Effect of International Commercial Arbitration on Civil Law Considering the Interaction between the Common Law and the Civil Law in Practicing the taking of Evidences and the standard of Proof

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Abstract

This paper is an attempt to highlight the impact of international commercial arbitration in view of the development of its rules and regulations in civil legal jurisdictions. For the intentions of this paper, this term has been used in the context of arbitration practice and procedures that are applied to resolve commercial disputes involving parties from different backgrounds. This paper will further explore the effect of international commercial arbitration practice by considering practical demonstrations of its impact on civil law countries. This paper will also compare between the civil law and common law by discussing the topic of taking evidences and the standard of proof in international commercial arbitration.

Keywords

Arbitration, International Commercial Arbitration, Civil laws, Common law, Legal traditions, international Chamber of Commerce, Evidence, Standard of Proof.

Introduction

Amongst the most efficient modes of dispute resolution, arbitration is acknowledged as one of the most convenient mode of resolving commercial contentions. In the purview of international commercial arbitration, the disputes in question mostly occur in between commercial entities that belong to different countries[1]. This diversity of background implies that in most of the disputes, the parties involved would be from different cultures, history, languages and lifestyles. Apart from these general characteristics, they have different legal systems where different methods and practices exist for the resolution of disputes. Civil law and Common law are amongst the most common legal systems that exist around the world. Countries like Germany, Italy, France, and other European and Northern African countries follow civil law systems, whereas common law jurisdictions are those whose legal systems have been historically influenced by the British Common-Wealth Empire. There are significant historical, legislative, and administrative differences that exist between civil and common law legal systems[2]. Disputes can occur in between any two or more contracting parties dealing at local or international setups. Complex legal issues arise mostly when the parties in dispute belong to different countries where different laws are applied. Particularly when the parties

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1 Dulhame, (2015), International Commercial Arbitration Legal Definition. Retrieved From: Http://Www.Duhaime.Org/Legaldictionary/I/Internationalcommercialarbitration.Aspx.

2 Ali, Shahla F., and Tom Ginsburg. "International Commercial Arbitration In Asia." Juris Publishers, (2013).

belong to the jurisdictions that follow different histories, it becomes more complex to resolve such disputes. It is due to these complexities that attempts have been made to reconcile the differences between the two systems[1]. The foremost inclination of this paper will be to highlight the rules and procedures of international commercial arbitration that strike on the civil law systems, applying holistic approach. This is in addition to concentrating on the method of taking evidences in international commercial arbitration according to the civil law and common law, and what is the standard of proof applied in both the civil law and common law.

1. *Global Arbitration*

The arbitration rules pertaining to international commercial disputes have been formulated by international organizations such as International Chamber of Commerce (ICC), International Code of Arbitration (ICA), and many other organizations like International and Regional bar associations[2]. It is interesting to note that the framework and development of these rules have been novel to this world for the fact that they do not originate from traditional legal systems like the ones tracing their background from Common or Civil law traditions. It is due to this reason that concerns about the compatibility of these rules and guidelines with common and civil legal systems have been crucial. On the other hand, it is also important to analyze that identification of legal nature of these rules

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1 Elsing, Siegfried H, and John M. Townsend. "Bridging The Common Law-Civil Law Divide in Arbitration" Arbitration International 18, No. 1 (2002).

2 Varady, Tibor, John J.. Barceló, And Arthur Taylor Von Mehren. International Commercial Arbitration. Thomson West, (2003).

is further complicated because they also vary from jurisdictions to jurisdictions, depending on the local practices. It is on the basis of local legal traditions and administration of countries that such rules get modified in practice. Proponents in favor of international commercial arbitration suggest that the inherent framework of these arbitration rules is novel to the global legal perspective and possesses room to counter differences of legal traditions. However, in practice, it is submitted that these arbitration rules are highly influenced by the two most common legal systems of the world. In this regard, we may consider the example of civil law practice whereby oral testimonies are not encouraged as a matter of policy. The influence of civil legal procedures can also be experienced in arbitration practices that take place within such countries, most prominently in the arena of trademarks, internet concerns and the establishment of new corporations[1].

In all, it may be considered that arbitration rules and processes have been formulated by the policies and procedures which were pre-dominantly influenced by civil and common law jurisdictions. In other words, it is doubtful whether their formulation is based on novel culture of legal format[2].

