MASTER THESIS

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„Evidentiary Process in International Commercial Arbitration: Current Issues and Ways of Their Resolution on the Example of Comparison between Common Law and Civil Law Traditions“

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INTRODUCTION

The adoption of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 marked a new stage of a neutral way of settling cross - border disputes. For the last decades, international commercial arbitration has truly become the predominant way of dispute resolution in international business environment due to its procedural flexibility, high knowledge and expertise of arbitrators in applying foreign law and accommodating wishes of the parties and, most importantly, broad parties' autonomy[1]. Nowadays, however, the proposed advantages of arbitration have been seriously questioned. According to the International Arbitration Survey "the Evolution of International Arbitration" conducted by Queen Mary University and White & Case LLP in 2018, users of arbitration are much concerned about the growing costs and length of the arbitration proceedings. In particular, while 97% of respondents indicate this mode of dispute resolution as a preferred one, either in conjunction with other ADR (49%) or on a stand-alone basis (48%), costs of arbitral proceedings are considered the worst feature of international arbitration, followed by absence or complete lack of effective sanctions which could be applied in the course of the proceedings; lack of the arbitral tribunal's powers in relation to third parties and time-consuming manner of the conduct of arbitration[2]. To certain extent, the reason why the users of arbitration have encountered with these problems is connected with the so-called "*due process paranoia*" which is said to hinder arbitral proceedings from being much more efficient.[3] In the third International Arbitration Survey "Improvements and Innovations in International Arbitration" conducted by the abovementioned institutions in 2015, this term was defined as *"a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully"*[4]. Overly cautious case management decisions may take place, *inter alia*, where the tribunal repeatedly grants extensions of time for written submissions of the parties; accepts multiple amendments to their content; accepts fresh evidence or grants very generous orders for document production. Excessive caution of the arbitral tribunal in the abovementioned

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[1] Waincymer, J., Procedure and Evidence in International Arbitration. Kluwer Law International, 2012. P. 3.

[2] 2018 International Arbitration Survey: the Evolution of International Arbitration, conducted by Queen Mary University and White & Case LLP, available at https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf, (accessed 3 June, 2020).

[3] Oldenstam, R., "Due Process Paranoia or Prudence?', in Calissendorff, A., Schöldstrom, P. (*eds.*), *Stockholm Arbitration Yearbook 2019*, Vol. 1. Kluwer Law International, 2019, pp. 121 – 128.

[4] 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, conducted by Queen Mary University and White & Case LLP, available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, (accessed 23 May 2020). P. 10

issues is conditioned on a hypothetical risk that an arbitral award may be challenged in the future, leading thereby to re-litigating the dispute. The latter may result not only in higher costs and length of the settlement of a dispute in general, but also in the negative reputation of arbitrators since enforcement and setting aside proceedings are in the public domain.

It is worth to note that dissatisfaction with a proper case management of the proceedings by users of arbitration is largely concerned with the process of the taking of evidence in international commercial arbitration. Indeed, the taking of evidence is a significant stage in the process of a dispute resolution which generally takes very much time to go through. The reason is that disputing parties tend to impose their perception on what type of evidence should be collected and presented to the tribunal's attentions. Here, the arbitral tribunal is generally encountered with the cultural differences between parties coming from different legal traditions, namely, common law and civil law which favour adversarial and inquisitorial approaches respectively. Nevertheless, the so-called *"Great Divide"* between these approaches does not impede to characterize modern arbitration as a transnational, hybrid creature which is independent and disconnected from national legal systems[5]. The way international arbitration has been developing is primarily done through elaboration of non-binding guidelines and rules which are adopted for the sake of excluding the cultural clashes between common law and civil law legal traditions.

Nevertheless, one of the most frequently debated questions today is that of undue "Americanisation" of international commercial arbitration[6]. The reason for such assertion is that many of the common law elements, directly or indirectly, are largely implemented in the process of the taking of evidence. In this regard, users of arbitration are encountered with endless rounds of mutual written submissions, witness testimony, examination and cross-examination of witnesses, frequent amending applications for production of documents. In turn, this may result into inefficient conduct of arbitral proceedings with increases time and expense due to lack of careful control on the part of the tribunal[7].

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[5] Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", *Journal of International Arbitration*. Vol. 36 Issue 3. Kluwer Law International, 2019, p. 296 – 297.

[6] Stampa, G., "The Prague rules", in Park, W. W. (*ed.*), *Arbitration International*, Vol. 35 Issue 2, Oxford University Press, 2019, pp. 221 – 244. Dasser, F., "The Arbitrator and the Arbitration Procedure, Soft Law in International Commercial Arbitration – A Critical Approach", in Klausegger, C., Klein, P. (*eds.*), *Austrian Yearbook on International Arbitration*, Vol. 2019. Manz'sche Verlags- und Universitätsbuchhandlung, 2019, pp. 111-113.

[7] Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", pp. 306 – 307.

So far, there has been much written about the gradual harmonization of the Great Divide, yet there are areas where one may argue the dominance of either common law or civil law institutions. The widespread agreement on the *sui generis* nature of international arbitration was questioned on 14 December 2018, the date when the Rules on the Efficient Conduct of Proceedings in International Arbitration, the Prague Rules for short, were adopted. As has been pointed out by the Working Group of the Prague Rules in its Introductory Note, the primary reason for the revival of a debate between cultural clashed in legal traditions is the necessity to elaborate on such a system where the arbitral tribunal would take a more proactive role in the case management which, in turn, shall reduce the increasing time and costs of arbitral proceedings. In this context, the Prague Rules pursue the line of thought that proactive case management, for which the Rules seek to establish a best practice framework, is traditionally done in civil law legal systems and welcome by arbitration users[8].

This statement raised many questions as to the advantages of civil law-style procedures opposed to those of common law-style practices in arbitration, primarily laid down in the Rules on the Taking of Evidence adopted by the International Arbitration Association, usually referred to as the "IBA Rules of Evidence". With the proliferation of the latter in the international arbitration sphere and the recent adoption of the Prague Rules, evidentiary procedure has become one of the most discussed topics among practitioners and academics alike[9] in light of the comparison between adversarial and inquisitorial approaches favoured by both sets of rules respectively.

Until 2018, the disputing parties could only opt for the adversarial approach of taking evidence reflected in the IBA Rules of Evidence, primarily because these were the only set of best practice rules, or soft rules, to fill in the gaps regulating evidentiary issues in arbitration. The IBA Rules were highly criticized for having "adversarial" spirit which confines the powers of the arbitral tribunal[10]. Given that institutional rules do not generally contain comprehensive provisions in this area, which, in turn, gave rise to discussions and concerns in the legal

[8] Henriques, D. G., "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?", *ASA Bulletin*. Vol. 36 Issue 2. Kluwer Law International, 2018, pp. 351 – 352.

[9] Welser, I., Mimnagh. S., "The Arbitration Agreement and Arbitrability, Production of Physical Evidence in International Arbitration – A No Go?", in Klausegger, C., Klein, P. (*eds.*), *Yearbook on International Arbitration*, Vol. 2020. Manz'sche Verlags- und Universitätsbuchhandlung, 2020, p. 115.

[10] Pettibone, Peter J., "The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration: Are They an Alternative to the IBA Rules on the Taking of Evidence in International Arbitration?", in Weeramantry, R., Choong, J. (*eds.*), *Asian Dispute Review*. Vol. 21 Issue 1. Hong Kong International Arbitration Centre (HKIAC), 2019, pp. 13 – 14.

community that there is a necessity for an alternative set of rules which would largely favour the inquisitorial approach.

The common law approach to taking the evidence is currently characterized by on the one hand, by the parties' autonomy, and, on the other hand, massive document production, countless witness and expert testimony which contribute to the length and costs of the proceedings, while the civil law tradition is based on the principles where the arbitrators are expected to act proactive and facilitate the settlement of a dispute, as well as *jura novit curia*, which entitles the tribunal to apply legal norms not invoked by the parties[11]. This is the mindset of the Prague Rules. Bearing the aforementioned in mind, one would question: first, whether the differences between adversarial and inquisitorial approaches and their manifestation in soft law indeed influence the costs and length of the proceedings, or it depends only on the arbitrators and the parties, and second, whether the Prague Rules should be considered as a rival to the IBA Rules of Evidence which ultimately could replace the latter.

The aim of the master thesis is to compare the adversarial and inquisitorial approaches in the taking of evidence in international commercial arbitration on the example of comparison between the Prague Rules and the IBA Rules of Evidence, in terms of the taking of documentary evidence, witness and expert testimony.

To pursue this aim, this work is divided into three parts. In the first chapter, the author will discuss the general procedural principles of the taking of evidence in international commercial arbitration from the perspective of common law and civil law. Further, the main provisions and the drafting history between the IBA Rules of Evidence and the Prague Rules will be considered. In the second chapter, the regulation of the documentary evidence from the perspective of the two sets of rules will be shown, including the scope of document production requests and requirements to their content; what types of documents may be requested for disclosure; the duty of parties and non-parties to the arbitral proceedings to comply with the order of the arbitral tribunal to disclose the requested documents. In the third chapter, witness testimony and expert witness will be considered and in particular, the following issues will be enshrined: the requirements to the witness testimony and who may testify as a witness; the power of the tribunal to compel attendance of a witness at the evidentiary hearings; difference between the tribunal- and party-appointed experts and requirements to the expert report.

[11] Ibid, p. 14.

I. TAKING OF THE EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

1.1.General Principles of the Taking of Evidence in Common Law and Civil Law Legal Systems

Procedural issues are central for determination between the parties and the tribunal before the arbitral proceedings. In general, institutional rules and local laws containing arbitration-related norms will rarely provide a list of issues to be governed by the procedural legal norms[12]. Nevertheless, there is a general list of issues which comprises the timetable and arrangements for written submission and hearings, including issues of place and language, and additional powers the tribunal may have to decide interim issues and to make interim or partial awards. Some legal scholars also point out that it is of importance to agree on whether the proceedings will be conducted in an inquisitorial or adversarial style[13]. This remark deserves a special attention and has significant implication in cases where the disputing parties come from different legal jurisdictions.

Evidentiary proceedings, as the name speaks, fall within the scope of the procedural matters both in common law and civil law jurisdictions. Nevertheless, the problems of providing the parties with fairness may be at stake. When speaking of procedural fairness, legal scholars generally raise such issues as *due process* which, in turn, contains two significant elements or, better, principles, namely the equal treatment of the parties and an adequate opportunity to fully present a case[14]. The problem which might arise here is that of providing the equal treatment to the parties where they come from different legal traditions. Given that the latter have mostly various approaches to procedural issues in arbitration, especially those relating to evidence, is that possible to stick to neutrality thereby avoiding *an a priori* bias towards one legal culture over another?[15] This can be illustrated by the theoretical case involving a claimant from the US and a German respondent. If for the claimant, coming from the common law jurisdictions, full disclosure of internal documents held by the respondent is an essential party of fair proceedings, for the respondent this is not the case. The reason is that in civil law countries, fair proceedings do not imply that it should help the claimant in obtaining evidence since the latter should have had a proper case before commencing it. In this regard,

12 Waincymer, J., Procedure and Evidence in International Arbitration, p. 9.
13 Lew, Julian D. M., Mistelis, Loukas A., Kröll, S., Comparative International Commercial Arbitration. Kluwer Law International, 2003, pp. 17 – 19.
14 Waincymer, J., Procedure and Evidence in International Arbitration, p. 32.
15 Ibid.

the parties are encountered with a quite contentious aspect of fairness which might have different interpretation in legal systems.

International commercial arbitration is said to be harmonized since almost all institutional rules follow the same structure and contain the similar set of rules[16]. It is noteworthy, however, that institutional rules usually omit the provisions on the taking of evidence primarily due to the reason that it is the parties who employ the principle of the parties' autonomy and decide on their own how and in which manner evidence shall be presented. Therefore, the evidentiary issues have still strong traditional roots, and harmonization is just as necessary here[17]. As was correctly pointed out in the doctrine, *"we may rhapsodize as much as we want about how the aims of justice are fundamentally the same everywhere, but the plain truth is that different legal systems have profoundly different approaches to the reception of evidence in litigation"*[18].

Thus, it has become traditional to draw a clear distinction between civil law and common law approaches which are usually referred to as inquisitorial and adversarial approaches respectively. Put it simply, under the former system, the judge possesses wide discretion in presenting evidence, while under the latter this role is given to the parties and their representatives where the adjudicator acts more as a referee taking account of compliance by the parties with the rules of law and procedure. Each of the aforementioned approaches has its value taking account of the context of the countries where it is followed [19]. Nevertheless, despite the well-known flexibility, the critics of the predominant adversarial approach is taking place, which actually says that there are problems in co-existence and mixture of these two approaches which lead to the increased costs and length of the arbitral proceedings[20].

It would be of importance to emphasize some practical considerations and expectations. First, the practical solution concerning co-existence of two traditional approaches in taking evidence seems to be possible provided that users of international commercial arbitration do not strictly bound themselves to a global system, regardless of whether inquisitorial or

[16] Born, Gary B., International Commercial Arbitration. 2nd edition. Kluwer Law International, 2014, p. 135.
[17] Sanders, P. (*ed.*), Yearbook Commercial Arbitration 1976. Vol. I. Kluwer Law International, 1976, p. 221.
[18] Paulsson, J., "Overview of Methods of Presenting Evidence in Different Legal Systems", in Albert Jan Van den Berg (*ed.*), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*. Vol. 7. ICCA & Kluwer Law International, 1996. pp. 112
[19] Sanders, P., (ed). Yearbook Commercial Arbitration 1976, p. 534.
[20] Ibid.

adversarial[21]. This means that one the most effective workable approach is to find the most suitable way to reconcile these systems in each particular case. Here, the arbitrators are expected to come to cross-cultural solutions taking account of such principles as fairness, and suitability to the transnational context[22]. This means that such impetus to meet parties' legitimate expectations may lead to harmonization in the field of taking evidence, and avoidance of local legal peculiarities, especially in the context of the rules of evidence applied.

The inquisitorial approach prevails in continental European countries and thus, this is a civil law tradition where it is an adjudicator who directs ascertainment of the facts and the law and may conduct its own examination of witness[23]. Conversely, adversarial approach is predominantly employed in common law countries where the parties seek the truth by employing, to a large extent, the tactics of cross-examination of the relevant witnesses[24]. These features are pertinent in court proceedings, while arbitral proceedings are far more flexible, which means that the parties may even opt for one of the ways of conducting the proceedings, or a mixture thereof. The latter harmonizing option is said to be the most effective and workable approach, as has already been mentioned, and thus, in cases of where the inquisitorial model has been chosen, the matters upon which the tribunal's decision is formed shall be opened to examination and critical analysis by the disputing parties[25].

