectations as to the process of taking evidence. Moreover, it would not be contrary to the principle of flexibility of the proceedings since it would be the parties who would have the autonomy

of choosing at the very beginning which rules to adopt or, in the absence of such a choice, to adopt the protocols before the arbitration commences, with the help of the arbitrator. The introduction the default rules is helpful in balancing the values and principles, which are not sufficiently balanced only by the discretion of the arbitrator. Furthermore, the predictability of the rules governing the proceedings resulting from deciding the rules *ex ante* would help the parties to arrange their commercial and professional affairs properly in the accordance with the existing rules. It is true that, as some fears, the introduction of the more precise rules might discourage some participants to the international arbitration, however, at the same time, the promotion of predictability and certainty in international arbitration could attract some new international parties who were deterred from the arbitration by its lack of certainty and too broad flexibility and discretion of the tribunal. At the end, the certainty and predictability of the commercial affairs is what matters for the international parties and so is the case when it comes for the international disputes. The parties expect the accurate awards and predictable proceedings more than they prize the flexibility. After all, the success of the IBA Rules lies in the fact that they do provide some rules and guidance in case of evidentiary matters which were missing in the institutional rules and left to the discretion of the arbitrators. The existing problems and the issues raised by the practitioners in relation the lack of guidance in a number of evidentiary matters means that the international society does want the introduction of certain rules and solutions and the predictability of the procedure.

In the light of the above, it is evident that the proper balance of the principles such as efficiency, fairness, flexibility and predictability is possible only by the combination of discretionary powers or arbitrators and the more precise rules as to the conduct of the arbitral proceedings, in particular taking of evidence. The arbitrator's discretion alone does not give sufficient balance of the main goals of arbitration proceedings and the differences of the parties legal and cultural background. The default rules are needed in order to ensure the fairness and efficiency of the proceedings, with the consideration of the approaches and expectation of the different parties, providing the certainty and predictability of the proceedings. The arbitral discretion shall serve as a mean of implementation of the rules and the proper administration of the proceedings, securing the fairness and independency of the proceedings, but shall not be itself a main feature of the proceedings affecting the interest of the parties and the goal of the international arbitration which is obtaining the accurate award.

CONCLUSIONS

The differences in approaches between the Civil and Common law are evident. As it has been shown, 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 case of evidence are relatively important because almost in every filed the traditions present the opposite approach. The international arbitration by its nature combines the legal traditions, however whether this is a successful "marriage" is disputable. Since the international arbitral procedure is characterized 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 the proceedings to 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 exists, since in many fields the 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 for such issues as legal privilege, hearsay, timing of the production of documentary evidence and the burden and standard of proof, in which some more specific guidelines may be helpful in combining the different approaches of Common and Civil Law. The IBA Rules implement a hybrid system which is neither Civil nor Common Law favorable. The mechanism present in IBA Rules is a new system which combines come of the aspects of each legal system but also implements some new solutions. The question is whether such a new solution, without more specific guidelines, is satisfactory for both sides while none of the originate approaches of the parties is implemented but instead a "half measures" solutions are suggested and the broad discretion of arbitral tribunal is used as a mean of solution of the problems. As W.L.Craig, W.W.Park and J. Paulsson remind the words of Lord Mustill in 1976: «*arbitrators should not confuse flexibility with compromise. Having chosen one system, the arbitrators may modify it in the interest of efficiency, but should not try to marry it to the other system…this attempt to amalgamate the two systems invariably produces a solution which embodies the weakest features of each system; and it almost always guarantees misunderstanding and confusion*»[114]. Adopting those words to evidentiary matters, a combination of various rules from different legal systems is not always a best solution, when

[114] W. Laurence Craig, William W. Park, Jan Paulsson, International Chamber of Commerce Arbitration, third edition, Oceana Publication, Inc., 2000, pp. 423.

it does not provide the proper and precise rules of their implementation, hence a hybrid system of taking evidence in its current form may indeed 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 harmonization, if not already being itself a harmonized system, still miss some important elements in order to provide a satisfactory solution.

Instead of very general rules which are a combination of some legal rules form Civil and Common Law, but not giving a full details as to how the solutions shall be conducted, leaving very broad discretion to the tribunal, the IBA Rules shall, in the view of the author, contain some more detailed and precise provisions as to the taking of evidence. Another solution could be the introduction by the arbitral institutions of the precise protocols or guidelines containing default rules on the most questionable issues which are not present or are to generic in the IBA Rules. This should be the case especially in relation to documentary evidence, which still provokes the major conflicts between the parties, in relation to the scope of disclosure and the possibilities to refuse production in case of privilege, secrecy, confidentiality. The professional conduct and ethics of the counsels are another weak point of the Rules, since in the lack of precise provisions and only a general provision as to the possibility of interviewing the witness, the parties coming from Civil Law tradition may be disadvantaged. It is not

defined to what degree the contact with the witness is allowed and where is the limit between a simple interviewing and preparing witness for the hearing and so called “coaching” the witnesses. A more precise and detailed rules as to what standards in witness examination, cross-examination, witness statement preparation are crucial in order to avoid the unequal treatment of the parties, when one party has an advantage in terms of not being bound by the ethical rules. It has been argued that notwithstanding the actual state of harmonization 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 proceeding. An inexperienced participants are bound to be disadvantaged in the current stage. There are still some areas in which a consensus has yet to emerge and more precise rules to be established. The arbitral discretion is not enough to secure the proper solutions satisfactory for both of the parties.