2. *International Commercial Arbitration*

Underlying reason behind popularity of arbitration is the downside experienced in court litigations around the world. Until now, no precise

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1 Trakman, Leon E. "From The Medieval Law Merchant To E-Merchant Law."University Of Toronto Law Journal (2003)

2 Weisbrod, Carol. Emblems Of Pluralism: Cultural Differences and The State. (Princeton University Press, 2009) p.38-110.

definition has been brought forward to exhaustively define the term if 'international commercial arbitration'. However, the composition of this term does not make it difficult to predict the underlying concept of this terminology. As an alternative medium to resolve disputes, it allows the disputants to resolve their disputes without getting into the hassle of stringent court procedures. Major advantage of arbitration over court litigation is that it involves an informal, consensual and speedy process of hearings after which the arbitrator issues an award based on the findings presented before him/her[1]. In this regard, the rules and regulations prescribed by the New York convention leaves it for the signatory states to select the matters which would fall within the definition of 'commercial'. Such discretionary mode of implementation may give rise to uncertainty over the said issue; however, in practice this has proved to be of least concern because of the universal acknowledgement and consensus of the concept and idea of this terminology[2]. However, certain problematic conditions may still arise; one such instance would be the applicability of anti-trust concerns which are compatible to be referred to international arbitration that, in some civil countries may not be possible.

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1 Newman, Lawrence W., and Richard D. Hill. Leading Arbitrators' Guide To International Arbitration, (3rd ed, Juris Publishing, Inc., 2014).

2 Wolff, Reinmar, Christian Borris, Bernd Ehle, Todd J. Fox, Rudolf Hennecke, Angela Kölbl, Christoph Liebscher, David Quinke, Maxi Scherer, And Stephan Wilske. New York Convention. München, 2012.

3.1 Historical Perspective

The rules and regulations pertaining to arbitration have been in process of evolution since quite a long time. Several countries have acceded to the international conventions and protocols which have been framed to govern the aspect of international commercial arbitration. This segment of arbitration appears to be of increasing importance, particularly in the context of its practice in the areas of international finances and construction disputes[1]. It may not be possible to predict the ultimate impact of arbitration into the local legal frameworks of signatory countries. This informal yet private form of dispute resolution can be helpful in disputes of different natures involving employment, family, commercial and other labor issues. Previously, the development of laws pertaining to arbitration was a local matter due to which countries used to adopt their local legal traditions in administration of arbitration processes[2]. Due to this historical mode of development at local level, there existed glaring differences in the rules and procedures of local arbitration in Common law, Civil law, Islamic and Chinese jurisprudence. In common law countries like the United Kingdom and other former colonies; the arbitration practice is regarded as an extension of legal system which helps to lessen the burden of cases from the courts of law.

With this brief about historical context of development of arbitration rules, this segment of paper will further explore the development of rules and regulations pertaining to international commercial

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1 Moses, Margaret L. The Principles And Practice Of International Commercial Arbitration. (2nd ed, Cambridge University Press, 2012) p 1-16.

2 Ibid No.9

arbitration at international level. The very idea of preparing international regulations related to commercial arbitration emerged during 1920-1925 from the European countries[1]. At that time, several difficulties existed in relation to the development of regulatory frameworks of commercial arbitration in international context, predominant reason being the differing legal systems operating around the globe. In 1923, due to such complexities of legal frameworks, Geneva Protocol of Arbitration Clauses was adopted by countries from Europe and other regions[2]. This protocol was widely welcomed and accepted by multiple numbers of signatories, and the framework of its guidelines proved to be of imminent success. During the same time, it was felt that certain regulations should be formulated in order to facilitate the global enforcement and recognition of foreign arbitration awards. In this regard, Geneva Convention for Execution of Foreign Arbitration Awards was formulated by the year 1927[3]. Like its predecessors, this convention also proved to be very successful, as many countries welcomed its provisions by integrating them with their local laws.

In the same manner, the need of an international organization to govern the said subject was felt. Following this reason in 1922, the International Chamber of Commerce was brought into global picture whose very first contribution was to formulation of

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1 Born, Gary. International Commercial Arbitration: Commentary and Materials, (2nd ed, Kluwer Law International, United States,2001), p 35-36.

2 Miller, David Hunter. The Geneva Protocol. New York, 1925.

3 Quigley, Leonard V. "Convention On Foreign Arbitral Awards." American Bar Association Journal (1972): 821- 826.

rules in 1923. Despite the establishment of international organization alongside international conventions and protocols, there remained a gap to govern the procedures at international arena with uniformity and consistency. In this regard, several deliberations were held to propose the consensual procedural rules to govern international arbitration proceedings such that it would be acceptable for all countries. In order to fulfill this purpose, 1938 Amsterdam Rules were brought forward. The underlying idea behind these rules was to provide certain guidelines related to framework of arbitration tribunal as well as its constitution with respect to its powers. It further established the office of Chairman Committee of the committee, which was proposed by the association of Commercial Arbitration of International Law. Subsequently, another draft pertaining to arbitration rules and regulations was consolidated and proposed by the International Institute for Unification of Private law (UNITROIT). Due to the outbreak of war in the European region, these efforts were halted.