Having enlightened the procedural framework of taking evidence in international commercial arbitration, the author will discuss further the main problems relating to taking of evidence from common law and civil law perspectives. To begin with, in international arbitrations, one generally speaks of confrontation between methods adopted in common law system civil law system. Common law countries have been traditional defined as having adversarial system due to placing more emphasis on role of the disputing parties in the management of the conduct of proceeding and such institutions as extensive discover, cross-examination bifurcation of proceedings into pre-trial/trial preparation[26]. As to civilian systems, frequently referred to as the inquisitorial, it is the adjudicator who controls the arbitration in general, and here, it takes the more proactive role.

[21] Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", pp. 300 – 303.
[22] Paulsson, J., "Overview of Methods of Presenting Evidence in Different Legal Systems", p. 114.
[23] Lew, Julian David Mathew., Mistelis, Loukas A., et al., Comparative International Commercial Arbitration, p. 532.
[24] Ibid.
[25] Ibid P. 533.
[26] Waincymer, J., Procedure and Evidence in International Arbitration, p. 42.

Although there is a common core of guidelines and practices concerning, among other things, the organisation of arbitral proceedings, it is hardly justified to speak about the international commercial arbitration culture. It would be better and more humbly to speak about the generally accepted best practice aimed at facilitating international commercial arbitrations. They generally serve the aim to ensure that each party will be granted reasonable opportunity to be heard and present its case, regardless of which legal background they come from[27]. As was aptly marked in the doctrine, in practice these allegations on cultural clashes between the adversarial and inquisitorial approaches serve the strategy chosen by the counsel to advance its way of handling the dispute where the most convenient technics for his or her client are employed[28]. For instance, counsel may wish to have direct examination of witnesses in place of their written statements only because this seems to be the best method to tell the arbitral tribunal the impressive story on which the counsel builds the case, but not because he or she has an antipathy against witness statements in a written form.

As was mentioned in the above, institutional rules do not contain comprehensive provisions on evidentiary issues and even if they do, the degree of specificity significantly varies. For instance, the LCIA Arbitration Rules address the disclosure issues by empowering the tribunals "*to order any party to make any property, site or thing under its control and relation to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, any other party, its expert or any expert to the Arbitral Tribunal*"[29]. Nevertheless, the Rules are not specific enough in regulating the mechanism whereby the disputing parties may obtain disclosure. The similar approach is followed by the Rules of the Vienna International Arbitral Centre (Vienna Rules). While recognizing the tribunal's possibility to conduct the proceedings at its discretion and in certain cases, on its own initiative to collect evidence and request parties to submit the necessary documents, the Vienna Rules also do not address the way the parties could seek disclosure[30].

What is so different about adversarial and inquisitorial approaches that make them so diverse and gave rise to the Great Divide? In the former it is commonplace that it is the parties

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27 Alberto, H., Naónm G., "Cultural Clashes in International Commercial Arbitration: How Much of a Real Issue?", in. Fernandez-Ballester, Miguel A., Lozano, David A. (*eds.*), *Liber Amicorum Bernardo Cremades*, Wolters Kluwer España; La Ley, 2010, pp. 557 – 560.
28 Ibid. Dasser, F., "The Arbitrator and the Arbitration Procedure, Soft Law in International Commercial Arbitration – A Critical Approach", in Klausegger, C., Klein, P. (*eds.*), *Austrian Yearbook on International Arbitration*, Vol. 2019. Manz'sche Verlags- und Universitätsbuchhandlung, 2019, pp. 111 – 113.
29 Arbitration Rules of the London Court of International Arbitration (LCIA Rules) 2014, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx, (accessed July 10, 2020).
30 Arbitration Rules of the Vienna International Arbitration Centre (VIAC Rules) 2018, available at https://www.viac.eu/en/arbitration/content/vienna-rules-2018-online, (accessed July 10, 2020).

who bear the burden to prove their position, lay out the evidence they intend to put before the tribunal, to test and, as much as possible, to discredit the allegations submitted by the other side, which is commonly referred to as "cross-examination"[31]. As to arbitrators, their role consists of selecting between the evidence submitted on behalf of disputing parties, deciding on its admissibility and weight attached to it, and rendering a decision based on the arguments presented by both sides. It is important to note that an arbitrator in adversarial approach acts as a kind of referee who is to ensure the fair process. Second, the reference to the so-called tribunal-appointed experts, although not directly forbidden, is kept to a minimum. The rationale behind this is the following. To abide by the principle of fair process, both parties shall know with some particularity the issues set out in pleadings, so that both of them are aware of the positions which is sought to prove at the evidentiary hearings[32]. In this context, the tribunal shall not interfere in the preparation and presentation of evidence, since the burden of proof completely lies with the parties[33]. Third, the common law-style of taking the evidence is largely characterized by the practice whereby the parties shall disclose in advance the relevant documentation which comprises the written evidence, regardless of whether it is supportive of that party's position or not. The practice is known as "discovery" which is considered a cornerstone in the common law system. This is so because the evidence will be formed in the testimony of witnesses as well as the disputing parties themselves. It is also of paramount importance that such evidence is to be tested by cross-examination. Here, it is worth to note some divergencies inherent in the U.S. approach to discovery. The U.S. practitioners do not find it necessary to dwell on pre-trial discovery of documentation as well as on pleadings on the grounds that it is sufficient that the issues in question will be addressed by a lawyer opening the case and "before calling or deploying his testimony"[34]. As Mr. Robert Coulson, President of the AAA explained, "*ordinarily, arbitrators will expect the parties to provide all testimony and evidence necessary to decide the case. However, it does not mean that any party is under an obligation to provide testimony or evidence detrimental to his case as with English Discovery procedures*"[35].

As to the inquisitorial systems, the parties usually deploy their written allegations and documents, but it is the tribunal or an arbitrator deciding on such issues as fact-finding, witness

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[31] Marghitola, R., Document Production in International Arbitration. Kluwer Law International, 2015, p. 89.

[32] Hodges, P., "The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?", in Klausegger, C., Klein, P. (*eds.*), *Austrian Yearbook on International Arbitration*, Vol. 2015. Manz'sche Verlags- und Universitätsbuchhandlung, 2015, pp. 205 – 209.

[33] Sanders, P. (ed), Yearbook Commercial Arbitration, Vol. 10. Kluwer Law International 1985. P. 147.

[34] Ibid.

[35] Ibid, pp. 148 – 151.

testimony and the conduct of evidentiary hearings. Second, the difference in regulation is that the weight attached to documentary evidence is higher than to verbal testimony[36]. However, civilian systems do not have the discovery procedure in the common law understanding[37]. Some legal scholars put it that the procedural techniques of direct- and cross-examination of parties as well as witnesses or experts is not inherent in continental legal system. This is due to the status of the arbitrator who primarily takes the role of a person in charge of the investigation with all associated powers. As Prof. Perrot pointed out, *". . . once arbitrators have the power to order that witnesses be heard* ex officio*, they can at the same time appoint any third party whom they wish to hear"*[38].

Thus, the main differences between the adversarial and inquisitorial approaches are seen in the passive role of the tribunal in the former system, while under the latter it usually takes the proactive participation in the proceedings; further, common law approach abides by the principle that dispositive grounds must be pleaded, where in civil law system the principle of jura novit curia prevails. Despite there has been much said about the profound differences between common law and civil law traditions, one actually sees today a convergence of them[39]. For instance, it has been argued that the civil law tradition has become less inquisitorial than the adversarial system in general, especially in terms of the powers conferred on the adjudicator are not limitless. In particular, the civilian systems follow the principle of adduction of evidence (*Beibringungsgrundsatz)* pursuant to which the adjudicator can substantiate the ruling on facts provided by the parties[40]. This, in turn, means that he cannot call upon witnesses at own discretion, even if it necessary for the resolution of the dispute.

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[36] Ibid.
[37] Ibid.
[38] Ibid, p. 149.
[39] Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", p. 299.
[40] Trittmann, R., "The Interplay between Procedural and Substantive Law in International Arbitration" in Risse, J., Pickrahn, G. (*eds.*), *SchiedsVZ | German Arbitration Journal*, Vol. 14 Issue 1, Kluwer Law International, 2016, p. 9

1.2. The IBA Rules on the Taking of Evidence and the Prague Rules: Drafting History, Scope of Application and Characteristics of the Main Provisions

Institutional and ad hoc rules contain detailed provisions on such matters as initial statements, appointment of arbitrators and challenge, the nature of the arbitral award and costs of the proceedings, however, they are purportedly silent on evidentiary issues in international commercial arbitration[41]. In many cases this intentional gap may lead to problems especially if parties come from different legal jurisdictions. These gaps in practice are usually filled in by reference to soft law which plays a significant role in the arbitral proceedings and which is drafted by practitioners coming from different legal backgrounds on the basis of their experience. The fact that international arbitration brings together parties from diverse legal jurisdictions proves that there is a practical need for soft law instruments, provided they reflect both approaches taken in different jurisdictions and contain "best practices" and standards in order to ensure that the arbitral proceedings are optimally maintained[42]. It is interesting to mention the terminology which is used to mention these best practices: Notes, Guidelines, Checklists, Rules, Principles, or Protocols. The purposes of choosing such terminology is conditioned on their nature as practice-made set of rules which excludes the assumption that they are of a statutory nature[43].

The well-known examples of application of soft law are the IBA Rules of Evidence, the IBA Guidelines on Conflicts of Interests, the ICC Commission Report on Controlling Time and Costs in Arbitration, the IBA Guidelines on Party Representation in International Arbitration and many others. It is interesting to note that even absent explicit agreement on the binding nature of soft law instruments, arbitrators tend to rely on them in cases where the clarification of a situation is to be provided[44].

It is interesting to note that the gaps in evidentiary issues in institutional rules are quite frequently filled in by the parties by reference to the IBA Rules on the Taking of Evidence. They were first introduced in 1983, then amended in 1999 and 2010 and today, the IBA Rules are described as "*one of the few rocks on the tumultuous seas that are international arbitration*"

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[41] Hodges, P., "The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?", in Klausegger, C., Klein, P. (*eds.*), *Austrian Yearbook on International Arbitration*, Vol. 2015. Manz'sche Verlags- und Universitätsbuchhandlung, 2015, pp. 205 – 210.
[42] Ibid
[43] Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", p. 303.
[44] Welser, I., Mimnagh. S., "The Arbitration Agreement and Arbitrability, Production of Physical Evidence in International Arbitration – A No Go?", p. 127.

which are "the most widely known, the most frequently used and highly rated". The IBA Rules of Evidence are well accepted as a successful and broadly-used harmonization of the procedures used in international arbitration. On 29 May 2010, the IBA Council adopted the revised version of the IBA Rules 1999 which reflect new developments and best practices in arbitration. It is worth to note that in the revised version of the IBA Rules of Evidence the term "commercial" was eliminated from the title of the Rules since they may be applied in both commercial and investment arbitration[45].

The IBA Rules on the Taking of Evidence in International Arbitration were initially drafted "with a purpose to bridge the gap in modes of dispute resolution between different legal cultures, and by all counts, the Rules were successful in this"[46]. Pursuant to Art. 1 (1) of the IBA Rules of Evidence, *"whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal"*. The parties and the tribunal may also apply the IBA Rules of Evidence in whole or in part and adapt them to the peculiar circumstances of each matter[47].

It is worth to note that generally, the parties agree that the IBA Rules shall serve as a guidance for the tribunal[48]. Furthermore, Art. 1(1) of the Rules acknowledges that they are quite rarely incorporated in an arbitration agreement and, hence, they need to be expressly adopted by the parties in order to apply them in the arbitral proceedings. Secondly, the IBA Rules cannot override mandatory provisions to be applied in arbitration. For instance, if *lex arbitri* prevents a disclosure other than voluntarily produced documents, the Rules will not apply if they contradict to the provision of the law of the seat[49]. Finally, the IBA Rules should be interpreted consistently with the objectives set forth in the Preamble, namely good faith, ensuring an efficient, economical and fair process and permitting flexibility, as stated in Art. 1.4 of the Rules[50]. Here, one shall note that under the principle of good faith it is expected that

[45] Ashford, P., Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration. Cambridge: Cambridge University Press, 2013, p. 6.
[46] Ibid
[47] Ibid, p. 7.
[48] Ibid, p. 28.
[49] Khodykin, R. M., Mulcahy, C. *et al*., A Guide to the IBA Rules on the Taking of Evidence in International Arbitration. Oxford University Press, 2019, p. 28.
[50] Ibid, p. 30.

the parties will cooperate and if the parties fail to do so, the tribunal under Art. 9.7 is entitled to award costs against a party who fails to cooperate in good faith with taking of evidence[51].

The IBA Rules are a soft law product, and in order to succeed and become efficient, they need to bridge gaps, not to burn bridges. It has been correctly noted that "*when it comes to the conduct of arbitration proceedings, the procedure can be customized to fit the intricacies of every single case, at least that is the theory*"[52]. However, in many cases resolved by means of arbitration the procedure is said to be standardized to such extent that there is actually not that much room for variations. As was mentioned in the first chapter of the thesis, institutional rules do not regulate evidentiary issues in deep details which makes parties to ultimately find and agree on the alternative set of rules handling the matters in question. A report prepared by the IBA in September 2016 shows further that their rules are regularly applied in both common law and civil law jurisdictions, with 72% of arbitration in England, 62% in France, and 56% in the USA[53]. Such statistics also proves the fact that today, the IBA Rules are frequently applied as the default rules. But what does it make them to be treated like the default rules? The answer is that so far, there has been no choice and no alternative set of rules which would regulate evidentiary issues in international commercial arbitration.

Today, the IBA Rules of Evidence are suspect to favour the approach used in common law systems since more often than not they are applied in an adversarial manner[54]. In turn, this resulted in a costly, lengthy and complex conduct of arbitral proceedings, and many practitioners, especially from European countries, think that there is a direct link between complex proceedings and application of the IBA Rules to which, so far, there was no any alternative. Therefore, lack of alternative set of rules has led to the development of an idea to elaborate a new set of rules which would be not a competitor to the IBA Rules but an efficient alternative to be applied in cases, especially those having civil law background. The Prague Rules, called so to commemorate the place where the idea was first discussed[55], offer the alternative ways to conduct arbitral proceedings.

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[51] D. O'malley, N., Rules of Evidence in International Commercial Arbitration. Taylor & Francis Ltd, 2012, p. 10.
[52] Doudko, A., Golovtchouk, O., "Introducing the Young Contender – the Prague Rules", *Ukrainian Journal of Business Law*, October 2018, available at www.ujbl.info (accessed 27 April 2020), p. 20.
[53] Report on the reception of the IBA arbitration soft law products, prepared by the International Bar Association Subcommittee in September 2016, available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=105d29a3-6261-4437-84e2-1c8637844beb,accessed 10 July 2020, p. 13.
[54] Rombach, A., Shalbanava, H., "The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?", *German Arbitration Journal*. Vol. 17, Issue 2. Kluwer Law International, pp. 53 –55.
[55] Ibid.