The principle of good faith shall be a 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 shall the tribunal follow in assessing the failure to act in good faith. It has been suggested that 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

upon which the party relies on in attempt to surprise the other party on a later stage of the proceedings.

In case of adverse inference, it is the discretion of the tribunal to balance the submitted evidence and the adverse inference drawn with the principles of due process. The IBA Rules do not give much guidance to the tribunal in relation to the issue of drawing the adverse inference and its application. Apart from providing for the possibility to draw adverse inference, the IBA Rules do not contain any guidelines as to how and when the inference might be drawn, what kind of inference to draw in a case where a large volume of material has been refused to be produced and there is a possibility that some of them could be harmful and some supportive for the refusing party's case. The possibility to draw adverse inference in the event of not filing the objection to the request to produce in due time may also raise some doubts in the event if the party has filed the objection but too late and the objection is correctly justified and merits granting. In such situation in would be difficult to access what kind of adverse inference justifiably draw from such a failure. The lack of guidance in IBA Rules as to the adverse inference may be a source of conflict between the parties and their dissatisfaction from the proceedings. It may also lead to a challenge of the award in the event of unjustified drawing of the adverse inference.

The procedural rules, despite expressing the principles of fairness, flexibility and efficiency, do not precise in which manner the tensions between those

principles shall be dealt with, leaving it to the discretion of the tribunal. Flexibility may also be a source of unfairness or abuse, especially in case the arbitral tribunal adopts the rules which do not guarantee both parties the same equal treatment or at its discretion decides about the proceedings without taking into consideration the parties will and interests. The limits of the flexibility and tribunal's discretion are set by the principle of fairness, which is expressed in all of the arbitration rules. The principle of fairness assumes equal treatment of the parties, their right to be heard and to present their case before the unbiased tribunal, all being the components of due process. Unequal treatment and the denial of the party's right to present its case is often the cause of the refusal of enforcement of the arbitral award by national court. The principle of fairness plays a major role when it comes for taking of evidence, where questions as to equal opportunity to submit evidence arise. The search for fairness may however lead to further abuse or conflicts since the standards of due process, the right to be heard and the possibility to present the case may be understood in different ways by the parties coming from different legal background. 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. The procedural rules and IBA Rules give the tribunal guidance as to the conduct of the proceedings, however in the absence of precise rules the main task of the tribunal is to balance carefully efficiency, fairness and equality. The discretionary power of the arbitrators is not absolute and is limited and tempered by the parties' autonomy and their rights, whereas the principles and main features of the

proceedings are the result and at the same time the main goal of the arbitral proceedings. The parties' rights of due process are the limits to the arbitrator's discretion, the arbitrator have a duty to ensure them and at the same time the rights are guaranteed by the discretion of the arbitrator in the event of attempts of 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 of time and cost, party rights, accuracy of facts and legal norms, 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. The very difficult aspect of the equal and fair treatment 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 party in respect of its legal background. The differences of the approaches, especially in case of evidentiary procedure, gathering of evidence, document production, witness examination, use of experts, written and oral submissions. The IBA Rules are helpful and provide guidelines however they leave a vast discretion to the tribunal in most of the cases when the conflict could arise of the approaches are difficult to combine. The gaps in the Rules are to be filled by the discretion of the tribunal, which however may not be an easy task. The notions of fairness and due process are also influences by the legal culture, since what is a due process for one party might seem unfair for the other.

Apart from the parties, also the arbitrator might be influenced by the values and principles of his legal background and culture in the conduct of the proceedings. The influence of the legal background on the arbitrator may be unconscious, however it is a natural consequence of legal training and the transmitted values. The result of such influence might be that the arbitrator will adopt the approach similar to his home legal system and also to those of the parties of the proceedings or result in a mixed approach as a combination of legal backgrounds of the participants. Arbitral tribunal may be also composed of arbitrators who come from different legal backgrounds among themselves. That may also affect the procedures since the cultural bias will determine the approach of each arbitrator towards evidentiary issues. That may result in one party's concerns about the fairness of the proceedings and its sense of lack of due process. The legal background of the arbitrators does matter, as it may influence the proceedings both procedurally and substantively. In those circumstances balancing the core principles and values in international arbitration by the discretion of the arbitrators is not enough and shall be supported by more specific rules as to the conduct of the evidentiary proceedings.

The lack of precise rules leads to the situations in which the same situation of the parties may be treated in a different way and the result of a dispute may depend not on what actually is accurate but on the person of the arbitrator who is deciding the case.