As it can be observed from the foregoing historical events, the proper development t of regulations and rules pertaining to arbitration had started during the time between the two world wars. At the same time, it can also be observed that most of these developments were confined to the western European region, with practically no involvement of other countries of the world.

3.2 Present Perspective

Although the convention declared in 1927 could initially be regarded as successful to some extent, its practicality proved to be short-lived. Amongst its persistent problems, one was that the disputant who sought to enforce an international arbitration award

were under the duty to prove the facts and conditions on the basis of which it was awarded. This could only be made possible by getting it recognized from the country where it was awarded. It was due to this reason, need was felt to upgrade the laws and regulations pertaining to the international commercial arbitration. In this regard, the Convention on the Recognition and Enforcement of Arbitration Awards, also known as the New York Convention of 1958 was signed. Besides consolidating the two previous instruments related to arbitration, the New York Convention brought certain amendments in the arbitration regulations and procedures[1].

In a nutshell, the Convention of New York entails the duty on the local courts of signatory countries to acknowledge and enforce international arbitral award. Nonetheless, a number of exceptions have also been ordained therein. As the provisions of the said convention put the burden of enforcement on the local judiciary, most of the time it is the foreign party who seeks to enforce an arbitral award against a local corporation. In this regard, this legal proposition entails the obligation on the local courts to adjudicate against their local companies, thereby minimizing the element of bias on their part. After the convention of 1958, more and more countries acceded to be part of it. In this way, the arbitration guidelines pertaining to commercial disputes became widely acceptable around the globe. Its success can be ascertained from the fact that by the end of twentieth century, approximately 135 countries have become signatories to this convention[2]. The European Convention of International Commercial Arbitration

1 Kaufmann-Kohler, Habrielle. "Globalization Of Arbitral Procedure." Vand. J. Transnat'l L. 36 (2003): 1313.

2 Yves Dezalay & Bryant G. Garth, Dealing In Virtue: International Commercial Arbitration and the Construction of A Transnational Legal Order (The University of Chicago Press, United Ststes,1996) p43-44.

was concluded three years after the New York Convention. This was the first international instrument bearing the name of 'international' in its title. This convention led to the establishment of arbitration culture in international commercial context. According to the outline of this convention, the member states were authorized to frame their local laws in order to regulate the matters concerning international arbitrations. At the same time, it also placed an obligation on the local courts to take into account the international economic affairs in cases in which one or more foreign disputants were involved. Later on, more advancement was made to refine the arbitration processes.

In 1966, the United Nations Economic Commission for Europe and the United Nations Commission for Asia and Far East jointly adopted the Arbitration Rules. Later in 1976, United Nations Commission on International Trade Law adopted the Arbitration Rules[1]. These rules were also endorsed by AALCC, the Asian-African Legal Consultative Committee. The two ends of influential countries of that time, i.e. the United States of America and the Soviet Union started their negotiations with respect to harmonization of international commercial arbitration rules and procedures. Because of their influence across the globe, the rules and regulations adopted by these two were regarded as widely acceptable. Since the arbitration rules adopted by UNCITRAL concentrated more on ad hoc arbitration proceedings, there remained a space for the private party arbitrations. These rules further enshrined that the provisions of the said rules would prevail over the mutual intention of disputing

1 Honnold, John. "The United Nations Commission on International Trade Law: Mission And Methods." The American Journal Of Comparative Law (1979): 201-211.

parties[1]. It was after these Arbitration Rules by UNCITRAL that Model laws were formulated by the mid of 1980s. These laws were important because they did not merely extend the prevalent guidelines about arbitration process, but also provided certain guidelines with respect to the available discretionary powers of the disputants. Due to its comprehensive approach, it was apprehended that these laws would be popular amongst developing countries; nonetheless, Canada was the first country to adopt them[2]. By the end of 2005, these model laws were adopted by more than thirty nine countries including many developed countries like the U.S, Canada, Singapore, Japan, Germany, Spain, and many others. Profound focus of these model laws was to regulate the governance aspect of international commercial arbitration.

The matter of governance of international commercial arbitration is regulated by the international organizations and institutes such as the International Chamber of Commerce (ICC)[3]. Apart from the International Chamber of Commerce, there are other such international organizations that have been working in the same direction, such as the American Arbitration Association (AAA), International Centre for Dispute Resolution, Hong Kong and Singapore International Arbitration Centre. All these arbitration centers have adopted the rules of UNCITRAL to

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1 Caron, David D., And Lee M. Caplan. The Uncitral Arbitration Rules: A Commentary. (Oxford University Press, United Kingdom, 2013) pp 7-24, 1008-1011.

