

# Evidence in International Arbitration: Admissibility, Relevance and Differences between Common and Civil Law

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## I. Introduction

Arbitration is a form of alternate dispute resolution, that takes place outside the court of law.<sup>1</sup> Arbitral tribunals are usually not bound by domestic procedures for collection and evaluation of evidence.<sup>2</sup> Thus, there exists a vacuum with respect to laws relating to evidence in International arbitration, making it imperative to examine the rules of evidentiary collection and examination in arbitral tribunals.

In addition, it can be said that Fact-finding is arguably one of the most important functions of an arbitral tribunal.<sup>3</sup> This is because the result of over 60 to 70 percent of international arbitrations depend on the facts of the particular case rather than the application of relevant principle of law. While a good proportion of the remainder depend upon a combination of facts and the law, very few arbitral proceedings depend solely on issues of law. The cases where underlying facts are undisputed or irrelevant form only a minority arbitral proceedings.<sup>4</sup> Thus, the collection and presentation of evidence forms a large part of the international arbitral proceeding, and often form the turning point of such proceedings. In such a scenario it becomes imperative to understand the procedure for collection and presentation of evidence in front of an arbitral tribunal.

This paper seeks to examine the procedure relating to the admissibility and relevance of evidence in international arbitration. Parallely, this paper will also examine the differences in procedure in Civil and Common law jurisdictions, the practical effect of these differences and the implications of the same.

## II. Common and Civil Law Countries

At the outset, it must be mentioned that a simplistic distinction cannot be made between common and civil law countries, making an over-generalisation regarding all civil law countries. As stated by Swiss arbitration specialist, Professor Reymond, there is no such thing as '*Civil Law Procedure*'.<sup>5</sup> While it is possible to note certain basic principles of law and procedure, which are considered 'common' in common law countries, such commonalities are less frequent in civil law countries. Often, countries have a different blend of civil procedure

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1 BLACKABY (2015).

2 See, for instance, the Indian Arbitration and Conciliation Act, 1996, s.19.

3 PIETROWSKI (2006), pp. 373-410.

4 BLACKABY (2015).

5 REYMOND (1989), pp. 357-368.

which is influenced by local custom and colour.<sup>6</sup> Therefore, there may be just as much difference in the procedure followed by a German *Rechtsanwalt* and a French *avocat*, as between an Italian *avvocato* and English lawyer.<sup>7</sup> Even though all three countries, namely Germany, France and Italy are civil law countries, the approach to evidence may be wildly different.

However, for the purposes of this paper's discussion on presentation of evidence to international tribunals, there exists enough uniformity in the general approach to questions regarding the presentation of evidence to make use of the term 'civil law countries' in distinction to 'common law countries'. The most notable differences between the two systems are those related to the procedures that lead to fact-finding, which will be discussed later on.

### **III. Admissibility and Relevance of Evidence**

In an international commercial arbitration, arbitral tribunals are formed, which generally consist of three experienced international arbitrators.<sup>8</sup> These arbitrators may be from different legal systems, but they are expected to approach the question of the reception of evidence in a pragmatic way.<sup>9</sup> The arbitrators are supposed to focus on establishing the relevant facts, the facts which would be necessary for deciding the issues between the parties to the arbitral proceeding.<sup>10</sup> They are generally reluctant to be limited by technical rules of evidence which would be detrimental to the achievement of this goal.<sup>11</sup> Working under this premise, most arbitration rules vest large authority in the hands of arbitrators with respect to the admission and evaluation of evidence.<sup>12</sup> Many national arbitration laws recognise the authority and discretion given to arbitrators to evaluate evidence.<sup>13</sup> In addition, most international arbitration rules provide that it is the tribunal's responsibility to "determine the admissibility, relevance, materiality and the weight of the evidence offered".<sup>14</sup>

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6 *Ibid.*

7 BLACKABY (2015).

8 SALEH (1999), pp. 141-160; HOLTZMANN (1991), p. 101.

9 HOLTZMANN (1995), pp. 39-50.

10 STRAUS (1986), pp. 58-63.

11 HOLTZMANN (1995), pp. 39-50.; BLACKABY, (2015); International Bar Association Rules (2010) Art. 9(1).

12 PILKOV (2014), pp. 147-155.

13 The Indian Arbitration and Conciliations Act, 1996, s.9,81; English Arbitration Act 1996 s.34(1) and (2); German ZPO s.1042(4); Austrian ZPO s.599(1); Ukrainian International Arbitration Act s.19(2).

