

# EVIDENCE IN INTERNATIONAL ARBITRATION

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## ABSTRACT

The present study seeks to describe the law of evidence in international commercial arbitration, having regard to both the static regulation of the subject and the dynamic procedure for the evidence's in-taking. In particular, the research will address the principles that govern the evidentiary phase - including those related to the burden and standard of proof -, the single means of evidence and their admissibility, materiality and weight, the manners of introduction of any single mean along the course of the arbitration, as well as the "tension" between the provision for inquisitorial powers of the arbitrators and the parties' control over the proceedings. *Ex aequo et bono* arbitrations will only peripherally be taken into account, given that they are only seldom used in the sector at issue and since, in any case, a different parameter for the decision should not interfere with, nor lead any change upon the procedure leading thereto.

In chapter one, the borders of the analysis will be first delimited, focusing on the current "dimension" of procedural law in international arbitration in order to ascertain: *i.* whether and to what extent the rules of procedure can be determined by the parties' agreement; *ii.* in what relation such a freedom finds itself in respect with the role, powers and discretion conferred to the arbitrators; *iii.* which are the limits, if any, that are posed by national legislations and international public law in shaping the arbitral procedure. In this first phase of the analysis, it will be necessary to: - addressing the different theoretical designs of arbitration, without investigating the whole of their corollaries; - introducing critical concepts, such as those of procedural public order and mandatory procedural rules, without completely defining them and remanding to the last chapter for a first elaboration thereon.

The remaining chapters, from the second to the sixth, aim at describing the aforementioned aspects of the evidentiary phase.

To this goal, being international arbitration essentially a "product of practices", it seemed proper to set the research by leaving from the study of arbitral precedents

as well as of the State courts' decisions that, in controlling the awards, have examined such practices, either corroborating them *a posteriori*, correcting or rejecting them.

The field of international arbitration has long been recognized as one in which a progressive harmonization could have taken place of different procedural traditions or, at least, an approaching thereof. Undoubtedly, this is a rare example of an adjudication process for disputes between private parties of different nationalities.

Even if the majority of national arbitration laws avoid a large discretion for the parties and the tribunals in determining the procedure, these latter have in fact naturally tended to follow their belonging cultures and for this reason in the practice of international arbitration it has always been possible to observe a series of features coming from both the common law and civil law systems.

The above notwithstanding, international arbitral practice, rather than representing a mere case of clash between different procedural traditions, currently shows: *i.* on one side, a high level of flexibility, with multiple available solutions and the centrality of some basic procedural guarantees such as due process and the so-called “meet and consult method”; *ii.* on the other side, the development of a combination or compromise model of civil and common law systems, now constantly applied, subject of general acceptance and incorporated within the relevant sources.

Also, for the latter reason, throughout the years there have even been some proposals aimed at stating the existence of a *lex mercatoria arbitralis*, and/or at arguing that from the observation of international arbitral practice some principles would stem that are to be considered as general principles of international (procedural) law recognized by civilized Nations, according to article 38 of the ICJ Statute.

In chapter seven, after a corresponding expediency and utility assessment, a brief study of such developed theories will be accomplished.

Further, one may add that international arbitration is basically institutional arbitration and thus it is worth mentioning that it is due to the major arbitral Institutions and to other private Associations if the growing and convergent best practices have been progressively transposed and codified within - respectively -

arbitral regulations and some other sources of procedural soft-law, such as the IBA Rules on the taking of evidence.

The recognition of a uniform practice and the increasing “vocation for autonomy” of international arbitration (procedural) law makes it possible today to face with an in-depth study of the emerging solutions adopted that, in turn, triggers a list of considerations about single national procedural systems.

Such considerations include, amongst others, questions about utility of provisions on strict rules of evidence related to admissibility and probative value, casting doubts about the preferable mean between the expert entrusted by the parties and the figure of the court appointed expert, or still, for instance, generating reflections as to the right counterbalance - to be achieved in any process of adjudication - between the adversarial principle, the powers of the adjudicator and the need for finding the objective truth.