2 Hoellering, Michael F. "The Uncitral Model Law on International Commercial Arbitration." The International Lawyer (1986): 327-339.

3 Derains, Yves. "International Chamber Of Commerce Arbitration." Pace L. Rev.5 (1984)

regulate international commercial arbitration disputes. Use of Terms of Reference is amongst the most salient features of the guidelines of International Chamber of Commerce. This term of reference is basicaily a sum-up of issues and claims involved in dispute alongside the details of arbitration procedure. Parties to the disputes are mostly asked to sign these terms of reference before the commencement of arbitration process[1].

2.3 Customary Practice in Civil law

As discussed earlier, the international regulations of arbitration framework have had different impact on civil and common legal systems. Legal systems are important for the fact that they underline the roots of its institutional patterns[2]. Understanding of this subject also helps elaborating the legal norms, practices and doctrines of that particular jurisdiction. Broadly stating, these legal traditions are also regarded on the basis of Eastern and Western contexts[3]. This generality disregards the very difference of legal system that exists within each of it. For instance, there are both Civil and Common legal regimes that exist within the western end, having considerable differences between one another[4]. The practice of international commercial

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1 Barin, Babak; Little, Andrew; Pepper, Randy (2006). The Osler Guide to Commercial Arbitration In Canada, The Netherlands: Kluwer Law International

2 Glendon, Mary Ann, Michael . Wallace Gordon, Christopher Osakwe, And Christopher Osakwe. Comparative Legal Traditions in A Nutshell. West, 2012.

3 Harold J. Berman, Law And Revolution: The Formation Of The Western Legal Tradition (Cambridge, Mass.: Harvard University Press, (1983)

4 J.M. Kelly, A Short History Of Western Legal Theory (New York: Oxford Un. Press, 1997).

arbitration depends on the local legal systems whereby the international rules are enacted. These international rules and regulations are enacted locally in the form of code or statutes, backed by scholarly writings or case laws. These practices are also affected by the influence of regional bodies, for example the European Union or South Asian Association for Regional Corporation (SAARC). International legal cultures are often projected as being the integration of multiple states adopted by international bodies like the World Trade Organization. The rules and regulations governing the international commercial arbitration are the amalgamation of common and civil law traditions which have been formulated and unified by the international bodies like the International Chamber of Commerce. In the same manner, traces of civil legal systems can also be witnessed in the arbitration practices in Latin America, China and Japan.

3.4 Example of a Civil law Country

To show the impact of international commercial arbitration in civil legal system, the insight explanation of French legal system will be taken into account. Because of its liberal laws and regulations, France has become a well known hub for international commercial arbitration. It is also famous because of the presence of International Chamber of Commerce[1]. Code of Civil procedure of France entails most of the provisions related to arbitration. This civil procedure code is further divided into Code of Judicial Organization and the Civil Code. In the 1980s, France adopted certain legislative instruments (decree) which were its first

1 Rouche, Jean, And Gerald H. Pointon, Eds. French Arbitration Law and Practice. (Kluwer Law International, 2003).

modern regulations about international commercial arbitration. This instrument basically differentiated between international and local arbitration processes and appeared to be more liberal for international arbitration practices. In the same line, French courts have been lenient and liberal to interpret the arbitration clauses. Followed by the number of judgments pertaining to arbitration, new legislative code was enacted in 2011 which enshrined the legal principles previously settled in different landmark judgments. This new legislative framework further encourages the acceptance of international arbitration rules within France, making it one of the most arbitration friendly countries in the world. When comparing with other regulatory instruments pertaining to arbitration, rules adopted by France are much more liberal than others.

3. *Effect on Civil Laws*

The rules and guidelines formulated by International Chamber of Commerce leave it at the prudence of the disputants to determine about the factors to be taken into account with respect to the arbitration proceedings. They also have a choice to decide at what forum and place they would wish to proceed with the arbitration. In all, they are entitled to decide the course of dealing with regard to their international commercial arbitration according to their needs and choices.