14 UNCITRAL Arbitration Rules (as revised in 2010) art.27(4); American Arbitration Association (AAA) International Arbitration Rules art.20(6); London Court of International Arbitration (LCIA) Arbitration Rules art.22.1(f).

In general, arbitral tribunals give more importance to establishing the truth than technical rules of evidence and arbitrators are cognizant that parties must be given a fair opportunity to present their case, at the risk of having the arbitral award set aside.<sup>15</sup> As a result, they often end up admitting most of the evidence submitted by parties.<sup>16</sup> Arbitral tribunals tend to err on the side of caution, and are reluctant to exclude evidence for being inadmissible, even when the evidence is questionable.<sup>17</sup> However, this does not imply that the weight of the evidence is not given due consideration. Stemming from a common law tradition, the concept of general admissibility of evidence is recognised in international arbitration.<sup>18</sup> Admissibility boils down to one simple rule, that all relevant evidence is generally admissible, whereas all evidence which is not relevant is not admissible.<sup>19</sup> In international arbitration, a piece of evidence may be considered relevant if it has a logical connection with the fact that the party intends to prove.<sup>20</sup> Evidence is usually included unless it is manifestly irrelevant.<sup>21</sup>

It is important to recognise the distinction between exclusion of evidence on purely procedural grounds and the exclusion of evidence as inadmissible.<sup>22</sup> For example, if a particular deadline is set out for the submission of evidence, the tribunal may refuse to include any evidence which is submitted after such a deadline. However, more often than not, as the failure to comply with the deadline does not change the nature of the evidence, the tribunal may also choose to include this evidence as admissible. This is not the same approach that would be applied for example, if a party does not comply with the rules of 'discovery', i.e., a party requests documents that were not exchanged or disclosed to be excluded from evidence. In such a situation, the arbitral tribunal need not exclude the evidence, but could rather adjourn the hearing, in order to allow the party time to examine the document. Thus, arbitral proceedings provide arbitral tribunals far greater flexibility and discretion in terms of evidence than court proceedings.

Unfortunately, in such a situation it ends up being the lawyer's responsibility to take consideration of the arbitrator's legal influences. When lawyers from a common law jurisdiction appear before an arbitral tribunal, they must be cautious not to place too much reliance on technical rules considering the admissibility of evidence. Similarly, lawyers from civil law countries, when faced with an arbitral

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15 BLACKABY (2015).

16 PILKOV (2014), pp. 147-155.

17 BLACKABY (2015).

18 SALOMON (2003), pp. 285-294.

19 PILKOV (2014), pp. 147-155.

20 International Bar Association Rules for taking Evidence (2010).

21 PIETROWSKI (2006), pp. 373-410.

22 BLACKABY (2015).

tribunal comprising of arbitrators trained in a particular common law system, must be careful to ensure that the crux of their arguments does not depend on proving facts using evidence which would be inadmissible under the given common law system. While most international arbitral tribunals comprise members of body civil and common law jurisdictions, it is again up to the lawyers to cater to ‘non-hybrid’ tribunals (tribunals consisting of arbitrators from both civil and common law legal systems)<sup>23</sup> when they are established.<sup>24</sup> Teams of lawyers are expected to include a member that is familiar with the rules for presentation and reception of evidence in the systems of law that the arbitrators are trained in. While it is unlikely that a party will be prevented from submitting evidence in an international arbitration which would be necessary to ascertain the facts, the nature of such proceedings places a higher burden on the practitioners of the law.

#### **IV. Burden and Standard of Proof**

The question of burden of proof in international arbitration is one that arises time and again. However, the most widely accepted answer is that the ‘burden of proof’ for any factual allegation or set of allegations, lies upon the party which makes the allegation.<sup>25</sup> Each party has the burden of proving any facts relied on by it in order to support its claim or defence.<sup>26</sup> However, propositions that are completely obvious need not be proved in an arbitral tribunals. For example, a statement stating that the earth is flat need not be proved, even though certain societies may disagree.<sup>27</sup>

The degree or standard of proof for evidence in international arbitration is not defined; however, it is usually boils down to the test of the ‘balance of probability’, whether a particular fact is more likely than not<sup>28</sup>. It falls to a preponderance of probabilities, rather than the standard of ‘beyond all reasonable doubt’.<sup>29</sup> The general practice of arbitral tribunals is that the weight of evidence is assessed depending on the nature of the proposition it seeks to prove.<sup>30</sup> For example, if the weather at a particular place is a fact in issue, then the party would not have to employ a meteorology expert to present the evidence, but it would be enough

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23 BLACKABY (2015).