The Rules on the Efficient Conduct of Proceedings in International Arbitration, usually referred to as the Prague Rules, has a remarkable drafting history primarily because they were adopted as a response to the IBA Rules of Evidence which took monopoly in their application in arbitral proceedings. The Prague Rules were officially signed on 14 December 2018 and received the Global Arbitration Review Awards 2019 for the Best innovation by an individual or organization[56]. After the Rules were announced, they came under fire from those who found them redundant as they do not provide for novelties. To be more precise, some scholars claimed that there was no need for it because the IBA Rules of Evidence have already envisaged such provisions as the encouragement of the tribunal to take an active role in the proceedings by means of appointment of its own expert (Art. 6), placing limits on document production (Art. 4), or curtailing irrelevant witness evidence (Art. 5)[57].

The Prague Rules were drafted by the Working Group which consisted of legal professionals coming from around 30 civil law countries, and it is quite unusually that this was an informal group, not an international or regional organization which operated under the same minutes[58]. The Working Group shared the view that today, users of arbitration are dissatisfied with the time- and money-consuming arbitral proceedings caused by the creeping "Americanisation" of international arbitration and the dominance of the common law world. Eventually, the main focus of the Prague Rules was slightly shifted towards the case management in arbitration. In particular, one of the ways to increase its efficiency is, in the opinion of the Working Group, to encourage an arbitral tribunal to take the proactive role in the case management, as is traditionally done in most of civil law countries[59]. At the same time, it is interesting to note that early case management conference, sometimes referred to as a "procedural conference" have been already encouraged by, for instance, the in the 2012 ICC Rules, which in Art. 24 set forth a requirement that "*the arbitral tribunal shall that a case management conference be held in ICC Arbitrators*".

The provisions manifested in the Prague Rules are indeed based on civil law procedural traditions and the way the proceedings are to be conducted, and these techniques will also be familiar to the parties and lawyers coming from non-civil law jurisdictions. The Working Group was of the opinion that there are two things which may enhance efficiency and flexibility

[56] Ibid.
[57] Ibid.
[58] Duggal, K., Rangachari, R., "A Challenger Approaches: An Assessment of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration", *Journal of International Arbitration.* Vol. 37 Issue 1. Kluwer Law International, 2020, p. 31.
[59] Ibid, p. 34.

of arbitral proceedings. First, before starting the proceedings, the parties and the tribunal shall think carefully about how the procedure should be organized, and not commence the proceedings from the standard PO1 (procedural order No.1). At this stage, among other things the cultural differences between the parties should be considered. For instance, lawyers with common law background might be embraced with such civil law allegations that it is not always necessary to find the truth of the case by means of involving witnesses and huge document production. Similarly, the parties and lawyers trained in civil law countries may be embraced with the common law institute of cross- examination. Second, the tribunal shall not be suffering from the due process paranoia which has such hallmarks as endless procedural requests and applications in the course of proceedings[60]. Therefore, the Prague Rules contain provisions which empower the arbitral tribunal to have more management powers in the hope that this will assist in effective and not lengthy and costly dispute resolution in international commercial arbitration.

As was correctly pointed out by Prof. Dr. Alexander Bělohlávek at the ceremony devoted to the official launch of the Rules, "*…the Prague Rules are not a rival to the IBA Rules... they are to help and give a viable alternative where applicable*"[61]. Indeed, the Preamble to the Prague Rules clearly sets out that the Rules "*are not intended to replace the arbitration rules provided by various institutions and are designed to supplement the procedure to be agreed by parties or otherwise applied by arbitral tribunals in a particular dispute. Parties and arbitral tribunals may decide to apply the Prague Rules as a binding document or as guidelines to all or any part of the proceedings*".

Moreover, both set of rules may fit for cases where parties come from civil law and common law background whose dispute requires a streamlined procedure to be actively conducted by the arbitrators. In this regard, it is necessary to outline the similarities between the rules. First, the application of the Prague Rules is subject to conditions of application similar to those of the IBA Rules. In particular, pursuant to Art. 1 (1) of the Prague Rules, "the parties may agree on the application of the Rules before arbitration is initiated or at any stage of the arbitration". Further, under Art. 1 (2) of the Prague Rules, "*the arbitral tribunal may apply the Prague Rules or any part thereof upon the parties' agreement or at its own initiative after having heard the parties*". Second, Under Art. 8.2 of the IBA Rules, "*the tribunal has complete control over the evidentiary hearing and may limit or exclude questions and/or the appearance*

[60] Ibid, p. 30
[61] Ibid.

of a witness". In Art. 5.7 of the Prague Rules, "*the tribunal has control of the hearing and examination of witnesses. The tribunal can reject a question posed to a witness, limit the time for examination or the types of questions allowed*". Third, both set of rules provide that the tribunal is entitled to indicate what type of evidence it finds helpful and useful for the dispute resolution (Art. 2.3 of the IBA Rules, Art. 2.4 of the Prague Rules). Fourth, Art. 3.10 of the IBA Rules and Art. 2.5 of the Prague Rules vest the tribunal with the power to order parties to produce evidence.

Yet, significant differences between the rules exist. To begin with, since the IBA Rules and the Prague Rules favour different legal approaches, adversarial and inquisitorial respectively, their content is largely influenced by the respective principles[62]. As was mentioned above, in the adversarial systems, the role of a judge or arbitrator is minimum and the whole process is in the hands of the parties and their counsel, while the inquisitorial approach adduces the main role to the adjudicator. This underlying distinction was laid down in the IBA Rules and the Prague Rules. The latter put the tribunal at the centre of the proceedings and in this regard confer on it more proactive powers in order to reduce the length and costs of the arbitral proceedings. In particular, they empower the tribunal to take the proactive role in the process of investigating facts, evaluating the evidence. The Prague Rules also created and provide a rule set forth in Art. 2 which says that *"the tribunal should first clarify with the parties what the arbitration is about at the case management conference"*. At the conference, it is expected that both sides will discuss disputed and undisputed facts, as well as the legal intentions of the parties. Afterwards, the arbitrators may even express their preliminary view on the way the parties are to proceed and on the merits of the case, something that is unthinkable in the arbitration conduced in common law jurisdictions.

Giving preliminary opinion may, without any doubt, contribute to the efficient conduct of the proceedings and avoid waste of considerable time and money on minor or completely irrelevant issues. It should also be noted that the tribunal shall remain open to altering its view expressed in the preliminary opinion, in light of new evidence and arguments presented by the parties. However, in practice the tribunal is said to be hesitant in changing its opinion since there is a fear of looking indecisive[63].

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[62] Stampa, G., "The Prague rules", in Park, W. W. (*ed.*), *Arbitration International*, Vol. 35 Issue 2, Oxford University Press, 2019, pp. 228 – 231.

[63] Henriques, D. G., "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?", pp. 354 – 360.

The corresponding provision in the IBA Rules does not directly address the assignment of the specific role to arbitrators, rather, in Art. 2.3 "*it sets forth its obligation to consult the parties at the earliest appropriate time and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence*". Thus, despite the IBA Rules of Evidence also encourage the arbitral tribunal to make a preliminary determination as to the issues relevant and material to the outcome of the case, the scope of this provision is noticeably narrower in comparison with that of Art. 2 of the Prague Rules. While the IBA Rules treat the tribunal more as an "observer", the Prague Rules consider it as "a leader" whose power is not confined with the frameworks of the parties' agreement. Rather, the arbitral tribunal has discretion "*to steer the proceedings and to express its opinions on the case*"[64].

For this very reason, Art. 2 of the Prague Rules has caused some sort of discomfort among common law practitioners. The reason is that the proactive role of the arbitral tribunal in determining the procedure in general and matters of evidence more specifically may result in filing challenges of arbitral awards, especially in jurisdictions not familiar with civil law-based status of the arbitrator. What is more troubling is the power of the tribunal to decide on what kind of evidence it wants to see. In jurisdictions where only the parties steer the gathering evidence, the provisions of the Prague Rules on the active role of the tribunal may seem to be an excess of the tribunal's mandate[65]. The same accounts for the provisions on expressing preliminary view on the merits of the case. Although the Prague Rules explicitly provide in Art. 2.4 that the preliminary views "*shall not by itself be considered as evidence of the arbitral tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification*", it is uncertain whether the article at hand would withstand a challenge before the state court. Nevertheless, the tendency to express preliminary views by the tribunal at an early stage is increasing[66]. For instance, the alike provisions are provided in Art. Art. 27.4 and Annex 3 (F) of the 2018 DIS Arbitration Rules and Art. 56 of the Interactive Arbitration Rules of the Japan Commercial Arbitration Association.

[64] Öhlberger, V., Pinkston, J., "the Arbitrator and the Arbitration Procedure, Iura Novit Curi and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blinders and Misplaces Concerns About Impartiality" in in Klausegger Ch., Klein, P., (*eds*), *Austrian Yearbook on International Arbitration*, Vol. 2016, p. 115.
[65] Rombach, A., Shalbanava, H., "The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?", p. 55.
[66] Ibid.

At the same time, in some cases the IBA Rules are characterized by offering a greater control assigned to the arbitral tribunal than that available in the Prague Rules[67]. For instance, pursuant to articles 5.2. and 5.3 of the Prague Rules, the tribunal may decide to exclude certain evidence only after having consulted with the parties, while the IBA Rules entitle the tribunal on its own motion to do so. One more contribution of the Prague Rules to the way of enhancing cost-effective conduct of the arbitral proceedings is the treatment of document production. In general, both the IBA Rules (Art. 3) and the Prague Rules (Art. 4) favour the limited document production, however, the latter set of rules go further by giving preference to the avoidance, where possible, extensive production of documents, including any form of e-discovery. Here, the parties are to seek the permission of the tribunal to order production of specific documents.

The proactive role of the tribunal acting under the Prague Rules has its specific features in the fact-finding process. Art. 3.3 of the Rules confers the powers on the arbitral tribunal to request, on its own motion, "*any of the parties to produce relevant documentary evidence or make witnesses available for examination during a hearing, appoint their own (factual and legal) experts, order site inspections, or take any other actions which they deem appropriate*". In any case, the exercise of such powers does not release the disputing parties from their respective burden of proof. However, and as fairly noted in the doctrine, nothing is prohibited in the IBA Rules of Evidence what is allowed for the tribunal under the Prague Rules[68]. Despite the former lack a comparably distinct provision with regard to the tribunal's powers in the fact-finding process, the IBA Rules still equip the arbitrators with the power to exercise control over the proceedings. In particular, under Art. 3.10 of the IBA Rules, the tribunal is also entitled to request the parties to produce documents, or to take steps, at its own motion, to obtain documents from third parties. Similarly, the tribunal may exercise the option set out in Art. 4.10 of the IBA Rules pursuant to which where a person was not offered as a witness by any of the disputing parties, it may still be ordered by the tribunal to appear as a witness. Further, under Art. 8-9 of the IBA Rules, it lies within the parties' discretion to decide which fact witnesses they want to appear at the evidentiary hearing, and here, the tribunal may exclude such witnesses provided their testimony is irrelevant for the dispute resolution. Likewise, Art. 5 of the Prague Rules authorizes the tribunal to take control over presentation of fact witnesses, which is done by the parties under the tribunal's permission. The difference, however, occurs

[67] Khodykin, R. M., Mulcahy, C. *et al.*, A Guide to the IBA Rules on the Taking of Evidence in International Arbitration. Oxford University Press, 2019, p. 45.
[68] Ashford, P., Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration. Cambridge: Cambridge University Press, 2013, p. 76-79.

in the following matter: according to Art. 5.6 of the Prague Rules, the tribunal directs cross-examination of witnesses, while under Art. 8 of the IBA Rules it is the counsel who does so.

The last remark to be made in the fact-finding process deal with the treatment of experts. The difference between the IBA Rules and the Prague Rules is that the former allow both the tribunal- and party-appointed experts (Art. 5), while the latter give preference to tribunal-appointed experts (Art. 6). If the parties, having they proceedings to conduct under the Prague Rules, want to appoint their own experts, they shall seek the tribunal's permission.

In Art. 7 the Prague Rules introduced *iura novit curia* which implies an inquisitive manner where the tribunal investigates points of law on its own motion[69]. This maxim is not provided in the IBA Rules of Evidence. In civil law countries, *iura novit curia* is perceived to be a mandate of the arbitral tribunal to resolve the cases on those legal grounds it finds appropriate, regardless of whether these legal grounds have been pleaded by the disputing parties[70]. In general, this provision is relatively for lawyers trained in civil law countries since it would be odd for an adjudicator to refrain from applying the rule which is perceived to be relevant merely because the parties did not refer to it. It is worth to note that the Prague Rules hedge arbitrators against risks and concerns which might be potentially raised due to the *ex officio* application of the law[71]. For such case, Art. 7.2 sets out that the tribunal *"shall seek the parties' views on the legal provisions it intends to apply"*. The Prague Rules also stipulate that the tribunal shall give the parties the opportunity to comment on legal authorities which were not submitted by them, regardless of whether they relate to issues they have pleaded. This article actually serves as a guideline for the tribunal which should not have troubles with application of the principle *iura novit curia.*

One more remarkable provision of the Prague Rules is set forth in Art. 9.2-9.3 which regulate mediation-arbitration (med-arb) and deal with the assistance in amicable settlement of a dispute by the arbitral tribunal. This provision depicts the civil law approach to the role of an adjudicator who is expected to promote settlement, while common law lawyers do not favour this approach[72]. To be more precise, the Prague Rules mandate the tribunal to assist in dispute settlement by means of, for example, giving a preliminary view on the respective positions of the parties which should not be considered a pre-judgement.

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[69] Ibid
[70] Rombach, A., Shalbanava, H., "The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?", pp. 57.
[71] Ibid.
[72] Ibid..

At the same time, the abovementioned provisions have raised many doubts because it is not very typical for arbitrators "to change their hat for a mediator hat"[73]. Although under Art. 9.2 of the Prague Rules the change of role of an arbitrator is possible only upon parties' prior written consent, it still may pose significant risks for impartiality of an arbitrator. The reason is that during mediation, the arbitrator generally conducts *ex parte* discussion with the disputing parties, where confidential information may be obtained. If the mediation procedure does not result in a settlement, parties shall in a writing form consent to the arbitrator's mandate, otherwise, the mandate terminates and a new arbitrator shall be appointed, as set forth in Art. 9. 3. On the one hand, this novelty may affect the efficiency of arbitral proceedings, especially in cases where the tribunal consists of three arbitrators. In this case, the information gap between the members of the tribunal may lead to tension which may result in a lack or loss of trust on the part of the parties, and this concern is not addressed in the Prague Rules. It should be marked that the policy of promoting mixed mediation and arbitration proceedings has become a frequent demand of arbitration users. In the survey mentioned in the introduction of the thesis, 60% of the respondent indicated that settlements should be encouraged more proactively, including by means of mediation during arbitration, and the Prague Rules picked up on this demand[74]. Notably, that today, this approach is frequently used in China, where med-arb has become a commonplace[75]. Ultimately, the option of using med-arb under the Prague Rules is an offer which can be rejected by the parties, either by opting out of Art. 9.2 and 9.3 in the arbitration agreement, or by refusing to submit the required consent to the arbitral tribunal.