Apart from this, all the international associations dealing with the international commercial arbitration provide their own rules and regulations for arbitration proceedings. For example, non-institutional arbitrations were restricted to few arbitration centers of British Columbian region initially. However, this has now become a common practice and facilitates the

disputants in making selection of the rules and regulations that they wish to apply for their dispute resolution[1]. Although the International Chamber of Commerce provides guidelines about arbitration process, these guidelines are not exhaustive when compared to statutes and codes enacted in different countries. Statutory guidelines with respect to the said topic are mostly inflexible and exhaustive. Guidelines of International Chamber of Commerce suggest that for the parties to invoke arbitration, a formal request needs to be submitted to the chamber bearing the detail of disputes, followed by a response from the defending party[2]. In addition to these requirements, another documents needs to be submitted which entails the terms of reference of the arbitrator, which has to be signed by the parties to dispute. This document is very much similar to the pre-trial order, which can be observed in court procedures of most common law jurisdictions[3]. After the submission of this ToR, the process involves the submission of details of the case by all disputants to the arbitrator. Depending on the background of the parties, the arbitrator chooses the language for arbitration proceedings. The number of arbitrator in the panel depends on the complexity of case; therefore, it varies from case to case. In case of arbitration whereby the disputants have mutually agreed on the names and number of arbitrators, their

1 Trakman, Leon E. "" Legal Traditions" And International Commercial Arbitration." Am. Rev. Int'l Arb. 17 (2006): 1-615.

2 Ibid No.25

3 Hulbert, Richard W. "Arbitral Procedure and The Preclusive Effect Of Awards In International Commercial Arbitration." Int'l Tax & Bus. Law. 7 (1989)

mutual agreement prevails over all other guiding principles. Unless authorized by the parties concerned, the arbitrator should not be the one who belongs to the home country of any of the parties in dispute. Underlying reason behind such practice is to avoid the possibility of any prejudice that may take place if one of the disputants and arbitrator share common backgrounds. In such arbitrations that require three arbitrators, two of the total three are appointed by the International Chamber of Commerce after the nomination by the disputing parties[1]. Code of ethics prescribed by the International Chamber of Commerce provides that the arbitrator must be unbiased and must disclose before the disputing parties the possible conflict of interest. In case where any of the disputing parties is not satisfied about the independence of arbitrator over the matter in question, the ICC rules prescribe a remedy for them to submit their grievance. Upon commencement of arbitration proceedings, there are lesser chances for parties to delay the process, and each disputant is provided with a fair chance to present the facts and evidences for their case. Based on these facts and evidences, the arbitrators are obliged to resolve the dispute in due course in least possible time. Because arbitration in an informal process of dispute resolution, arbitrators are not authorized to propel the disputing parties to produce evidences. At the same time, they have the authority to record negative inference against the party that shows least interest in resolution of dispute.

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1 Grierson, Jacob, Annet Van Hooft, And Jeffrey Waincymer. "Arbitrating Under The 2012 Icc Rules: An Introductory User's Guide." Business Law Review (2012).

In addition to this, the rules of International Chamber of Commerce also authorize the arbitrator to play the role of a friendly negotiator to facilitate compromise between the disputing parties. In order to play the role of such mediator, they are obliged to take into account the universal equitable principles to ensure that justice is served. This only occurs when the disputing parties are interested to entrust the arbitrator to perform the role of negotiator as well. Apart from this, the powers of the arbitrator are confined to adjudicate on the matter, with arbitral award backed by the prevalent laws and regulations. At some instances, the option of judicial review is not available once the arbitrator issues the award[1].

All the countries that are signatory to the New York convention of 1958 (the Convention on the Effect of International Awards) are under a legal obligation to recognize the international commercial arbitration awards in their local jurisdictions respectively. In this manner, the convention of New York facilitates the disputing parties to enforce the arbitral awards awarded in their favor within the signatory countries. In order to enforce these awards, the party seeking its enforcement should supply the local courts with a certified copy of arbitral award alongside the consent document of both disputants. When there is a difference in official language used in arbitration proceedings and the country where its enforcement is intended, then a translated copy of award needs to be submitted to the court of law.

Impact on laws and legal framework of countries can be seen from these developments. It can also be observed that with increasing number of rules and regulations, more options have been created for the

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1 Ibid No.28

parties to govern the resolution of their disputes as per their conveniences. Keeping in mind the historical approach of dispute resolution through courts, the disputing parties would have to follow the rigid and stringent court procedures and practices. The process of dispute resolution by way of arbitration has been implemented in many civil and common law countries due to its apparent benefits over court litigation. The process of arbitration curbs hostility by encouraging informal communication between the disputing parties. The advantage of arbitration proceedings in civil legal system also includes the avoidance of inflexibility of court procedures in civil disputes. Arbitration processes involve further benefits over court litigations in civil law systems; most common of which are confidentiality and cost effectiveness of the process. Due to its informal approach, arbitration proceedings are considered to be less time consuming as opposed to the court processes. In addition to all this, formal complexities of procedural and evidential laws are not strictly applied in arbitration proceedings; therefore, the disputing parties have lesser possibilities to delay the proceedings[1]. It also gives the liberty to the disputing parties to avoid publicity of their disputes. In this manner, the recent developments in international commercial arbitration have affected the framework and processes of dispute resolution in civil law countries.