The level of compromise and harmonization reached by some guidelines, in particular by 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 sole discretion of the tribunal is often not enough to achieve the goals of the arbitration and to ensure fairness, efficiency and equality. The more precise rules shall be adopted in order to regulate the specific areas of the proceedings, especially in the field of evidence, which are problematic and cause conflicts and lack of predictability. The discretion of the tribunal is often not a sufficient guaranty for the fairness of the proceedings. What the participants of international arbitration want is definitely the accurate award which is predictable based on the particular circumstances. The wide discretion of the tribunal and the lack of precise rules leaves the parties in the uncertainty whether their case will be dealt with in an accurate and fair manner if no prefixed rules exist.

In order to avoid judicialization of international arbitral proceedings, the more precise rules shall act as the guidelines and default rules, so there is no danger that the proceedings will evolve into international litigation, since the parties would always have a power to decide whether to adopt them. Such default rules would exist as an option for the parties which however could be decided not after the dispute is already in question or during the proceedings but on the *ex ante* basis. The discretion of the arbitrator which

currently exists permitting him to decide the procedural rules in way it considers the most appropriate does not prevent the possibility that the approach adopted by the tribunal is not in accordance with what one of the parties considers a due process. The application of ad *hoc rules* which are not known to the parties in advance may lead to the challenges of the proceedings on the basis of the unfairness of the proceedings. The broad arbitral discretion without a prefixed procedural rules may be welcome in the proceedings which involve the parties coming from the same legal background and which do not differ in the perception of procedural fairness, evidentiary procedures and the conduct of the proceedings. However, international arbitration most of the times involves the parties from different legal backgrounds, in particular from Civil and Common Law traditions, who may not appreciate as much the arbitral discretion as the certainty and predictability of the procedure to be adopted. They may not be satisfied with the solution that the rules as to how to proceed will be adopted only when the problem already arose in the course of the proceedings. In this regard, rather than leaving those issues to the discretion of the tribunal and creating the uncertainty for the parties, the more precise rules could be adopted, either by the 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 a default rules in the form of protocols or guidelines which could be applicable before the commencement of the proceedings on the “opt” in or “opt out” basis. That would prevent the creation of the stiff and binding procedural rules but would at the same time provide some certainty for the parties which would

know in advance of the proceedings which rules would be adopted. The parties would still have the full autonomy as they could adopt the procedures to their needs however this would be done before the arbitration starts and not at some stage of the proceedings as it usually happens nowadays in case of discretional powers of the arbitral tribunal in deciding on an *ad hoc* basis the proper procedure to be adopted. The protocols or guidelines could be prepared and adopted by leading arbitral institutions which could include such protocols to their procedural framework enabling the parties to adopt them even at the moment of the drafting of the contract, promoting best practices. In case of the failure of the parties to include such provisions in relation to evidence in the contract, they could do so before the commencement of the arbitration or at the beginning of it. It could be also the arbitral tribunal that would adopt one of such protocols upon the consultation with the parties. The setting of such rules would involve finding the common ground upon some of the issues which could be done by the use of a method similar to the Most Favored Nation rule. They could contain a collection of rules present in both different legal systems of the parties, those which provide the widest protection and secures the most of the rights of the parties in the process of taking of evidence. It would involve the promotion of best practices and result in the predictability of the proceedings, which would be beneficial for the parties of the arbitration. The introduction the default rules would be helpful in balancing the values and principles, which are not sufficiently balanced only by the discretion of the arbitrator.

The current stage of the rules governing the proceedings in relation to the taking of evidence is not satisfactory. It has been shown that the IBA Rules, which are the most advanced existing rules in that regards and which combine the approaches from both Civil and Legal System, provide a new, synthesized system of rules of taking of evidence, which to some extent works well and is widely used by the practitioners. However, it does have some weaknesses, which result in dissatisfaction of the parties and further conflicts and may lead to the challenge of the award if the arbitral tribunal exercise the discretion left by the Rules in an unfair way. The Rules are a compromise between both legal systems which however is not yet definitely elaborated and lacks some more detailed rules. The silence of the Rules or the leaving the solution of the problems to the arbitrators are the main weaknesses of the Rules and a reason of some parties' discontent. The parties expect the accurate awards and predictable proceedings more than they wide discretion of the arbitrator to decide about the questionable issues. 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 left to the discretion of the arbitrators. The existing problems and the issues raised by the practitioners in relation 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.

The more precise rules are needed in order to ensure the fairness and efficiency of the proceedings, with the consideration of the approaches and

expectation of the different parties, providing the certainty and predictability of the proceedings. Finding a right balance between the efficiency, fairness and accuracy entails reconciliation of different legal traditions and rules. A certain degree of harmonization 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 with the main goals of the arbitration which is flexibility. However flexibility will always exist taking into account the party autonomy to adopt the set of precise rules. Too much flexibility and leaving the controversial issues to the arbitral discretion may sometimes lead to confusion and uncertain results. It is not surprising that the parties of international arbitration do want to have the certainty of the rules adopted and do want an ordered process without surprises. Flexibility may seem crucial at the time of drafting an arbitral agreement however when the dispute arises the parties will be more satisfied with the certainty of the procedures, fair and accurate award rather than with the knowledge that nothing is certain.

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