Further, the approach to the evidentiary hearings under the provisions of the IBA Rules and the Prague Rules differs as well. As set out in Art. 8.1 of the Prague Rules, a dispute should, if possible, be resolved on a document-only basis. The rule does not apply if one of the parties requests a hearing. Nevertheless, even in the hearings are requested, the Prague Rules encourage the disputing parties to opt for electronic communication in order to avoid additional costs. The IBA Rules do not contain provisions on case management and are intentionally

[73] Rombach, A., Shalbanava, H., "The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?", pp. 56– 60.
[74] 2018 International Arbitration Survey: the Evolution of International Arbitration, conducted by Queen Mary University and White & Case LLP, available at https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf, accessed 3 June, 2020.
[75] Hodges, P., "The Arbitrator and the Arbitration Procedure, The Proliferation of "Soft Laws" in International Arbitration: Time to Draw the Line?", in Klausegger, C., Klein, P. (*eds.*), *Austrian Yearbook on International Arbitration*, Vol. 2015. Manz'sche Verlags- und Universitätsbuchhandlung, 2015, pp. 214 – 219.

limited to the issues of the taking of evidence, thus, instead of addressing the question of *whether* the hearing shall take place, they provide for the rules *when* it takes place in Art. 8. Further, Art. 8.2 of the Rules clearly stipulates that at all times, the tribunal shall have complete control over the hearings. While Art. 8 of the IBA Rules extensively covers such issues of the hearing as the procedure for the witness examination, the Prague Rules address the conduct of evidentiary hearing very in a rather fragmentary manner.

Having considered the similarities of and differences between the IBA Rules of Evidence and the Prague Rules, the following conclusions can be made. The idea behind the adoption of the Prague Rules corresponds to the current needs in international commercial arbitration to increase efficiency by means of reducing the length and costs of the proceedings. Furthermore, the necessity for the adoption of the Prague Rules resulted from the needs of users of arbitration based in civil law jurisdictions to conduct the arbitral proceedings under the principles of civil law. It also should be pointed out that today, more and more cases are represented by in-house lawyers which requires the less complicated rules, and here, the Prague Rules fit more than good[76]. The reason is that they deal not only with evidentiary issues in international commercial arbitration, but also with the management of the proceedings in general with proactive powers of the tribunal. The practical example could be where the tribunal guides the disputing parties in a sale of goods dispute where specific documents are to be presented, in order to make the conduct of arbitration more efficient and faster.

It is interesting to note that it is quite arguable whether the Prague Rules will trigger a substantial reduction in the number of evidentiary hearings[77]. First, the lack of an oral hearing may lead to questions concerning whether a party has been given a reasonable opportunity of presenting its case. Second, Art. 8.1 of the Prague Rules is not mandatory which means that the parties may wish not to invoke this provision in cases where the high amount at stake. The same is true when institutional rules set forth that the hearing shall be a mandatory stage in arbitration, and the Prague Rules compromise with this approach. Whether this purpose will be achieved is a matter of time and practice which, in its turn, also poses a question about the wide application of the Prague Rules as that of the IBA Rules.

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[76] Pettibone, Peter J., "The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration: Are They an Alternative to the IBA Rules on the Taking of Evidence in International Arbitration?", in Weeramantry, R., Choong, J. (*eds.*), *Asian Dispute Review.* Vol. 21 Issue 1. Hong Kong International Arbitration Centre (HKIAC), 2019, pp. 13 – 17.

[77] Ibid.

II. FUNDAMENTAL DIFFERENCES IN THE TAKING OF DOCUMENTARY EVIDENCE BETWEEN THE IBA RULES OF EVIDENCE AND THE PRAGUE RULES

2.1.Principles of the Taking of the Documentary Evidence in International Commercial Arbitration

In international commercial arbitration, documentary evidence plays a significant role in the discharge of the burden of proof of the disputing parties. Charles Brower suggested that "… *contemporaneous written exchanges of the parties pre-dating the dispute as the most reliable source of evidence and that the actual course of conduct between the parties prior to the dispute arising was the best evidence of the proper interpretation of any relevant conduct*[78]".

Furthermore, the value of documentary evidence lies also in the fact that depending on the complexity of the case, it may be even sufficient to resolve the whole dispute on the basis of exchange of written submissions of the parties and documentary evidence. The rule of thumb in arbitration, as well as in litigation, is that a document "*is taken to be conclusive evidence of its contents, to the extent that it does exist and bar allegations of forgery*"[79]. At the same time, the value and techniques used in presenting documentary evidence differ in common law and civil law systems. Although there has been a tendency towards the convergence of inquisitorial and adversarial approaches in international arbitration, there are still many differences which do not allow to completely assert their harmonization. In particular, lawyers with a civil law background accord much more weight and value to documentary evidence, than lawyers coming from common law jurisdictions who heavily rely on oral testimony[80]. To be more precise, civil law lawyers prefer *contemporaneous* documents over oral witness testimony. The reason is that the latter is said to be less reliable and more self-serving type of evidence due to the fact that it is generally compiled after the dispute has arisen and is known.

What is actually deemed under a "document" in arbitration? With the adoption of the UNCITRAL Model Law on International Commercial Arbitration in 1985, the notion was more or less unified and many countries included in their legislation the definition of a document as stated in the Model Law. Although the latter does not contain a direct meaning of the term "documents", it may still be inferred from the provisions on Art. 7, as marked in the

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[78] Waincymer, J., Procedure and Evidence in International Arbitration, p. 827.

[79] Blanke, G., "Document Production in International Arbitration: From Civil and Common Law Dichotomy to Operational Synergies", in O'Reilly, M. (*ed.*), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management,* Vol. 83 Issue 4. Chartered Institute of Arbitrators (CIArb); Sweet & Maxwell 2017, pp. 423.

[80] Waincymer, J., Procedure and Evidence in International Arbitration, p. 825.

legal doctrine. In particular, pursuant to Option I Art. 7, a document takes any forms, "including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy" which can be "generated, sent, received or stored by electronic, magnetic, optical or similar means" by acknowledging that an arbitration agreement can be "written" in these forms[81]. As to the soft law rules, which are the main subject of consideration of the thesis, the Prague Rules do not contain definition of what is deemed under a document, while the IBA Rules sets forth in the section of definitions that *"document"* means *"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"*.

In the legal doctrine, there are certain types of documents generally submitted to the tribunal as documentary evidence[82]. Firstly, it is original documents which are contemporaneous with the contract and which record the parties' contractual relationship. Here, the parol evidence rule applied in common law systems should be mentioned according to which the consideration shall be given only to the document which is formally signed and adopted at the time of contracting. Conversely, civil law tradition accords not less attention to the precontractual documentation in determining a contractual relationship[83]. In practice, however, the tribunal frequently looks back beyond contractual documents. Secondly, document prepared during the contract performance are also considered documentary evidence and may include minutes of meetings; financial and marketing plans; business correspondence between the parties' incidental reports and others. The weight of these types of documents is measured via their possibility to give a valuable insight into a dispute. Thirdly, documents prepared for the dispute are also valuable source of evidence since they generally record the issues which may give rise to the possible dispute in the future from the very beginning and during the development of a misunderstanding between the parties. Fourthly, documents prepared in the course of the dispute as documentary evidence may include internal reports, corresponding between the parties and their counsel.

Given that the disputing parties frequently come from different legal jurisdictions, cultural clashes between the legal systems may arise also with regard to the interpretation of

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[81] UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf (accessed July 10, 2020).

[82] Drymer, Stephen L., Gobeil, V., "Document Production in International Arbitration: Communicating Between Ships in the Night", in Albert Jan Van den Berg (*ed.*), *Legitimacy: Myths, Realities, Challenges. ICCA Congress Series*, Vol. 18. ICCA & Kluwer Law International, 2015, pp. 205 – 220

[83] Ibid

the document submitted as evidence. For instance, under the views adopted in common law jurisdictions, such interpretation is to be given by an author of the document or the parties to the contract, and should be adduced with the help of the interrogation of the authors[84], while civilian lawyers leave it to the consideration of judges, and this is the very approach which is today accepted in international commercial arbitration, but not exclusively[85].

Certain differences may be found in a way such sort of evidence is presented to the arbitral tribunal. This issue is of big significance in arbitral proceedings which are characterized by necessity to process loads of documents submitted by the parties. The first difference is in establishment of the authenticity of documents[86]. Generally, international commercial arbitration does not require admitting documents into witness evidence who attests to their authenticity[87]. This approach is different to that adhered in common law traditions where documents are to be presented by witness as a part of his or her oral evidence and styles as exhibits. Here, witnesses also attest to the document's nature and authenticity, thereby assisting in understanding of their content from the perspective of the broader evidentiary record[88]. In civil law jurisdictions, before considering as a separate matter, the adjudicator would generally wait for challenges to authenticity, regardless of whether the documents were notarized. In this regard, it seems desirable to stick to the presumption of that authenticity of the documents, absent parties' challenges, for the purposes of saving time of the proceedings.

As was pointed out in the first chapter of the thesis, the challenge of modern international commercial arbitration is to combine the best and most efficient features of adversarial and inquisitorial approaches with regard to documentary evidence which, as will be shown below, quite a comprehensive task. This matter is of big importance given that at the heart of the documentary evidence lies the document production procedure which is severely criticized as a purely common law product which contributes to increasing length and costs of the arbitral proceedings. Extensive discovery process in adversarial systems can be explained by the structure of a statement of claim which requires short and plain description of the dispute[89]. The rationale behind this is that the parties are given an opportunity to sort out their

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84 Ibid
85 Ibid.
86 Otto L.O. De Witt Wijnen, "Collection of Evidence in International Arbitration", in Fernandez-Ballester, M.A., Lozano, D.A. (*eds.*), *Liber Amicorum Bernardo Cremades*, Wolters Kluwer España; La Ley, 2010, pp. 351 – 359.
87 Drymer, Stephen L., Gobeil, V., "Document Production in International Arbitration: Communicating Between Ships in the Night", in Albert Jan Van den Berg (*ed.*), *Legitimacy: Myths, Realities, Challenges. ICCA Congress Series*, Vol. 18. ICCA & Kluwer Law International, 2015, pp. 205 – 220
88 Waincymer, J., Procedure and Evidence in International Arbitration, p. 828.
89 Ibid

mutual weaknesses and strengths via pre-trial discovery. Therefore, the division of the lawsuit into disclosure and trial leads to a situation where parties with common law background typically submit their claims without evidence supporting their allegations[90]. In civil law jurisdictions, on the contrary, an adjudicator places heavy reliance on documentary evidence, and the procedure of document production, initiated by the parties, is confined to the "discharge of a party's burden of proof".[91] This means that generally, the party bringing the claim submits all the relevant evidence which supports its position since the other party should not assist the former to help to find out what else could be attested. Given that there is a policy conflict, divided along inquisitorial and adversarial traditions, there is no automatic right to document production in arbitration. Although, it is becoming the norm, but in a carefully controlled manner[92].

Below, the author will consider issues where there is still less consensus between adversarial and inquisitorial approaches, namely: 1) scope and extent of document production; 2) approach to adverse inferences; 3) "to what extent should the tribunal interfere at the evidentiary stage and call for the relevant material where it believes that "the parties themselves have not been comprehensive as both to production and requests for production".

2.2.Regulation of Document Production under the IBA Rules of Evidence and the Prague Rules

Both common law and civil law legal systems abide by the principle that a party bringing a claim shall substantiate it with evidence and hence, bears the burden of proving its allegations. An important tool used in evidentiary process in common law jurisdictions is discovery or disclosure, which means requesting a disputing party to submit certain documents which may be relevant and necessary for considering the dispute. Common law lawyers usually request disclosure of all documents which are relevant to the dispute, while the principles of civil law provide that a claimant is required to disclose only those facts which are necessary to discharge its burden of proof[93].

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[90] Ahdab J. E., Bouchenaki. A, "Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?", p. 75.
[91] Blanke, G., "Document Production in International Arbitration: From Civil and Common Law Dichotomy to Operational Synergies", in O'Reilly, M. (*ed.*), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management,* Vol. 83 Issue 4. Chartered Institute of Arbitrators (CIArb); Sweet & Maxwell 2017, pp. 424.
[92] Ibid.
[93] Ibid.

Today, it is argued that the process of discovery in international commercial arbitration is actually a foreign creature for civil lawyers who are not familiar with this stage merely because it is not provided in their domestic litigation[94]. It should be noted that despite the procedure in arbitrations tends to be unified, yet parties, arbitrators and counsels have different expectations due to their various legal origin. Indeed, an arbitration system has so far achieved some level of transnationality, however, the taking evidence has still remained the most debated topic in this context. At the 50th Anniversary Conference of the ICCA, it was reported that users of arbitration are sometimes frustrated with the administration of taking the evidence which leads to increasing costs and delays in the arbitral proceedings[95]. At the same time, it is also argued that regardless of the arbitrators' background, they generally tend to adopt from the inquisitorial and adversarial approaches those evidentiary methods which would allow them to exclude cultural clashes, to find out the truth of the case, confirm and invalidate those issues which they extracted from the parties' submissions[96].

Pursuant to Art. 4.1 of the Prague Rules, *"each party shall submit documentary evidence upon which it intends to rely in support of its case as early as possible in the proceedings".* It is interesting to note that the basic approach of the Prague Rules, set out in Art. 4.2, is aimed at avoiding any form of document production, including electronic discovery. The drafting history of the Rules shows that in the previous versions, the Working Group initially opted for the wording "extensive" production of documents[97], however, the final version of the Rules has undergone significant changes. Actually, interpretation of Art. 4.2 of the Prague Rules suggests that document production is not completely excluded, but remains or at least intends to remain the exception.

As to production of a specific documents, both sets of rules adhere to the same characteristics, but with a difference in the scope. Art. 4.5 of the Prague Rules set forth that the specific documents shall be relevant and material to the outcome of the case, not in the public domain and in the possession of another party or within its power of control. Additionally, the party requesting document production may approach the arbitral tribunal directly and avoiding the requirement to seek an exchange of documents from the other party by means of drafting a

[94] Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", *Journal of International Arbitration.* Vol. 36 Issue 3. Kluwer Law International, 2019, pp. 295 – 314.
[95] Ahdab J. E., Bouchenaki. A., "Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?', p. 68.
[96] Ibid, pp. 69 – 70.
[97] Ibid.

Redfern Schedule first[98]. Finally, the power of the tribunal to request the production of relevant documents from the disputing parties at its own discretion is not subject to the restrictions set forth for party-driven document productions. Also, under Art. 4.3 of the Prague Rules, if the party believes that there is a necessity for documents from the other party, it should indicate this to the tribunal at the stage of conducting the case management conference,

As to the IBA Rules of Evidence, they adhere to the balanced approach thereby the common law-style discovery is considered generally appropriate but with such powers of the tribunal which allow it to exclude, on its own motion, *"the production of documents on several grounds, including those mentioned in the Prague Rules"*[99]. Thus, given an extensive tool for document production in the IBA Rules, the tribunal is well positioned to impose constraints similar to those set forth in the Prague Rules. In practice, however, the tribunal hardly exercise this power, primarily due to the reason of being overly cautious about compliance with the principles of due process and equal treatment of the parties[100].