24 SMITH (1996), p. 161.

25 BLACKABY (2015).

26 Article 27(1), UNCITRAL Model Rules.

27 HONG (2011).

28 BLACKABY (2015).

29 PIETROWSKI (2006), pp. 373-410.

30 REYMOND (1994), pp. 317, 320, 321.

to simply produce the day's weather report from a reputable newspaper.<sup>31</sup> However, in cases of fraud or illegality, the degree of proof would be far higher, and the arbitral tribunal must look more closely at whether this standard has been met.<sup>32</sup>

## V. Differences between Civil and Common Law Jurisdictions

As mentioned before, this paper will seek to examine the difference in the outlook and procedure for collecting evidence in civil and common law jurisdictions. These variances in procedure stem from a difference in the basic outlook and approach towards fact-finding and collection of evidence.<sup>33</sup> The difference in the methodology of the two systems is the core element that drives all further divergences.<sup>34</sup> Common law is characterised by the adversarial approach, where arbitrators play a limited role.<sup>35</sup> In contrast, the civil law system cultivates an inquisitorial method with the arbitrator playing a more active role.<sup>36</sup> Thus, common law systems would mandate that parties would mandatorily be allowed to question the witnesses, one example being the ICSID rules, that are heavily based on common law, which state that "Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President."<sup>37</sup> However, in civil law jurisdictions, the choice is deferred to the Arbitral tribunal, as in the ICDR Rules<sup>38</sup> or Article 25(4) of the 2012 Swiss Rules<sup>39</sup> which state that "At the hearing, witnesses and expert witnesses may be heard and examined in the manner set by the arbitral tribunal."

The common law system in arbitration would obligate the parties to present all relevant evidence in their possession even if it was adverse to their own interest.<sup>40</sup> Parties may be sanctioned for withholding any evidence which is relevant to the facts in issue.<sup>41</sup> For example, in England, a party is required to disclose all relevant and admissible documents, whether or not they are helpful or harmful

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31 BLACKABY (2015).

32 *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47.

33 BLACKABY (2015).

34 KUBALCZYK (2015), pp. 85-109.

35 SMITH (1996), p. 161.

36 WAINCYMER (2012), p. 746.

37 Rule 35, ICSID Rules.

38 Article 20(4), ICDR Rules – "The tribunal may determine the manner in which witnesses are examined."

39 Article 25(4), Swiss Rules 2012.

40 VERCAUTEREN (2012), p.341.

41 KUBALCZYK (2015), pp. 85-109.

to the parties' case.<sup>42</sup> Parties are allowed to present evidence which they wish to rely on, and may exclude any evidence that is adverse to their interests.<sup>43</sup> For example, in the civil law jurisdiction of Germany, parties to an arbitration are only required to produce documents which support their case.<sup>44</sup> Similarly, in Japan, there is no provision for pre-trial discovery and documentary discovery is very limited. Parties may file a petition making a request for a document, however, the party must request for a specific document.<sup>45</sup> Documentary evidence is treated differently in civil and common law jurisdictions.<sup>46</sup> Lawyers from common law jurisdictions like the US may believe that parties are entitled to 'discovery' of all documents, including correspondence, emails, notes and other physical evidence.<sup>47</sup> However, the same may consider to be gross professional malpractice for a lawyer to disclose evidence either to the arbitral tribunal or the opposing party.<sup>48</sup>

Common law countries would be inclined to give more weight to oral evidence, whereas civil law arbitral tribunals would give greater importance to documentary evidence.<sup>49</sup> Another reason why common law states such as Canada<sup>50</sup> may favour oral evidence over documentary is that in those states arbitrators are permitted by local law to administer an oath,<sup>51</sup> as in the English Arbitration Act, §38(5).<sup>52</sup> These legislations allow criminal penalties, as in the case of the English Perjury Act, §§1(1), to be imposed in cases where anyone produces false testimony in front of an arbitral tribunal.<sup>53</sup> This would clearly enhance the legitimacy of any testimony of any tribunal, which would allow greater weight to be given to oral testimony. In contrast, civil law states such as France<sup>54</sup>, Belgium<sup>55</sup>

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42 Rule 31.6, English Civil Procedure Rules 1996.