4. *Taking evidences and the standard of proof in international commercial arbitration*

One of the main features of international commercial arbitration is the independence of the

1 Jan, Mohammad Naqib Ishan. "The Role Of Arbitration In The Resolution Of International Commercial Disputes." Iium Law Journal 22, No. 2 (2014)

arbitration parties in determining the arbitration procedures. The majority of arbitration legislations comprise an extensive area for the arbitration parties in the method of determining the rules of submission of evidences compared with the few provisions addressing directly the taking evidences through the arbitration panels such as the Arbitration Rules of International Chamber of Commerce (ICC Rules), the American Arbitration Association Commercial Arbitration Rules (AAA Rules), the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL Rules) and the London Court of International Arbitration (LCIA Rules). In international commercial arbitration,"[t]he primary objective of the proceedings is to establish the relevant facts, i.e., to reconstruct the past to the extent necessary to adjudicate on the issues or the claims made".[1]

Therefore, evidence is the primary objective which assists the arbitration panel to reach the truth.

International arbitration is a legal mechanism and unofficial judicial procedure generally for final and binding settlement of disputes. Evidences are one of the fundamental pillars required by the arbitration panels to settle the disputes between the arbitration parties. However, most of the arbitration rules do not include detailed rules illustrating how to manage the taking evidences. Hence, the International Bar Association (IBA), endeavoured to lay down practical, effective and fair rules for submission of evidences in international

1 Matti Kurkela and Hannes Snellman, Due Process in International Commercial Arbitration (Oceana Publication, Inc., New York, 2005), P 123.

arbitration.[1] Therefore, the arbitration parties and the arbitration panels may administer and regulate the arbitration procedures according to IBA Rules in connection with the taking evidences completely or partially.[2] However, the arbitration parties may also disregard such rules.[3] Therefore, the UNICTRAL Arbitration Rules of 1976 stipulate that "the Arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered".[4] In their endeavours to reach the truth, international arbitrators do not bind themselves with the technical rules of evidence, but are primary concerned with establishing the facts.

4.1 Freedom of the arbitration parties to take evidences

Among the most fundamental features of international arbitration is the principle of independence of the international arbitration parties. Therefore, the principle of arbitration independence exists and is acknowledged in all the modern arbitration legislations and arbitration rules.[5]

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1 Ashford, P , The IBA Rules on the taking of Evidence in International Arbitration (Cambridge University Press, 2013) p. 2.

2 Article 1(2) of the IBA rules.

3 Phillip Capper, International Arbitration: A Hand Book, 3rd edn (London: Informa Professional, 2004), p. 99.

4 UNCITRAL Arbitration Rules 1976 Article 25.

5 Article 28(1) of the UNCITRAL Model Law, s. 46(1) of the English Arbitration Act, s. 105(1) of German Civil Procedure Act ("ZPO"), Article 35(1) of the UNCITRAL Rules Article 35(1), Article 21(1) of the ICC Rules, Article 22(3) LCIA Rules.

The arbitration parties enjoy the freedom to determine the rules applicable on the dispute procedures and subject matter, arbitration venue, number of arbitrators and determining the arbitrators and the arbitration content.[1] Therefore, the arbitration parties play a fundamental role in determining the method of management of the arbitration procedures and exclude the legal rules which may be undesirable for them.[2]

Thus, all the major arbitration laws and arbitration rules give the arbitration parties the right to determine the arbitration procedures in the dispute, where article 19 of the UNICTRAL Model Law stipulates the following:

1- Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

2- Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight ofany evidence.[3]

Further, article 7 (1) of New York Convention stipulates this right: "The composition of the arbitral authority or the arbitral procedure was not in

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1 Lew, JDM, Mistelis, A and Kroll, S M, Comparative International Commercial Arbitration (Kluwer Law International, 2003) p. 413.

2 Carbonneau, T E, The Law and Practice of Arbitration (3rd ed, Juris Net, 2009) p 41.

3 The position in England is covered by s. 34 (1) of the Arbitration Act 1996.

accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

The authority given to the arbitral tribunal includes the authority to accept any evident relevant to the subject of the case, its significance and weight. Article 25 (6) of the UNICTRAL Arbitration Rules of 1976 stipulates that: "the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered".[1]

As the arbitration parties enjoy the freedom to agree on the submission of documents or evaluate the evidence by an expert, it is evident that the freedom of the arbitration parties may extend to the issue of the taking evidences and its evidential means.2

Further, articles 22 and 24 of the Arbitration Rules of the International Chamber of Commerce (ICC Rules) and articles 20 (2) and 22 (1) F of the Arbitration Rules of the London Court of International Arbitration (LCIA Rules) stipulate that the arbitral tribunal has the authority over the arbitration procedures, and that the tribunal has the authority to determine the admissibility and weight of the evidences. There are also restrictions

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1 Provisions with similar effect are found in the English Arbitration Act, s. 34, the French Code of Civil Procedure art. 1460; the Netherlands Arbitration Act art. 1039(5).