Pursuant to Art. 3 of the IBA Rules, a party may submit a request to produce which should meet certain requirements in order to be accepted by the tribunal. In particular, a request should contain: 1) a sufficient description of each requested document in order to identify it; and a description in sufficient detail of a narrow and specific requested category of documents that are reasonably believed to exist; 2) a statement as to how the documents requested are relevant to the case and material to its outcome; 3) a statement that the documents requested are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents, or a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party. The requirements set forth above for the valid document production request are aimed at preventing fishing expeditions where voluminous amounts of documents are requested, and require some commentaries. In general, where the request is submitted within the ambit of the allegations made, it will not be amounted to a fishing expedition, including those cases where a party has only a suspicion regarding the existence and importance of a document[101]. Conversely, if a party submits the document production request only with a view to amend it claim by means of adding new issues, the

[98] Ibid.
[99] Ibid
[100] Ibid, p. 99.
[101] Cohen, Amy F., "Options for Approaching Evidentiary Privilege in International Arbitration", in Giovannini, T., Mourre, A. (*eds.*), *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies,* Vol. 6. Kluwer Law International, 2009, pp. 430 – 432.

document requested by this party will be considered immaterial to the outcome of the case on the ground that it was out at the time when the request is made[102].

The provisions set forth for a document production request under the Prague Rules are substantially shorter than those in the IBA Rules of Evidence. In particular, they entirely exclude the categories of documents, including those which are narrow and specific ones. First, as mentioned in Art. 3.3 (a) (ii) of the IBA Rules of Evidence, a request to produce shall be sufficiently specific which, in turn, implies the identity and subject matter of the document, as well as location or the person in its possession or control[103]. This requirement is of paramount importance in practice because it prevents turning the document production procedure into broad-ranging adversarial style discovery. Hence, if the tribunal finds the request too broad, despite explicit identification of a document or category of the documents, it will reject it on the grounds of the lack of sufficient effort to specifically identify documents searched[104]. In theory, this provision does not represent difficulties, while in practice, it is not clear how the arbitral tribunal should deal with the request to produce where a party seeks to obtain information for the purposes of further allegations. The most reasonable approach would be to show prima facie or likely relevance, and if the party requests to produce documents within the ambit of its allegation, the latter would not be amounted to a fishing expedition, even in those cases where a party only has a suspicion about existence and importance of a document[105].

Second, the requesting party is required to show proof of existence of the document requested. As explained in the commentary on the IBA Rules, the party is only asked to have reasonable belief as to the existence of a document, but not knowledge of fact of the existence[106]. Thirdly, the request to produce will be rejected if it lacks explanation on relevance and materiality to the outcome of a case. Relevance of evidence relates to "*the party's claims as well as to the challenges it knows it will presumptively face from its opponent, while materiality is added as a further qualification to relevance, to avoid wasteful duplication and the provisions of unnecessary material*"[107]. In other words, materiality implies that the tribunal deems the document necessary in order to allow a complete consideration of whether a factual

[102] Waincymer, J., Procedure and Evidence in International Arbitration, p. 863.
[103] Khodykin, R. M., Mulcahy, C. *et al*., A Guide to the IBA Rules on the Taking of Evidence in International Arbitration. Oxford University Press, 2019, p. 69-70.
[104] Ibid, p. 60.
[105] Ibid, pp. 48-49.
[106] Ashford, P., Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 10.
[107] Waincymer, J., Procedure and Evidence in International Arbitration, p. 858.

allegation is true or not, or as defined in the UNCITRAL Draft Guidelines that the document shall likely to contribute to the clarification of the case[108].

Document production in the arbitral proceedings could be views as an additional battleground between the disputing parties. As a rule, the parties are expected to act in good faith and exchange requests in the so-called Redfern schedules, where, afterwards, the tribunal rules on their further requests and objections[109].

Given that the document production order is rendered against a party, there needs to be a proof that it is in the possession, custody or control over the document. The notion of control is of big significance especially taking into account that some crucial documents could be in the possession of third parties, such as sub-contractors, employees, insurers[110]. In other cases, the disputing parties would wish to inspect bank records which are held by non-parties, or electronic documents hosted on a server.

The problem which might arise in this issue is that the tribunal may draw adverse inferences if the third party denies to comply with the document production request. In turn, this leads to a suggestion that the less a party to the dispute has control over the third party, the less adverse inferences made by the arbitral tribunal are justifiable[111]. The realities suggest that theoretically, no impediments arise if the third party and the disputing party are in the same corporate group, or, due to the control of the latter over the former, it is entitled to gain access to the document requested[112]. In such cases, refusal to comply with the request where there is a justified objective possibility to compel the party under the control may fairly lead to adverse inferences. The situation, however, is less certain where relations are reversed and it is the disputing party which is a subsidiary or under another kind of control of another entity.

For instance, Art. 3.9 of the IBA Rules of Evidence treat this situation in the following way: if a party intends to obtain documents from parties who are not parties to the dispute and from whom this party cannot, on its own, to obtain such documents, the arbitral tribunal may set forth the time for the party to ask it to take legally available steps to receive the requested documents, or, upon the tribunal's permission, to do it itself.

[108] Ibid.
[109] Blanke, G., "Document Production in International Arbitration: From Civil and Common Law Dichotomy to Operational Synergies", pp. 423-424.
[110] Ibid.
[111] Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", pp. 298..
[112] Ibid.

Some observations should be made regarding submission of the request to produce electronic documents. Prima facie, they are treated equally as hard copy documents under the same principles of relevance, materiality to the outcome, confidentiality and privilege[113], and this proves the provisions of the Chartered Institute of Arbitrators has issued a Protocol for E-Disclosure in Arbitration, the ICDR Guidelines for Information Disclosure and Exchanges in International Arbitration Proceedings and the Sedona Principles. The IBA Rules of Evidence, in dealing with the request to produce, now provide for in Art. 3.3(a)(ii) the inclusion of search terms, files and other methods for identification of electronic documents[114]. The Rules also address the issue in which format e-documents should be provided. In particular, Art. 3.12 of the IBA Rules, they may be submitted "in the form most convenient or economical to the provide that is reasonably usable by the recipients, unless otherwise agreed, or the tribunal otherwise directs". The possible challenges connected with electronic storage may occur due to vast amounts of data available, which may lead to the increased time of the proceedings and efforts in evaluating the material[115].

Having considered the preconditions and requirements for submitting the request to produce, it is further necessary to establish how this request should be treated by the other party to whom it is addressed, in other words, the notion and scope of the duty of disclosure is to be considered.

To begin with, the duty of disclosure arises where one party requests from the other one to produce documents relevant for the consideration of the dispute. In the legal doctrine, it is defined as a mutual good faith duty relating to the presentation of the truth by means of producing evidence which the parties have in possession[116]. It is worth to note that a duty to co-operate in good faith in terms of presenting evidence should be considered separately from the claimant's and respondent's perspective. For instance, from the claimant's perspective, the duty to arbitrate in good faith extends to the presentation of evidence in such sense that a "*failure to provide relevant, albeit adverse evidence may be a breach of a duty to engage in arbitration in good faith*".[117] This means that it might seem misleading to show selective favourable documentary evidence. The respondent shall also abide by the duty to act in good

[113] Khodykin, R. M., Mulcahy, C. *et al*., A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, p. 66.
[114] Ibid.
[115] Waincymer, J., Procedure and Evidence in International Arbitration, p. 847.
[116] Ibid.
[117] Ibid.

faith and present not misleading picture but it shall be noted that it may merely seek to challenge the claimant's evidence and not make comprehensive factual submissions[118]. In other words, the respondent may simply provide contrary evidence in order to show that the claimant's case is not preponderant.

The principle of good faith cooperation is acknowledged by the IBA Rules of Evidence according to which *"each party shall act in good faith as to the taking of evidence"* while the Prague Rules lack the corresponding provision. Further, it is important to note that Art. 3 of the IBA Rules does not, however, encompass adverse information. According to Art. 3.4 of the IBA Rules of Evidence, a party to whom a request to produce is addressed shall produce the documents requested as to which it makes no objection, while limited objection rights are available as well. It should be marked that if the duty to act in good faith arises by virtue of the reference to the IBA Rules, it should be read and interpreted in the general context of other obligations set forth in the Rules. This contextual interpretation actually suggests that this duty shall not in and of itself require adverse documents to be presented because the IBA Rules' provisions only provide for a duty to present the documentary evidence on which a party intends to rely and then "allows for document production requests subject to specified criteria and exceptions", meaning that there is no an express duty to do so[119].

In the legal doctrine and international arbitration practice, there are still questions concerning the ambit of the duty of disclosure. Today, the tendency marked in both domestic and international arbitration is that it should be construed broad enough except those cases where the request to produce may be refused on the grounds such as confidentiality. In other words, there should be full access to all means of evidence regardless of whether it is under the control of the other party or third parties[120]. The core difference, however, is in the entitlement to the so-called "fishing expeditions" which generally takes place, while civil law jurisdictions favour the more general document production request where the requesting party does not have enough means at its disposal necessary for the identification of the documentary material in the possession of the opposing party[121].

Here, the approaches in legal regulation of adverse inferences also should be considered. A valid document production request is said to aim at eliciting adverse which might

[118] Ibid, P.831.
[119] Khodykin, R. M., Mulcahy, C. *et al.*, A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, pp. 83 – 85.
[120] Ibid,
[121] Ibid, pp. 48 – 49.

have been presented in the first instance[122]. Interestingly, there is no difference between the provisions on adverse inferences in both the IBA Rules and the Prague Rules. However, the cultural clashes, despite the similarity of the wording of the provisions in the Rules, do occur. In particular, civil law systems may find it inappropriate for the respondent to assist the claimant to make a case against it[123]. The rationale behind this is that before bringing the case to the attention of the arbitral tribunal, the claimant shall have the appropriate material. The respondent, thus, has no duty to assist the claimant to find out whether there is indeed a case[124]. The respondent might even suggest the claimant's duty to arbitrate in good faith requires to produce adverse documents in order the case be fairly and accurately assessed. This view is confronted with that adopted by lawyers coming from civil law jurisdictions where a judge is primarily concerned with finding the truth and, therefore, takes the leading role in directing the investigation and analysis of the case[125]. Here, if the adjudicator believes a document significant for the resolution of a dispute, the party cannot ignore his or her production request merely on the grounds that it does not suit this party's interests to have it presented. The inquisitorial approach indeed entitles the parties to seek documents from the other party, but this request is, as a rule, narrowly circumscribed and requires the requesting party to convince the tribunal that the documents sought are of the direct relevance to resolution of the dispute. At the other extreme, adversarial systems are always characterized as the ones favouring extensive and expansive discovery of documents[126].

One of the most contentious categories of documentary evidence is internal documents of the parties and their capability of being a subject of production orders by the tribunal[127]. Lawyers with common law background generally treat all documents appropriate for production requests unless they fall within exempting categories. Conversely, civilian lawyers find production of internal documents "*tantamount to improperly forcing a party to testify against its self interest*"[128]. If the documents are privileged, the disputing parties may overutilise this type of defence. Absent such privilege, the request for production of the internal

[122] Waincymer, J., Procedure and Evidence in International Arbitration, p. 834.
[123] Respondek, A., "How Civil Law Principles Could Help to Make International Arbitration Proceedings More time and Cost Effective", p. 34.
[124] Ibid.
[125] Ibid.
[126] P Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", p. 310.
[127] Blanke, G., "Document Production in International Arbitration: From Civil and Common Law Dichotomy to Operational Synergies", in O'Reilly, M. (*ed.*), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management,* Vol. 83 Issue 4. Chartered Institute of Arbitrators (CIArb); Sweet & Maxwell 2017, pp. 430-432.
[128] Ibid.

document is said to be “*a disincentive to fair and accurate recording of events in a commercial environment*”[129]. Importantly, this sort of documentary evidence is now regularly within document discovery processes under the IBA Rules of Evidence 2010 which broadened in general the category of documents including now internal ones, unless the Rules “*are expressly agreed to by the parties they cannot be determinative*”[130]. Pursuant to Art. 4 of the IBA Rules of Evidence, the party has no obligation to disclose documents upon which it does not intend to rely. Yet, the parties are required to exchange a list of documents beforehand, and this provision is generally complied with given that at the hearing production of documents, which have not been put in this list, is prohibited unless the tribunal consents[131].

Most legal scholars are of the opinion that the power of the tribunal to require a party to produce documents is implied in its general procedural powers and should be construed broadly[132]. For instance, Art. 26 (1) (b) of the UNCITRAL Model Law vests the tribunal with the power “to require a party to give information, documents, goods and property to an expert” which implies that the same tribunal’s power is to be construed in the meaning of the broad discretionary powers set forth in Art. 19 of the Model Law. Art. 3.14 of the IBA Rules of Evidence grant to the arbitral tribunal a possibility to handle document production in stages such as relating to jurisdiction, preliminary matters, liability or damages, and this opportunity may be included in an early procedural order or terms of reference. This provision is of big practical utility where the arbitration is conducted under tight timeframes.

The most problematic issue in exercising the document production powers of the tribunal is whether the tribunal may apply it, absent voluntary submission of the relevant material by the party[133]. This matter is of importance and will be considered from the following perspectives, namely: 1) the scope of the tribunal’s power to request documents shall not result in a fishing expedition which, in turn, entails, voluminous amounts of material and accompanying debates about exclusionary categories of confidentiality and the like[134], and 2) when and why the tribunal may have a broad discretion to reject a request for document production even when a limited number of material that might be of value is requested. When handling these issues, the tribunal is almost always encountered with the problem that if it forces one of the parties to open up its documentary evidence, this party may feel that the

[129] Waincymer, J., Procedure and Evidence in International Arbitration, p. 846.
[130] Ibid.
[131] Ibid.
[132] Born, Gary B., International Commercial Arbitration, p. 2322.
[133] Ibid, pp. 2344-2347.
[134] Ibid.

arbitrators are not disposed towards it. Ultimately, it may result in early lengthy and costly contests about validity of document production.

Under the IBA Rules of Evidence 2010, the documentary evidence is not automatically provided to the arbitral tribunal. The rationale behind this is that the parties are first given an opportunity to determine on their own what documents are worthy of submission for the tribunal to consider. This approach reduces both time and length of the arbitral proceedings because the tribunal is not tasked with determining which document is material out of the voluminous amounts of submitted materials what, in turn, allows to conduct the whole arbitral process smoothly by means of indicating at the very outset that "documents not disclosed cannot be relied on without its consent"[135]. It does not mean, however, that the tribunal is deprived of powers to call for documents it deems material. When this is the case, the tribunal should first give a party opportunity to object before making a relevant decision.