43 DE BOISSESON (1990), p. 101.

44 '*International Arbitration: Documentary Evidence And The Revised IBA Rules*' (Lexology.com, 2017) in <http://www.lexology.com/library/detail.aspx?g=92ab7c5c-d177-4910-b130-442b7e2ee867> (16.09.2010).

45 Mimp, *Chapter IV*, Part 2 (1947).

46 KARRER (2010), p. 53.

47 BLACKABY (2015).

48 LAEUCHLI (2010), p. 40.

49 SMITH (1996), p. 161.

50 Québec Code of Civil Procedure, Art. 944.7.

51 Netherlands Code of Civil Procedure, Art. 1041(1); Singapore International Arbitration Act, 2012, §12(2).

52 English Arbitration Act, 1996, §38(5); English Perjury Act, §§1(1).

53 Hong Kong Arbitration Ordinance, 2013, §56(8)(a), Hong Kong Crimes Ordinance, §31.

54 French Code of Civil Procedure, Art. 1467(2).

55 Belgian Judicial Code, Art. 1700(4) – "[The tribunal] may hear any person and such hearing shall be taken without oath".

and Sweden<sup>56</sup>, tend to forbid arbitrators from administering an oath<sup>57</sup>, thereby making oral testimony less reliable in civil law jurisdictions. In addition, due to the preferential treatment regarding oral evidence, arbitral tribunals in common law jurisdictions would be more amenable to admitting evidence which was not included in the party's statement of claim or statement of defence.<sup>58</sup> However, an arbitral tribunal influenced by the civil law system would be less inclined to introduce exhibits of evidence not previously included in the statement of claim or defence presented by the parties.<sup>59</sup> This can be witnessed in the Swiss Federal Tribunal case where the tribunal excluded evidence which was submitted late to the arbitral proceeding.<sup>60</sup>

In arbitral tribunals where arbitrators are rooted in civil law, the tribunal may choose to employ experts to provide, whereas in common law these experts may be called to present evidence by the parties themselves.<sup>61</sup> For example, in *El Paso Energy Int'l Co. v. Argentine Repub.*,<sup>62</sup> an ICSID award in a Civil law jurisdiction, the tribunal appointed an expert witness after soliciting a recommendation from the ICC's International centre of expertise. Also in the ICC Case No. 6497, the tribunal appointed an independent expert to investigate allegations of bribery regarding the impugned contract. In contrast, common law jurisdictions such as Ecuador in *Chevron Corp. v. Ecuador*<sup>63</sup> or Turkey in *Holdings v. Turkey*,<sup>64</sup> have experts which are appointed by the parties. However, as in the case of *Alpha Projektholding GmbH v. Ukraine*,<sup>65</sup> as well as in other instances,<sup>66</sup> there have been allegations regarding the lack of independence of the arbitrators. Tribunals virtually never "disqualify" this evidence,<sup>67</sup> but have tried to address this

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56 Swedish Arbitration Act, §25(3).

57 Finnish Arbitration Act, §27(2).

58 LAEUCHLI (2010), p. 40.

59 KUBALCZYK (2015), pp. 85-109.

60 Judgment of 28 February 2013, DFT 4A\_576/2012, 4.2.2 (Swiss Federal Tribunal).

61 BROWN (2004), p. 80.

62 *El Paso Energy Int'l Co. v. Argentine Repub.*, Award in ICSID Case No. ARB/03/15 of 31 October 2011, 40.

63 *Occidental Petroleum Corp. v. Repub. of Ecuador*, Award in ICSID Case No. ARB/06/11 of 5 October 2012, 80-87, 694-701; *Chevron Corp. v. Ecuador I*, Ad Hoc Procedural Order No. 8 of 31 March 2010, 3.1.

64 *Holdings Co. v. Repub. of Turkey*, Award in ICSID Case No. ARB/06/8 of 2 September 2011, 72, 74, 352, 365.