2 Lew, JDM, Mistelis, A and Kroll, SM, Comparative International Commercial Arbitration (Kluwer Law International, 2003) p 558; Poudret, JF, Besson, S, Berti, S V and Ponti, A Comparative Law of International Arbitration (Thomson, Sweet & Maxwell, 2007) p 500-501.

imposed on the admission of evidences, whether they are written or verbal evidences.[1]

Despite the above, the selection of the arbitration parties of a country as an arbitration venue does not necessarily mean that the procedural law or the court law is the law of this country in which the arbitration procedures are conducted.[2]

Hence, it is confirmed that the arbitration parties may agree in advance or during the progress of the arbitration procedures on matters relevant to the submission of evidences based on the witness statements and the experts evidences, as well as all matters relevant to the submission of documentary evidences.

4.2 Restrictions imposed on the principle of Autonomy *of the arbitration parties*

The significance of the technical rules for evidences is underlined by forming a part of the procedural laws of any country in which the arbitration hearings are held. Therefore, according to the New York Convention,[3] the field may be allowed to revoke the judgment passed in the event the arbitration procedures were not according to the law of the arbitration venue. This should consider the principle of equality between the arbitration parties, whereby no party is given an advantage at the account of the other party and the principle of equal opportunities, which is a guarantee of

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1 Article 9(2) of the IBA Rules.

2 Dallal v Bank Mellat [1986] Q. B. 441; (1986)1 All E..R. 239.

3 United Nations Convention for the Recognition and Enforcement of foreign Arbitral Awards (New York, UN, 1958) (New York Convention) art. V(1) (d).

the right of each party to present his case and take the adequate to recite the details of his case.[1] Therefore, the arbitration parties' selection of the arbitration venue necessitates automatically the implementation of the local procedures law.[2] This is because the explicit selection of the court by the arbitration parties is understood explicitly that there is an intention to settle their dispute according to the procedural law of the elected court.[3]

Article (18) of the UNCITRAL Model Law stipulates that the arbitration parties shall be treated on equal grounds, and that each party has the full opportunity to present his case. This is attributed to the principle of fairness and justice,[4] as well as the similar provisions in the New York Convention.[5] Further, article1 (1) of the IBA Rules stipulates that these rules are applicable in connection with the taking evidences, unless these rules contradict with any binding clause of the clauses of the law elected by the arbitration parties or the arbitral tribunal for its implementation on the dispute subject case.

In implementation of the above, we find that clause 43 of the English arbitration law in connection with the

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1 Binder, P, International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions (Sweet & Maxwell, 2010) p. 278.

2 Mauro Rubino-Sammartano, International Arbitration: Law and Practice, (2nd rev. edn, The Hague: Kluwer Law International, 2001) p 476.

3 Lord Diplock in Compagnie Tunisienne de Navigation S. A. v Compagnie d'Armament Maritime S. A. [1971] A. C. 572 at 604; [1970] 3 W. L. R.

4 Lew, Mistelis, Kroll, supra n 7, p 558.

5 Article V (1) (b).

attendance of the witnesses is a binding provision and related to the matter of submission and admission of evidences. Therefore, any of the arbitration parties may request to secure the presence of witnesses in front of the arbitral tribunal to present an oral testimony or submit any of the material evidences, after requesting the permission from the arbitral tribunal or according to the agreement between the arbitration parties.[1] Despite this, there are those who observe that the binding rules contradict with the principle of independence of the arbitration parties and their right to select the procedural and substantive rules applicable on their case.[2]

4.3 General Procedures for Taking Evidences in the Common law and Civil law

There are number of disagreements between the common law and civil law systems. In the countries which apply the civil law systems, we find that judges play a more effective role in the administration of the litigation procedures and gathering of evidences. On the contrary, in the countries which deal with the common law (such as the United Kingdom), we find that the authority to gather and submit evidences is always in the hands of the arbitration parties. Therefore, we will highlight the general features of the procedures and the

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1 According to subsection 43(3) (a) of the English Arbitration Act 1996, the witness must be in the United Kingdom. The arbitral Proceedings must be conducted in English and Wales or Northern Ireland.