In particular, pursuant to Art. 3.5 of the IBA Rules, the party may object to some or all documents requested within the time prescribed by the tribunal, and the reasons for such objections may be as follows. First, the request does not meet the requirements set forth in Art. 3.3 of the Rules, namely relevance, materiality to the outcome of the case and others mentioned above. After the objection submitted to the tribunal, the latter may invite the parties to consult with each other in order to solve the objections raised. Here, the tribunal may make use of it by providing a management meeting with the counsels of the parties in order to agree on limits to document production requests. Usually, it is done in the form of drafting the Redfern Schedule, a document which comprises four columns in order to streamline the document production process[136]. In the second option, the objections may be raised on the grounds set out in Art. 9(2) of the IBA Rules, according to which the tribunal shall exclude from production any document <…> due to "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; grounds of commercial or technical, confidentiality; grounds for special political or institutional sensitivity, or due to considerations of procedural economy, proportionality, fairness or equality of the parties". The party who objects to the document production request should be aware of the timing, i.e. the later the objections are submitted, the more likely they will be rejected.

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135 Ibid.

136 Kaplan, N., "The Arbitrator and the Arbitration Procedure, Innovating In Arbitration: Options for Greater Efficiency", pp. 99 – 100.

Quite frequently it occurs that the party persistently refuses to comply with the document production order rendered by the arbitral tribunal. As noted above, the right to document production is expected to be exercised in good faith, and if it is of contractual nature or supported by similar express disclosure obligation, the exempting elements would not apply[137]. It should be noted that the respective duties as to the document disclosure may be set out in the underlying contract between the parties which turn the general procedural nature of such duties into substantive ones[138]. For instance, these cases may take place where a party to a joint-venture agreement is contractually entitled to accounting records which are to be audited by an expert of its choice. Also, licensing agreements as well as franchise agreements provide, as a rule, for full disclosure. It is very important to bear in mind that the aforementioned rights are substantive ones and, hence, shall not be mixed up with quite broad document production requests. Here, the role of arbitrators is of big accuracy and importance in order not to confuse between substantive and procedural entitlements. To be more precise, a substantive claim may allege an infringement of this very entitlement, and in this scenario, a party may request imposing an interim measure as to preservation as well as an interim award which provides for a declaration that the document production is to be undertaken[139].

However, absent voluntary disclosure, the arbitral tribunal may undertake certain measures. Powers conferred upon state courts, such as imposing fines, are not available to arbitrators, nor have they any means equivalent to the *astreinte* order used in civil law jurisdictions for each day of non-compliance with the document production order[140]. Nevertheless, costs orders are possible in arbitration and generally "*limited to the added cost to the other party of challenging the inadequacy of document production*"[141]. If one reads the wording of Art. 9.7 of the IBA Rules of Evidence 2010, it would notice that it is quite broad "*to allow for wider costs implications than simply in relation to the undesirable evidentiary behavior*"[142]. Probably more significant repercussion is that should the party fail to produce requested documents without any satisfactory explanation, the tribunal may infer adverse impact of the documents to the interests of such party[143].

[137] Born, Gary B., International Commercial Arbitration, pp. 2394 – 2395.
[138] Ibid.
[139] Ibid.
[140] Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", *Journal of International Arbitration*. Vol. 36 Issue 3. Kluwer Law International, 2019, pp. 295 – 314.
[141] Waincymer, J., Procedure and Evidence in International Arbitration, p.880.
[142] Ibid.
[143] Ashford, P., Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, p. 67.

However, what should the tribunal undertake of the party is not able to comply with the production request merely because it cannot find relevant document or it leads to the unreasonable burden for this party? In the first case, the tribunal shall be convinced that the latter were intentionally destroyed before drawing adverse inferences since in general, a party is expected to take reasonable steps or exercise the duty of best efforts to obtain documents from third parties over whom it has control[144]. In any case, if the tribunal concludes there were no valid grounds for destruction or loss of the documents, adverse inferences may seem appropriate. In the second case, it is generally accepted that the tribunal shall take into consideration such scenario. This means that document production request on its own implies that if compliance with the request imposes an unreasonable burden on the party against whom it is addressed, then the material evidence can be validly rejected. For instance, the request could be rejected if the documents are not material to the outcome of the case since there are other documents at the tribunal's disposal which are sufficient to prove the point[145]. Pursuant to Art. 3.12 (c) of the IBA Rules of Evidence 2010, a party is not obliged to produce multiple copies of documents which are essentially identical unless the tribunal decides otherwise. The tribunal may also consider the difficulty of obtaining material at a later stage in order to determine the amount of material to be submitted and reviewed by arbitrators and experts.

In conclusion, it is undeniable that common law evidentiary practices have substantially influenced international commercial arbitration, and simultaneously, both civil law and common law lawyers "attribute the ineffectiveness of the evidentiary process in arbitration to the spread of discovery "*à l'américaine*"[146]. Further, there is significant probative value attached to documentary evidence in both legal traditions. First, the differences concerning fact-finding process in common law and civil law legal traditions are deeply rooted in their history of development. In particular, the latter resulted in a significant resistance in jurisdictions with the inquisitorial system to requiring a party to assist its opponent in gathering information which ultimately may be used against the producing party in court or arbitration[147]. Secondly, the powers of a judge in common law system is not of lesser importance, they are just differently oriented, while judges in inquisitorial systems generally act as neutral observes and assessors of the facts presented to them.

144 Ibid.
145 Khodykin, R. M., Mulcahy, C. *et al*., A Guide to the IBA Rules on the Taking of Evidence in International Arbitration, pp. 69-71.
146 Ahdab J. E., Bouchenaki. A., "Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?", p. 68.
147 Ibid, p. 74.

III. WITNESS TESTIMONY AND EXPERT EVIDENCE IN THE ARBITRAL PROCEEDINGS CONDUCTED UNDER THE IBA RULES OF EVIDENCE AND THE PRAGUE RULES

3.1.Regulation of Witness Testimony under the IBA Rules and the Prague Rules

Notwithstanding that the general preference is given to documentary evidence, witness testimony is often relied on in international commercial arbitration as a source of presenting evidence[148]. The modern practice in taking witness testimony is based on the following assumptions. First, a disputing party is entitled to know the witness's identity and the subject-matter of his or her testimony-in-chief before the evidentiary hearing. Second, the witness who has given a testimony should be generally available to respond to the questions of both the tribunal and the opposing party based on that testimony. Third, the arbitral tribunal is conferred on the powers to consider and weigh the witness evidence taking into account all the restrictions, including those who may offer testimony as a witness[149].

Yet, treatment of witnesses significantly differs in inquisitorial and adversarial approaches. As mentioned above, the former gives preference to the documentary evidence, especially if it originates from the time before the dispute arose, over an oral evidence. The reason is that credibility of a witness may be questioned on the grounds of lack of objectivity. Lawyers with a common law background put a big emphasis on the witness testimony and, therefore, devote considerable time in order to prepare a witness not only to testify, but also for cross-examination[150]. In civil law countries, on the contrary, it is an adjudicator who, on its own motion, will decide which witness shall be heard and will be in charge of his or her interrogation[151]. Further, the witness's memory may also be deceptive and, therefore, lead to confusing testimony. It is worth to note that the same concerns are discussed by common law lawyers who, in order to overcome these risks, tend to rely on and use the tactics of cross-examination[152].

As mentioned in the above, the witness testimony remains one of the important sources of evidence which deserves a special consideration. It is interesting to note in international

[148] D. O'malley, N., Rules of Evidence in International Commercial Arbitration, p. 105.
[149] Ibid.
[150] Paulsson, J., "Overview of Methods of Presenting Evidence in Different Legal Systems", pp. 119 – 122.
[151] Respondek, A., "How Civil Law Principles Could Help to Make International Arbitration Proceedings More time and Cost Effective", p. 35.
[152] Harbst, R Harbst, R., A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration, p. 10.

commercial arbitration, regulation of witness testimony is significantly based on common law assumptions which, however, have been critically discussed in the doctrine. As was pointed out by Langbein, "*the witness always detects what the lawyer hopes to prove at the trial, and if the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly*"[153]. In this context, cross-examination is said to be an ineffective tool to eliminate the repercussion of skillful coaching. Moreover, it may also be treated as a source of distortion which is employed against truthful testimony. Bearing the aforementioned general discrepancies in mind, there appears no uncertainties why there are different provision of the issue in question in the Prague Rules and the IBA Rules of Evidence.

To begin with and as will be shown below, the IBA Rules of Evidence place a big focus on written witness statements and their content, while the Prague Rules first consider the issue whether a witness is relevant for the arbitral proceedings[154]. When drafting the Prague Rules, the Working group considered two option on this matter. The first one was that the tribunal would be empowered to refuse the witness proposed by the parties to be question at the evidentiary hearing. The second option was that the tribunal was expected to express its preliminary opinion only[155]. Nevertheless, none of these options were inserted in the final draft, and the tribunal was instead vested with the powers to constrain the number of witnesses, provided there was an abuse of the process on the side of the disputing parties. Further, contrary to the IBA Rules of Evidence, the Prague Rules shortly regulate the written witness statements which could be presented by the parties upon the permission of the tribunal, even without calling the witness to the hearing in person. This can hardly be said to be the strong provision of the Prague Rules since the opposing party actually is deprived of the opportunity to confront the witness directly. Therefore, this provision may destroy the fairness of the dispute resolution or question the quality of the decision-making process by the tribunal on the one hand, and this could also speed up the arbitral proceedings, on the other hand.

It can be undoubtedly said that where the Prague Rules do diverge from the common law approach is the treatment of witness testimony. This set of rules provides for a more direct role of the tribunal regarding witnesses and witness statement. In Art. 5.1, the Prague Rules provide that at the time period of filing a statement of claim and that of defence, or at any later stage of the arbitral proceedings, each party shall identify "*factual witness(es), on which the*

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153 Ibid.
154 Rombach, A., Shalbanava, H., "The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?", p. 57.
155 Ibid.

party intends to rely in support of its position, as well as the factual circumstances on which the respective factual witness(es) intend(s) to testify". Further, it can be asserted that the Prague Rules place the arbitral tribunal in the driver's seat when establishing the merits of the case via fact witnesses and experts. It is interesting to note that where the party abuses its right for calling witnesses, the tribunal is entitled to limits their number named by such party to testify at the evidentiary hearings. The Prague Rules also provide the tribunal with broad powers, laid down in Art. 5.2, to request the parties "*to produce a witness for the hearing and calling a witness for examination at the hearing*". Here, the relevance of the testimony of the witness called is established by the arbitral tribunal. If it finds that the witness of fact should not be called, the party is still allowed to submit the witness's statement and the other party may ask for the cross-examination of that witness. However, once the tribunal has rendered that the evidence of the witness is not relevant, that could be regarded a discouragement for the party against presenting the witness's testimony[156].

At the evidentiary hearing, the arbitrators may control the examination of the witnesses as well as decline question which the tribunal finds immaterial to the outcome of the case. Here, it can be concluded that the Prague Rules hand the control of witness evidence over to the tribunal out of the hands of the disputing parties, which, in turn, may lead to additional time and costs if the parties still seek to convince the tribunal to hear the witness.

This statement finds its manifestation not only in Art. 5.2 of the Prague Rules, but also in other provisions. In particular, "the tribunal is empowered to decide that a certain witness shall not be orally examined if it considers the witness's testimony to be irrelevant, immaterial, unreasonably burdensome or duplicative, even where a written statement has been submitted for this witness (Art. 5.3, 5.6), and – in exceptional cases – even where a party has insisted on calling the witness for examination (Art. 5.7). What is more important, the decision of the tribunal not to call a witness, despite he or she submitted the witness statement, does not constrain the authority of arbitrators to give as much evidential value to that statement as they deem appropriate (Art. 5.8). This provision, however, should be used in a very cautious way. The reason is that without giving a party an opportunity to test the credibility of the witness on the cross-examination procedure, this party may challenge the arbitral award due to violation of due process, especially in cases where the arbitral tribunal denied the request for examination of a witness by one of the disputing parties[157]. Thus, to avoid possible negative repercussions

[156] Ibid.
[157] Ibid.

of challenging the final award, the tribunal should allow for a witness's examination, if there is even a little chance that the testimony of such witness may be relevant for the outcome of the case.

Conversely, the common law approach adheres to the view that these are the parties who decide on which witnesses they intend to present and cross-examine. The role of an arbitrator is to ensure the compliance with the timeframe for cross-examination at the evidentiary hearings. The IBA Rules abide by this assumption as well[158]. In comparison with the Prague Rules, the IBA Rule contain a much more extensive regulation on witness of fact in Art. 4. In particular, they include detailed provisions on the content of written witness statements, while the Prague Rules consider the latter as not essential for a fact witness's testimony. The Prague Rules, on the contrary, clearly set forth in Art. 5.1 that the disputing parties should identify, inter alia, the witnesses already in their statements of claim or defence, as well as the relevance and materiality of the witness testimony to the outcome of the case.

In contrast to the Prague Rules, the IBA Rules' underlying theme is that it is the parties who determine which fact witnesses appear at the hearing. Under Art. 8.3 of the IBA Rules, counsel directs examination of witness, and the parties' position in choosing and presenting fact witnesses does not imply that the arbitral tribunal will permit to choose whatever witnesses. Rather, it may exclude, subject to certain conditions, oral testimony in Art. 8.2 and Art.9.2 on the grounds of lack of relevance and materiality. This leads to the conclusion that the arbitral tribunal operating either under the Prague Rules or the IBA Rules of Evidence has the similar power to exclude unsuitable testimony of the witness. The difference lies, however, in the way these powers are conferred. As mentioned in the above, in the Prague Rules the power of the tribunal to control witness testimony is the default rule, while in the IBA Rules of Evidence this "default setting" relates to the control of the parties over processing of fact witness testimony, while the tribunal has a subsidiary role only[159].

Despite the IBA Rules largely follow the common law principles, there are provisions which, to some extent, compromise adversarial and inquisitorial approaches. In particular, under Art. 5 verbal testimony is generally presented in the form of a written deposition prior to the evidentiary hearing. The party's right to cross-examine may be exercised only on issues in respect of which the advance notice, by means of an oral evidence notice, is given. As to the

[158] Ibid.
[159] Ibid. Stampa, G., "The Prague rules", pp. 232.

witness examination, it is the tribunal which questions first, and thereafter the witness is examined, cross-examined and re-examined by the disputing parties in the common law-style. Furthermore, according to Art. 5.12 of the IBA Rules, a witness is called without the prior lodgement of his or her witness statement if it can be proved that the witness "*has refused to give one and cannot be compelled to do so but is, apparently, prepared to give oral testimony at the hearing*"[160].

Further, the discrepancies between adversarial and inquisitorial approaches are also displayed in the regulation of an issue concerning the ability to testify as a witness. The reason for this different treatment lies in the notions of trustworthiness if a witness. As noted in the doctrine, a witness may lack reliability since it may pursue personal interests in the outcome of the case[161]. The same is held true where the witness is the disputing party itself who attempts to support only own allegations. Noteworthy, that common law practitioners take into account this inherent conflict which is overcome through cross-examination in order to "*unmask improper attempts to further the case*" [162].