65 *Alpha Projektholding GmbH v. Ukraine*, Award in ICSID Case No. ARB/07/16 of 8 November 2010, 155-56.

66 *Helnan Int'l Hotels AS v. Arab Repub. of Egypt*, Award in ICSID Case No. ARB/05/19 of 3 July 2008, 39-42.

67 *Jan de Nul NV v. Arab Repub. of Egypt*, Award in ARB/04/13 of 6 November 2008, 28, 42.



problem by asking experts appointed by both parties to present a joint report as evidence.<sup>68</sup>

Common law arbitral tribunals usually take the approach that relevance is not a matter of strict law, i.e., admissibility *sensu stricto*, but rather a general understanding of common sense and reasoning.<sup>69</sup> In civil law, there is a greater reliance on law to decide relevance. The laws applicable to the arbitral proceedings are used to decide what evidence is relevant.<sup>70</sup> In common law jurisdictions, there is no separation between the concept of materiality<sup>71</sup> and relevance. They are merged, and materiality retains no independent viability.<sup>72</sup> However, in common law systems they are separate categories. Materiality is a dependent category, which is dependent on the independent category of relevance. It is a criterion considered in relation to the sufficiency of evidence which is material to the outcome of the proceeding.<sup>73</sup> Thus, while all evidence admitted in a common law system would require to be material, civil law jurisdictions would allow for evidence to be admitted which is relevant but may not be considered in the outcome of the case.

Even though there may exist differences in the outlook and expectations regarding evidence, both civil<sup>74</sup> and common law<sup>75</sup> jurisdictions agree that the arbitral tribunal has the power to determine the admissibility, relevance, materiality and weight of any evidence.<sup>76</sup> However, there are some differences regarding this principle in common and civil law. Common law courts in the US have upheld

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68 *Occidental Petroleum Corp. v. Repub. of Ecuador*, Award in ICSID Case No. ARB/06/11 of 5 October 2012, 80-87, 694-701; *Chevron Corp. v. Ecuador I*, Ad Hoc Procedural Order No. 8 of 31 March 2010, 3.1; *Holdings Co. v. Repub. of Turkey*, Award in ICSID Case No. ARB/06/8 of 2 September 2011, 72, 74, 352, 365.

69 SALOMON (2003), pp. 285-294.

70 PILKOV (2014), pp. 147-155.

71 KUBALCZYK (2015), pp. 85-109.

72 SALOMON (2003), pp. 285-294.

73 Konstantin Pilkov, (2015) *Evidence In International Arbitration: Criteria For Admission* in <http://arbitration-blog.eu/evidence-international-arbitration-criteria-admission/> (25.04.2017).

74 Article 1467, French Code of Civil Procedure; German ZPO, §1042(4); Austrian ZPO, §599(1); Japanese Arbitration Law, Art. 26(3); Korean Arbitration Act, Art. 20(2); Costa Rican Arbitration Law, 2011, Art. 19(2).

75 English Arbitration Act, 1996, §§34(1), (2) – “It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter”.

76 BORN (2014), pp. 2120-2138; Article 19(2) UNCITRAL Model Law; Article 27(4), UNCITRAL Rules 2010, “gives the arbitral tribunal wide discretion to determine freely” weight of evidence.

in various cases<sup>77</sup> such as *Int'l Chem. Workers Union v. Columbian Chem*<sup>78</sup> and *Supreme Oil Co. v. Abondolo*<sup>79</sup> that arbitrators have broad discretion to make evidentiary decisions. In addition, the court held in *Rai v. Barclays Capital*,<sup>80</sup> that as long as there was a 'barely colourable' explanation for the tribunal's evidentiary decision the arbitration award must be confirmed, bestowing large amounts of power on tribunals regarding the determination of evidence. The UK Supreme Court too has held that arbitrators are the sole authority to assess evidence and its credibility.<sup>81</sup> Common law tribunals are not bound by domestic rules of evidence as held in *Generica Ltd v. Pharm. Basics*.<sup>82</sup> US Courts have time and time again upheld arbitral awards, despite the fact that the tribunal may have derogated from domestic rules of evidence, such as in the case of *Petroleum Separating Co. v. Interam. Refining Corp*, where the arbitral award was upheld even though the arbitrators relied on hearsay evidence.<sup>83</sup> Civil Courts also uphold the discretion of the arbitrators to adduce evidence as they see fit, such as in *Dutch Hoge Raad Case No. R06/005HR*.<sup>84</sup> However, courts and arbitral tribunals in the civil law jurisdiction such as France<sup>85</sup> and Germany<sup>86</sup> give due consideration to national legislations and principles of natural justice as seen in *Soh Beng Tee & Co. Pte Ltd v. Fairmount Dev. Pte Ltd*,<sup>87</sup> where the court recognised that the policy of minimal interference in arbitral tribunals stemmed from the tribunal's obligation to observe the principles of natural justice.<sup>88</sup>

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77 *Wallace v. Buttar*, 378 F.3d 182, 193 (2d Cir. 2004); *Compañía Panameña Marítima San Gerassimo, SA v. J.E. Hurley Lumber Co.*, 244 F.2d 286 (2d Cir. 1957); *Popkave v. John Hancock Distrib. LLC*, 768 F.Supp.2d 785 (E.D. Pa. 2011); *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F.Supp. 1276 (S.D.N.Y. 1979).

78 *Int'l Chem. Workers Union v. Columbian Chem. Co.*, 331 F.3d 491, 497 (5th Cir. 2003).

79 *Supreme Oil Co., Inc. v. Abondolo*, 568 F.Supp.2d 401, 408 (S.D.N.Y. 2008).

80 *Rai v. Barclays Capital Inc.*, 739 F.Supp.2d 364, 375 (S.D.N.Y. 2010).

81 *Jivraj v. Hashwani* [2011] UKSC 40, 62 (U.K. S.Ct.).

82 *Generica Ltd v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997).

83 *Petroleum Separating Co. v. Interam. Refining Corp.*, 296 F.2d 124, 124 (2d Cir. 1961).

84 Judgment of 29 June 2007, Case No. R06/005HR (Dutch Hoge Raad).

85 Judgment of 10 March 1981, *Arkhaieff v. Entreprise roumaine d'Etat pour le commerce extérieur Arpimex*, 1981 Bull. civ. No. 82, 69 (French Cour de cassation civ. 1e).

86 Judgment of 12 April 2011, 2011 SchiedsVZ 230, 232 (Oberlandesgericht München).

87 *Soh Beng Tee & Co. Pte Ltd v. Fairmount Dev. Pte Ltd*, [2007] SGCA 28, 60 (Singapore Ct. App.)

88 *Vianini Lavori SpA v. H.K. Housing Auth.*, [1992] HKCFI 172, 44 (H.K. High Ct.).

## VI. Attempts to Bridge the Gap

Having considered the differences that exist between civil and common law jurisdictions, it is important to consider the argument that the importance of differences between civil and common law backgrounds are exaggerated in contemporary times.<sup>89</sup> While there are certain differences in outlook regarding evidence in different jurisdictions, in practice there is also a confluence of civil law and common law procedures in international commercial arbitration.<sup>90</sup> As mentioned above, international arbitrations in civil law traditions do not follow any set ‘civil law’ pattern.<sup>91</sup> Similarly, common law countries like England and the United States vary greatly in different jurisdictions among themselves. Thus, there is no fixed procedural formula for either ‘common law’ or ‘civil law’ arbitrations,<sup>92</sup> the differences lie in the outlook of the arbitrators and the weight that they assign to evidence.

Civil law arbitrators may conduct arbitral tribunals in an inquisitorial manner, however, even in civil law jurisdictions there exist significant limits on a tribunal’s fact finding authority.<sup>93</sup> Therefore, even though the civil law influences may cause an arbitrator to introduce evidence by themselves, these decisions would be annulled when the arbitral award is enforced.<sup>94</sup> This has been witnessed in *Excelsior Film v. UGC-PH*<sup>95</sup>, an arbitration in a civil law jurisdiction, where the award was annulled because the tribunal relied on one arbitrator’s knowledge from a previous related arbitration. Similarly, in *Compagnie Aeroflot v. AGF*, the award was annulled from an arbitration in which the tribunal assessed value of a leasehold by referring to information which was not provided by or available to either of the parties.<sup>96</sup> Another case arbitrated by a hybrid law tribunal was annulled by the Paris court of Appeal, a civil law jurisdiction because the tribunal relied on a report provided by an expert witness which was not provided by the parties.<sup>97</sup> Experienced practitioners have stated that even parties from civil law backgrounds, represented by European lawyers, will present evidence in

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89 KERN (2010), pp. 78-93.