Pursuant to Art. 4.2 of the IBA Rules of Evidence, any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative. As has been mentioned above, the tribunal is quite limited in its authority to conduct its own inquiries and, hence, should rely on the both gathering and presenting evidence by the disputing parties. The IBA Rules make explicit the following rules which are called, by some legal scholars, hallmarks of the adversarial approach. The first rule is that under Art. 5(9) any witness appearing before the tribunal is subject to cross-examination. The second rule, set forth in Art. 5(8), allow a lawyer to interview even potential witnesses. Further, according to Art. 4.3, *it shall not be 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*.

In this regard, the regulation of witness testimony adopted in the adversarial law seems to be more pragmatic since every person may testify as a witness[163]. Therefore, it appears

[160] Shenton, D. W., "International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration", in Sanders, P. (*ed.*), *Yearbook Commercial Arbitration*, Vol. 10. Kluwer Law International, 1985, p.151.
[161] Harbst, R., A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration, p. 68.
[162] Ibid, p. 9.
[163] Ibid.

evident that the practice of international commercial arbitration follows this approach which, inter alia, adheres to the tendency not to disqualify persons at the outset as potential witnesses.

What shall the arbitral tribunal undertake where the witness is called and fails to appear at the evidentiary hearing? Both set of rules similarly regulate the issue where the witness whose appearance has been requested does not appear for testimony without a valid reason. In this regard, Art. 4.7 of the IBA Rules of Evidence clearly states that "*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*". The Prague Rules regulate similarly this matter in the article devoted to the general compliance with the tribunal's requests. Pursuant to Art. 10, "*if a party does not comply with the arbitral tribunal's order(s) or instruction(s), without justifiable grounds, the arbitral tribunal may draw, where it considers appropriate, an adverse inference with regard to such party's respective case or issue*". However, under Art. 5.8 of the Prague Rules, "*any decision not to call a witness who has submitted a witness statement does not limit the arbitral tribunal's authority to give as much evidential value to the written witness statement as it deems appropriate"*.

The tribunal may also exercise such option as to seek the testimony of a non-party-appointed witness. For instance, the IBA Rules of Evidence set forth that the party may be ordered to exercise best efforts in order to guarantee the appearance of any person. That party, in turn, may also request the tribunal to undertake legally available steps necessary to obtain the testimony of a person who possesses relevant and material information about the case. Also, Art. 4.8 stipulates that "*if the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement*".

Quite problematic area in taking witnesses evidence is that of calling them to attend the evidentiary hearings[164]. As was mentioned in the above, the tribunal is not conferred on the powers to compel the attendance of the witnesses, however, this auxiliary role could be made by the state court upon the party's application to provide an assistance. This procedure is usually referred to as *subpoena ad testificandum*[165]. Yet, a number of institutional rules in deference to the inquisitorial approach, grant the powers to all a witness only to the arbitral tribunal. Some other rules provide additionally that a party may also request the arbitrators to

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[164] Ibid.
[165] Steyn, J., "National Report for England", in Sanders, P. (*ed.*), *Yearbook Commercial Arbitration*, Vol. 8. Kluwer Law International, 1983. pp. 3 – 33.

call witnesses for them to testify at the hearing. Among such rules are the ICDR, SIAC Rules, LCIA Rules and the IBA Rules of Evidence. In this context, the rules follow the adversarial approach. As to the Prague Rules, they also follow the assumption that the arbitrators cannot coerce, but grant them an opportunity, under Art. 5.5, to invite, on their own motion, a party to submit the witness's statement before the evidentiary hearing.

In conclusion, in regulation of witness testimony the Prague Rules envisage for the tribunal a more proactive role where it is entitled to decide on the issues generally left within the parties' discretion under the IBA Rules of Evidence. At the same time, the latter deal in detail with the written witness statements where the burden of the presentation of witnesses is placed on the disputing parties.

3.2.Taking of Expert Evidence under the IBA Rules and the Prague Rules

Despite the tribunal generally seeks to reconcile both adversarial and inquisitorial approaches in the arbitral proceedings, the issue regarding expert evidence still poses certain difficulties. Indeed, the role of the expert in arbitration has generated lots of debates and reviews for a number of reasons concerned with their credibility and neutrality. As pointed out by some legal scholars, experts have become suspected and treated as "advocates-in-disguise" for the party who appointed them, which may even result in a situation where the tribunal meets their reports with skepticism[166]. At the same time, the role of an expert in the arbitral proceedings shall not be undermined, especially where there is a necessity for clarification of a specific character.

In general, there are three types of expertise that may be employed during the proceedings, namely: technical, legal, and expertise which is related to quantum, delay and disruption. The former is taken where the dispute requires special knowledge in the subject on which the arbitrators must be educated. Legal experts may clarify issues on the applicable domestic law with which the arbitral tribunal is not familiar. Experts dealing with delay and disruption, as a rule, assist in evaluating claims for the respective issues, especially in construction-related disputes, while quantum expertise is undertaken where there is a need for

[166] Haugeneder, F., "The Arbitration Agreement and Arbitrability, Party-Appointed and Tribunal-Appointed Experts in International Arbitration", in Klausegger Ch., Klein, P., (*eds.*), *Austrian Yearbook on International Arbitration*, Vol. 2020. Manz'sche Verlags- und Universitätsbuchhandlung, 2020, pp. 177; Rosen, H., "The Arbitration Agreement and Arbitrability, Making Effective Use of Experts" in Klausegger Ch., Klein, P., (*eds*), *Austrian Yearbook on International Arbitration*, Vol. 2020. Manz'sche Verlags- und Universitätsbuchhandlung, 2020, p. 137.

assisting in determining the quantum of damages which are claimed by the disputing parties in a range of disputes[167].

In the doctrine, it is said that the Great Division between adversarial and inquisitorial systems concerning the regulation of the expert evidence is connected with the treatment and status of party-appointed experts, also referred to as expert witnesses, and tribunal-appointed experts. The rationale behind this division is to balance the interests of the disputing parties and ensure neutrality of the dispute resolution process[168]. In the common law tradition, the presence and appointment of party-appointed experts is commonplace where they are treated in the same way as witnesses, including the same procedures such as examination-in-chief, cross-examination and re-examination[169]. It is so because arbitrators in common law jurisdictions follow the general evidentiary maxima according to which each of the disputing parties puts forward evidence which is favourable to its position[170], including party-appointed experts. The impediment in having two types of experts under adversarial approach is that it may lead to the battle of experts on the grounds of doubtful neutrality, where the victory may go not necessarily to the one telling the truth but to the one who was more convincing. Given that adversarial system gives preference to party-appointed experts over tribunal-appointed experts, legal scholars, especially those coming from civil law background, criticize this approach. In particular, it is argued that such experts are generally exposed to the evidence where they are expected to present such a reasoning which supports the position of the party appointing them. Further, it is possible that the party-appointed experts are nominated only because of their views which are most likely, again, to support the party who appointed them, the process known as "*expert shopping*"[171].

In contrast, in civil law jurisdictions an expert is not treated equally as a witness indicated by the parties, rather, as a person appointed by the neutral arbitrator or the tribunal itself. This approach can be explained by the fact that the courts here decide at their own discretion what questions are to be answered, even if proposed by the disputing parties, and examines the expert without cross-examining him or her[172]. In this scenario, the expert appears to be impartial and neutral which removes any sort of bias inherent in the adversarial system.

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[167] Rosen, H., "The Arbitration Agreement and Arbitrability, Making Effective Use of Experts", p. 177.
[168] Ibid.
[169] Nairn, K., "National Report for England and Wales (2019)", in Bosman, L. (*ed*), *International Handbook on Commercial Arbitration*. Supplement No. 107. ICCA & Kluwer Law International, 2019, p. 53.
[170] Ibid.
[171] Rosen, H., "The Arbitration Agreement and Arbitrability, Making Effective Use of Experts", p. 138-139.
[172] Ibid

It is interesting to note that in some civil law countries, the court attributes less weight to the evidence submitted by party-appointed experts, either by means of conferring the status of "conclusive" evidence to the court-appointed expert, as in France, or by amounting the testimony of such expert to mere assertion, as in Germany[173].

Nevertheless, the appointed expert may be also be perfectly neutral, as well as perfectly wrong[174]. Therefore, in both adversarial and inquisitorial systems the tribunal might be encountered with a problem that in the case of a party-appointed expert, the evidence of fact may be biased, where the appointment of experts by the tribunal may be perceived as unduly usurpation of the role of the arbitral tribunal, especially taking into account the fact that arbitrators may not be experiences in the selection of experts appropriate for a given issue[175].

It is worth to note that on the practical level, it has often been difficult to opt for one of the abovementioned approaches for general use. For instance, the UNCITRAL Model Law, with amendments adopted in 2006, follows the civil law approach, where Art. 26 sets forth that "*an expert is appointed by the arbitral tribunal, even with the proviso "unless otherwise agreed by the parties*". At the same time, in para. 69 of the UNICTRAL Notes on Organizing Arbitral Proceedings 1996, it is pointed that "*A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert*". The similar provisions are set forth in Art. 20 of the ICC Rules of Arbitration, while other institutional rules provide for the opportunity to appoint either or both party-appointed and tribunal-appointed experts, as, for instance, Art. 20-21 of the LCIA Rules, Art. 25 of the Swiss Chamber of Commerce, Art. 22 and 23 of the Singapore International Arbitration Centre (SIAC). The latest provision of the UNCITRAL Rules is that party-appointed experts, as well as tribunal-appointed experts may both participate in the arbitral proceedings, however, in order to enhance credibility, the latter will be subject to a strict screening process[176].

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173 Ludington, C., Newhall, H., "The Arbitrator and the Arbitration Procedure, Experts: Early, Tailored and Effective", pp. 145-156.
174 Berti, de G., "The Arbitrator and the Arbitration Procedure – Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?" in Pitkowitz, N., Petsche, A. (*eds.*), *Austrian Yearbook on International Arbitration*, Vol. 2011. Manz'sche Verlags- und Universitätsbuchhandlung, 2011, p. 55.
175 Ibid
176 Berti, de G, "The Arbitrator and the Arbitration Procedure – Experts and Expert Witnesses in International Arbitration: Adviser, Advocate or Adjudicator?", p. 56.

The above-considered roots of regulation of expert evidence in adversarial and inquisitorial systems explain the differences in assumptions on expert evidence between the IBA Rules of Evidence and the Prague Rules, based on common law and civil law legal traditions respectively. Nevertheless, the practice in international commercial arbitration shows that the arbitral tribunals generally follow the common law approach of party-appointed experts, although they often have broad powers to appoint their own experts as well, as set forth in Art. 6 of the IBA Rules or Art. 29 of the UNCITRAL Model Law[177].

The use of tribunal-appointed experts takes place quite rarely in practice[178], nevertheless, the Prague Rules moved it to the default provision. In particular, should specialist knowledge be necessary, the arbitral tribunal will appoint an independent expert. Furthermore, it is a tribunal-appointed experts who sets the agenda for any discussion of expert issues. At the same time, the disputing parties are not precluded from appointing their own experts, as set forth in Art. 6.5 of the Prague Rules. Thus, as follows from Art. 6, the Prague Rules envisage that the tribunal-appointed expert is a primary source for required expert evidence. Whenever a tribunal deems expert evidence necessary for the decision of the dispute, the Prague Rules encourage the appointment of a tribunal's expert who is considered more neutral in comparison to an expert appointed by the party. Pursuant to Art. 6.2 of the Rules, of the tribunal appoints an expert, it should seek suggestions from the parties as to the candidacy of an expert. Further:

"*the Arbitral Tribunal may establish the requirements for potential experts, such as qualification, availability, costs, etc., and communicate them to the Parties. The Arbitral Tribunal shall not be bound by the candidates proposed by the Parties and may: a) appoint a candidate proposed by any one of the Parties, or identified by the Arbitral Tribunal itself; b)compose a joint expert commission from the candidates proposed by the Parties; or c)seek a proposal for a suitable expert from a neutral organization, such as a chamber of commerce or other professional association*".

It is worth to mention the provisions of Art. 6.3 of the Prague Rules, according to which the tribunal may draw an adverse inference as to the party's position if it does not pay "*its share of the advance of expert costs or does not provide the expert with access to the subject matter of the expert examination or with requested documents or information*". Therefore, scholars point out that this provision favours the approach of appointing one tribunal expert only which could reduce significant cost[179]. Nevertheless, it is highly questioned whether the "single-

[177] Rosen, H., "The Arbitration Agreement and Arbitrability, Making Effective Use of Experts", p. 139.
[178] Haugeneder, F., "The Arbitration Agreement and Arbitrability, Party-Appointed and Tribunal-Appointed Experts in International Arbitration", pp.
[179] Henriques, D. G., "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?", pp. 358 – 363.

expert situation" envisaged by the Prague Rules will turn into reality. The reason for such opinion is that if a party disagrees with the report of the tribunal-appointed expert, it will seek to submit the report of its own expert as a rebuttal. Given that under Art. 6 of the Prague Rules the tribunal is not entitled to exclude an expert report submitted by the party, this may turn into lengthy proceedings against which this set of rules is struggling[180].

The IBA Rules of Evidence contain a much more detailed regulation on expert evidence and its treatment of experts is in contrast with the Prague Rules since both tribunal-appointed and party-appointed experts are given equal treatment, as set forth in articles 5 and 6 of the Rules. Yet, in practice, under the IBA approach, the proceedings are generally only attended by party-appointed experts who often provide the tribunal with conflicting reports[181]. The IBA Rules provide that an expert witnesses shall state his or her experience and qualifications, set out the facts on which the expert report is based, and describe the method, evidence and information relied upon and (in the past) to affirm the "truth" of the expert report, as set out in Art. 6.2 of the IBA Rules. The IBA Rules allow a Tribunal to order a meeting of experts for the purpose of reaching agreement, where possible, and document areas of agreement and disagreement. The IBA Rules may be seen as an attempt to achieve the benefits of independence promised by the civil law tradition, but in the context of the adversarial model of party-appointed experts followed in the common law tradition. Art. 5(2) of the IBA Rules requires party-appointed experts to address certain topics in written expert reports. Two of these requirements are applicable to an expert's declaration and include quite important obligations. First, the expert is required to submit a statement of independence from the parties, their counsel as well as from the tribunal. Additionally, the IBA Rules require the expert to affirm the genuine belief in the opinion the expert expressed in his or her report. These assertions are an important step forward in developing a code of conduct for party-appointed experts but are not without criticism. One of the points for criticism is that the IBA Rules do not regulate the expert's duty to disclose adverse information as well to assess whether assumptions provided by counsel are reasonable[182].

[180] Rombach, A., Shalbanava, H., "The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?", pp.54 – 55.
[181] Haugeneder, F., "The Arbitration Agreement and Arbitrability, Party-Appointed and Tribunal-Appointed Experts in International Arbitration", p. 179.
[182] Rosen, H., "The Arbitration Agreement and Arbitrability, Making Effective Use of Experts", p.149.

Some legal scholars point out that in many cases the appointment of a single expert could indeed result in cost savings[183]. Nevertheless, given that there is still a possibility to invite party-appointed experts, there may be no any significant advantage of the Prague Rules over the IBA Rules, especially where contrary expert opinions could be validly held[184]. At the same time, party-appointed experts are sometimes considered a not reliable source of evidence due to the fact that they are hired and paid by the party who pursues its own interest to submit an expert report favouring its position on the case. This results in a situation where both parties appoint their own experts and the tribunal shall decide whose report could be trusted. In this regard, the civil law approach may seem more effective since the expertise is considered credible when it is a neutral one. The sole reliance on tribunal appointed experts is, however, not without its downsides. Critiques argue that tribunal appointed experts gain too much influence on the decision since their findings are almost taken as dispositive[185].

In conclusion, the taking of evidence from expert witnesses is an area fraught with difficulties. In cases where additional special knowledge is required, the disputing parties would wish to appoint their own experts and submit their report as evidence supporting their allegations, regardless of whether the tribunal purports to be aided by a neutral report of its own experts. This takes places irrespective of the adversarial or inquisitorial is followed. As pointed out by Dr. Wetter, "the tribunal seeking to reach "a wise decision" may be required to use his authority to inject inquisitorial elements into a basically adversarially organized procedure, or *vice versa*…"[186]. In this context, the tribunal's right to appoint a neutral expert should not be construed as a refusal from the common law traditions as long as there is an opportunity to challenge the findings of such experts, by means of submissions of party-produced expert testimony[187].

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183 Henriques, D. G., "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?", pp. 358 – 359.
184 Stampa, G., "The Prague rules", pp. 237 – 240.
185 Ibid.
186 See in Paulsson, J., "Overview of Methods of Presenting Evidence in Different Legal Systems", p.121.
187 Jones, Douglas S., "Party Appointed Experts in International Arbitration—Asset or Liability?", in Brekoulakis, S. (*ed.*), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 86 Issue 1, Chartered Institute of Arbitrators (CIArb); Sweet & Maxwell, 2020 , available at: http://www.kluwerarbitration.com/document/kli-ka-amdm-86-01-002-n?q=jones%20AND%20party-appointed%20expert (accessed 8 May 2020), pp. 17 – 20.

CONCLUSION

Rigid distinctions between adversarial and inquisitorial approaches are hardly said to have been imposed on international commercial arbitration since the modern practice of taking of evidence comprises elements of both common law and civil law legal traditions[188]. Yet, the most frequently applied rules to fill in the gaps on evidentiary matters, omitted by majority of institutional rules, implicitly follow common law approach. This, in turn, results in the discussions on whether adversarial approach with the creeping Americanisation of international arbitration prevails. Given the wide application of the IBA Rules on the Taking the Evidence, the author is of the opinion that there is still a challenge for practitioners to completely harmonise two approaches so that the parties will not be deprived of the opportunity to use the advantages suggested by the inquisitorial approach[189].

In this regard, it is aptly argued in the doctrine that the meaning "international" in arbitration should show, how the international paradigm *can* look like taking into account peculiarities of common law and civil law principles. Therefore, it may not be right to allege superiority of the adversarial approach over inquisitorial one or *vice versa*. Rather, one should think outside the box of cultural distinctions, and such thinking should be pragmatic. This means that the procedure in international commercial arbitration should be construed through the interaction between the arbitral tribunal and the parties, who may come from different legal background, in each particular case, inspired by rules enshrined in the best practice standards, such as the IBA Rules of Evidence and the Prague Rules[190]. In this context, the main distinctive feature which gives rise to considering other differences between common law and civil law, in general, and the IBA Rules and the Prague Rules, in particular, is the allocation of the powers and duties to investigate the merits of the case at hand, and who, the tribunal or the parties themselves, could deal with these matters in a more effective manner.

Having compared the soft law instruments on taking evidence in international commercial arbitration, the following conclusions can be made. First of all, the adoption of the Prague Rules could be hardly regarded as a panacea to the problems in the evidentiary process in the modern arbitration. The reason is that the Rules contain the same benefits and shortcomings of the IBA Rules of Evidence. Consequently, the Prague Rules' quality and

188 Lew, Julian D. M., Mistelis, Loukas A., Kröll, S., Comparative International Commercial Arbitration, p. 556.
189 Respondek, A., "How Civil Law Principles Could Help to Make International Arbitration Proceedings More time and Cost Effective", p. 34.
190 Berger, Klaus P., "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?", pp. 304 – 306.

potentials for wider successful application are to be evaluated within this framework. At the same time, it would be a mistake to consider the civil law product as a means to displace the IBA Rules, given that this was never intended on the part of the Working Group. Second, despite the Prague Rules introduced the state-of-the-art techniques to increase efficiency in the conduct of arbitral proceedings, still the Rules and the IBA Rules of Evidence remain the soft law instruments which are not binding upon the parties, unless otherwise agreed by them.

Of course, there are similarities between both sets of soft law instruments. For instance, like the Prague Rules, the IBA Rules also contain the provisions where the tribunal is encouraged to take a proactive role in the issues concerning calling on witnesses, excluding witness testimony, drawing adverse inferences in certain circumstances, limits questions posed to witness at the evidentiary hearings. The Rules also have points of harmonization in terms of document production. Pursuant to Art. 4 of the Prague Rules, the tribunal deals with it in a liberal way and may deny requests of the parties if the latter seek disclosure of "any and all" category of documents, which is very similar to the regulation provided in Art. 3 of the IBA Rules. Nevertheless, despite this similarity and the uniform application of the "relevance and materiality" test with regard to the requested documents, the scope of document production still remains the point for divergent opinions in arbitral practice and between the rules considered in this thesis[191].

First, the Prague Rules inserted unique provisions on the proactive role of the tribunal which make them distinct from the IBA Rules of Evidence. While the latter address the taking of the evidence as a part of the arbitration proceedings and mention the power of arbitrators *en passant*, the Prague Rules treat the proactive tribunal as the leitmotif of the rules in general. This, in turn, means that when the parties agree on the application of the Prague Rules, they should be aware that they make the decision in favour of the inquisitorial approach which has the following characteristics: refusal from extensive document production, long hearings with excessive examination and cross-examination of witnesses and experts. Conversely, if these novelties may contradict to the expectations of the users of arbitration, it would be reasonable to opt for the IBA Rules which support the adversarial concepts in international commercial arbitration and lead to increasing costs and prolongations of the arbitral proceedings. While the tribunal acting under the IBA Rules is generally fearful of hypothetical challenges to an award on the grounds of its proactive role, under the Prague Rules arbitrators, on the contrary, are

[191] Ahdab J. E., Bouchenaki. A., "Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?", pp. 71-75.

encourages to overcome this due process paranoia, and to conduct an efficient case management.

Second, the Prague Rules set forth to some extent revolutionary rules on case management and the taking of evidence. This, without any doubt, contribute to the legal diversity pursued by the Prague Rules, and is a significant step against the monopoly of the IBA Rules. As was discussed in the thesis, the IBA Rules may serve as a means "to bridge" both adversarial and inquisitorial approaches, however, in the cases where the disputing parties are at the same bank and come from civil law jurisdictions, the decision on opting for the IBA Rules may seem redundant, unless otherwise agreed. Further, the Prague Rules respond well to the efforts undertaken by arbitral institutions to ensure efficiency in small-value arbitrations. For instance, the 2017 Arbitration Rules of International Chamber of Commerce introduced a form for expeditious arbitral proceedings provided the amount of dispute is two million USD or less. This "fast-track" provision streamlines the arbitration by means of granting the tribunal the power to resolve the dispute on a document-only basis, excluding the procedure of document production and limiting the scope of both parties' written submissions and witness evidence statement. All of these measures are similar to the rules on the case management which is addressed in the Prague Rules in a very detailed manner. In this regard, by applying the Prague Rules and their detailed articles on fact-finding procedure, witness and expert evidence, facilitation of the dispute resolution, the arbitral tribunal will be undoubtedly concentrated on an efficient case management avoiding extra costs, while this may not apply to the case governed by the IBA Rules of Evidence.

Overall, the aim pursued by the drafters of the Prague Rules to enhance a proactive role of the tribunal which should contribute to efficiency in the conduct of arbitral proceedings is very welcomed in the legal society. Moreover, the measures provided by the Rules are suitable instruments to attain this goal. Nevertheless, and as correctly pointed out in the doctrine, "*a rulebook is always just as good as the individuals who use it*"[192]. This means that the successful application of the Prague Rules will substantially depend on the expertise and knowledge of the arbitrators who will apply them to the proceedings. This may sound paradoxically, but the primary rivals of the arbitral tribunal in attaining the desired efficiency are the parties since what they want much more than cost and time savings is to ultimately win the case.

[192] Rombach, A., Shalbanava, H., "The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?", p. 60.

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ABSTRACT

For decades now, international commercial arbitration has been a popular method for the resolution of complex cross - border disputes due to its flexibility and the prevailing principle of the parties' autonomy. Currently, there are several concerns in the conduct of the arbitral proceedings, namely significant costs and length of the arbitral proceedings and the taking of evidence in particular, which do not enable the users of arbitration to completely benefit from its advantages. Therefore, the main focus of this master thesis will be placed on the current problems of the evidentiary issues in international commercial arbitration which predominantly follow the common law approach.

There are two conflicting legal cultures in the conduct of arbitral proceedings, namely common law and the civil law which follow the adversarial and inquisitorial approaches respectively. The former is primarily based on the autonomy of the parties, while the latter confines more investigative powers on the arbitrators, leaving to the them the authority to control virtually every aspect of the arbitral proceedings. When discussing evidentiary issues in arbitration, it is to be noted that the adversarial approach prevails due to quite broad application of the IBA Rules on the Taking of Evidence, as amended in 2010. Once recognized as one of the primary soft law tool in international arbitration, the proceedings conducted under the IBA Rules have become more complex, lengthy and costly. Therefore, many practitioners coming from continental Europe argued that the monopoly of the IBA Rules does not allow to overcome inefficiency in the arbitration proceedings generated by the common law techniques, such extensive document production, examination and cross-examination of witnesses.

In response to the aforementioned concerns, the new set of rules based on the inquisitorial approach was adopted on 14.12.2018 in Prague - the Rules on the Efficient Conduct of Proceedings in International Arbitration or, the Prague Rules. As announced by the Working Group, the Prague Rules is an alternative set of rules on the taking of evidence, but not a rival, to the IBA Rules. The leitmotif of the Prague Rules lies in the proactive role of the tribunal during the proceedings which is aimed at increasing efficiency and reducing costs and length of the dispute resolution. Opting for the Prague Rules means a fundamental decision in favour of limited scope of document production, resolution of the dispute on a document-only basis, limited length and scope of written submissions and written witness evidence.

While both set of rules remain the soft law instruments which are not binding upon the parties, unless otherwise agreed by them, there is a discussion on whether there was a practical necessity to adopt the Prague Rules. The arguments enshrined in the master thesis will show that despite similarities, there are also distinctive features between the IBA Rules of Evidence and the Prague Rules. At the same time, the successful application of the Prague Rules will substantially depend on the expertise and knowledge of the arbitrators who will apply them to the proceedings, since "*a rulebook is always just as good as the individuals who use it"* [193].

[193] Rombach, A., Shalbanava, H., "The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?", p. 60.

ABSTRACT

Seit Jahrzehnten ist die internationale Schiedsgerichtsbarkeit, aufgrund ihrer Flexibilität und des vorherrschenden Prinzips der Autonomie der Parteien, eine beliebte Methode zur Beilegung komplexer, grenzüberschreitender Streitigkeiten. Derzeit gibt es mehrere Bedenken bei der Durchführung eines Schiedsverfahrens, nämlich erhebliche Kosten und Dauer des Schiedsverfahrens, sowie insbesondere die Beweisaufnahme, die es den Schiedsrichtern nicht ermöglichen, seine Vorteile vollständig zu nutzen. Daher wird der Schwerpunkt dieser Masterarbeit auf die aktuellen Probleme der Beweisaufnahme in der internationalen Schiedsgerichtsbarkeit gelegt, die überwiegend dem Common Law Ansatz folgt.

Bei der Durchführung von Schiedsverfahren gibt es zwei widersprüchliche Rechtskulturen, nämlich das Gewohnheitsrecht und das Zivilrecht, die dem kontradiktorischen bzw. dem inquisitorischen Ansatz folgen. Ersteres beruht auf der Autonomie der Parteien, während Letzteres den Schiedsrichtern mehr Ermittlungsbefugnisse einräumt und ihnen die Befugnis überlässt, praktisch jeden Aspekt des Schiedsverfahrens zu kontrollieren. Bei der Erörterung von Beweisfragen in der Schiedsgerichtsbarkeit ist zu beachten, dass der kontroverse Ansatz aufgrund der recht breiten Anwendung der IBA-Regeln zur Beweisaufnahme in internationalen Schiedsverfahren in der Fassung von 2010 Vorrang hat. Einmal als eines der wichtigsten Instrumente des Soft Law in der internationalen Schiedsgerichtsbarkeit anerkannt, wurden die nach den IBA-Regeln durchgeführten Verfahren komplexer, langwieriger und kostspieliger. Viele aus Kontinentaleuropa stammende Experten argumentierten daher, dass das Monopol der IBA-Regeln es nicht erlaube, die Ineffizienz der Schiedsverfahren zu überwinden, die durch die Techniken des Common Law, wie die umfassende Erstellung, Prüfung und Vernehmung von Zeugen, hervorgerufen werden.

Als Reaktion auf die oben genannten Bedenken wurde am 14.12.2018 in Prag das neue Regelwerk auf der Grundlage des inquisitorischen Ansatzes verabschiedet - die Regeln für die effiziente Durchführung von internationalen Schiedsverfahren oder so "Prager Regeln". Wie von der Arbeitsgruppe angekündigt, sind die Prager Regeln ein alternatives Regelwerk für die Beweisaufnahme, aber kein Rivale zu den IBA-Regeln. Das Leitmotiv der Prager Regeln liegt in der proaktiven Rolle des Tribunals während des Verfahrens, die darauf abzielt, die Effizienz zu steigern und die Kosten und die Dauer der Streitbeilegung zu senken. Die Entscheidung für die Prager Regeln bedeutet eine grundlegende Entscheidung zugunsten eines begrenzten

Umfangs der Dokumentenerstellung, einer Beilegung des Streits nur auf Dokumentbasis, einer begrenzten Länge und eines begrenzten Umfangs schriftlicher Einreichungen und schriftlicher Zeugenaussagen.

Während beide Regelwerke Soft-Law-Instrumente bleiben, die für die Parteien nicht bindend sind, wird, sofern nicht anders vereinbart, diskutiert, ob eine praktische Notwendigkeit zur Annahme der Prager Regeln bestand. Die in der Masterarbeit die dargelegten Argumente zeigen, dass es wesentliche Unterschiede zwischen den IBA-Beweisregeln und den Prager Regeln gibt. Gleichzeitig hängt die erfolgreiche Anwendung der Prager Regeln wesentlich von der Sachkenntnis und dem Wissen der Schiedsrichter ab, die sie auf das Verfahren anwenden werden, da „ein Regelwerk immer genauso gut ist wie die Personen, die es anwenden".