90 BORN (2014).

91 BRINER (1997), pp. 155, 159.

92 VEEDER (2008), pp. 347, 349-50.

93 BORN (2014).

94 *Judgment of 29 June 2007*, Case No. R06/005HR, 3.3.3 to 3.3.4 (Dutch Hoge Raad).

95 *Judgment of 24 March 1998, Excelsior Film v. UGC-PH*, 1999 Rev. arb. 255 (French Cour de cassation civ. Ie).

96 *Judgment of 10 June 1993, Compagnie Aeroflot v. AGF*, 1995 Rev. arb. 447 (Paris Cour d’appel).

97 *Judgment of 18 January 1983, Société Sporprom Servs. BV v. Polyfacne Immo*, 1984 Rev. arb. 87 (Paris Cour d’appel).

a common law method.<sup>98</sup> This could be in part due to the individual styles or tactics of the lawyers, but may also happen for fear of having an arbitral award overturned in a court of law. In either case, it is clear that there is an increasing common law tint to international arbitration.

There have been many efforts made to bridge the gaps between traditional common and civil law procedures, but they have only been partially successful.<sup>99</sup> One example of such an effort, the International Bar Association (IBA) rules for taking evidence, does not provide clear rules for relevance of evidence.<sup>100</sup> In addition, these Supplementary rules ultimately adopted a common law approach to arbitration, which is why they did not gain widespread acceptance.<sup>101</sup> This 1999 version of IBA rules had an even greater common law orientation, such as permitting a reasonable measure of documentary discovery and authorizing involvement of lawyers in preparation of witness testimony.<sup>102</sup> Thus, the set of rules specifically dealing with collection of evidence was heavily favoured towards common law, making it less appealing to civil law parties. In addition, the IBA rules are not independently binding in international arbitration,<sup>103</sup> and are mostly used as guidelines,<sup>104</sup> leaving room for influences to drive the arbitral proceeding.

## VII. Conclusion

It has been established that Arbitral tribunals play fast and loose with the rules of evidence. No concrete rules of evidence have been established, even in international jurisdictions, nor are arbitral tribunals restricted by any domestic procedures for evidence. Arbitral tribunals do not need to be restricted by highly technical rules of interpreting evidence, and can focus on the truth. In such a situation, it would be less likely for lawyers to abuse the system. For example, Common law tactics of using theatrics to have evidence thrown out of court would not be acceptable in arbitral tribunals. However, a situation is also created where arbitrators may be influenced by the legal system in which they were trained. While these would constitute biases that could be considered to impact

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98 CRAWFORD (2010), pp. 303, 323.

99 BORN (2014).

100 International Bar Association Rules (2010).

101 RUBINO-SAMMARTANO (1989), p. 375.

102 2010 IBA Rules on the Taking of Evidence, Art. 3(2) ("Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal a Request to Produce."), Art. 4(2) ("It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses.").

103 2010 IBA Rules on the Taking of Evidence, Preamble, 1, 2.

104 BORN (2014).

the impartiality<sup>105</sup> of the arbitrations, lawyers are forced to cater to the peculiarities of each system rather than focus on a single system of law. Tendencies such as the common law tendency to assign more importance to oral evidence, or the civil law tendency to limit discovery or disclosure, seep into arbitral proceedings, due to a difference in expectations. While the effect of these tendencies may be mitigated by instituting ‘hybrid’ tribunals, it is a problem that still exists, especially in the case of non-hybrid tribunals. Annulling decisions made by such arbitral tribunals, or forcing common law rules on civil law jurisdictions does not provide a solution to the problem. It is imperative to harmonise the differences in procedure between both systems of the law in order to ensure holistic evaluation of the evidence. Thus, there exists a need to create a procedural framework to further to bridge the gap between civil and common law. Evidentiary rules in international arbitration must be clearly defined to provide a neutral set of procedures for the presentation of evidence, which would be equally fair to both civil law and common law parties. A comprehensive set of rules must be created to implement facets of both legal systems, which do not restrict functioning of the arbitral tribunal, but limit the nature of the discretion that can be exercised by them.

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