2 Goode, R "The Role of the Lex Loci Arbitri' [2001] International Commercial Arbitration 17 International Arbitration, page 172.

method of obtaining evidences in the common law and civil law.

4.3.1 Common law

In countries which deal with the common law, for example the United Kingdom, we find that litigation is divided into two major parts, whether the matter is related to local issues or international issues.

The first stage is the pre-trial stage, which comprises the stage of the instructions, submission of documents and submission of the pleadings.

The second stage is the most significant stage, which is the trial stage, i.e. the establishment of the litigation, which permits the arbitration parties to present their case fully and verbally to the court.

The pre-trial stage in the Supreme English Court starts with the mere notification of the other party with the summons. The summons include a statement of the case or forwarding it after a period of up to fourteen days. The defendant shall submit his defence after twenty eight days of the date of being notified with the summons.[1]

The pleadings shall only mention the material facts and shall be in an adequate manner and not in excessive details.[2] The memoranda lodged with the English

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1 Paolo Michele Patocchi, Ian L. Meakin, "Procedure and the taking of evidence in international commercial arbitration: the interaction of civil law and common law procedures" 1996, International Business Law Journal. 885.

2 RSC Ord 18 rr7, 8, 12 and 13.

Supreme Court should be in line with the internal system of the supreme court (RSC).[1]

In the UK which deals according to the common law, we find that the authority of gathering and submitting evidences is almost confined to the hands of the arbitration parties. In return, we do not find any comparison procedure in the countries working according to the civil law system, where the judges have a more effective role in the administration of the litigation procedures and gathering of evidences.[2] Therefore, we find in the UK that lawyers are the ones who prepare the witnesses, examine and cross-examine them in the hearing sessions. Further, the appointment of expert witnesses is by the arbitration parties or the court may appoint an independent expert according to the request of any of the arbitration parties.

The pre-trial stage in the English procedure, represented in submitting the documents and exchange of written briefs, is merely a preparation for the most significant event in the entire procedure, which is the trial. Therefore, all the evidences are submitted in front of the court, where the parties present everything considered relevant to the subject matter, read or plead it in front of the judge. On the contrary, in the countries which apply the civil law, the hearing sessions are held throughout the procedure duration.[3]

In the countries which deal according to the common law such as the UK, although the court participated in the preparatory procedures, the

1 Paolo Michele Patocchi, Ian L. Meakin, supra n 52.
2 Ekin Omeroglu,"Taking Evidence in International Arbitration" 2015, Coventry Law Journal, 5.
3 Paolo Michele Patocchi, Ian L. Meakin, supra n 52.

arbitration parties in the hearing session shall present their case since the beginning, including the presentation of the witness testimonies. The lawyer of the plaintiff and defendant presents an opening statement, followed by submitting their presentation of their case and their evidences. At the end, the defendant submits his closing defence, followed the last response of the plaintiff. Mostly, the court passes the judgment immediately, unless it deems that there is a need to postpone for completing the pleading.[1]

In the English law, the judge does not intervene in the trial, as mostly he plays a neutral role. He does not regard the objections which are not raised by the other party. Further, he considers the other party as waived the claims which continue to be undisputed.[2]

4.3.2 Civil Law

As we already stated, the common law procedures are distinguished in the pre-trial and trial stages. The civil law distinguishes between the exchange of written memoranda and the gathering of evidences, which are the basis of the civil procedures.[3]

After the submission of the case statement, a reconciliation hearing is held, which represents the first stage. The practical effect of the reconciliation hearing differs from one country to the other within the civil law systems. This procedure is considered as formal in the Switzerland. On the contrary in Zurich, the

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1 Ibid.

2 Borris, Common Law and Civil Law: Fundamental Differences and their Impact on Arbitration, Arbitration, May 1994, p. 79.

3 Paolo Michele Patocchi, Ian L. Meakin, supra n 52.

reconciliation hearing is considered as a procedure to test the strength of the case of each party and giving the field for an attempt to narrow the scope of the dispute. In this case, the parties should be ready to negotiate. Without prejudice, the judge may express his opinion in the case. Further, the judge may work to reach a settlement between the case parties by holding a meeting between them.[1]

The second stage, which is the essence of the procedures, is represented in the exchange of written briefs. According to the civil law, the fundamental element in the procedures is the presentation of the documents and contents of written briefs between the dispute parties. According to the nature of these briefs, the court takes its first impression. The civil procedures code determines the requirements which should exist usually in the written briefs. The written briefs determine the specific objective of the case. These briefs should include a detailed summary of the facts, enclosed with a list of all the documents to be relied upon.[2] Then, this stage of the procedures will end, and will result in specific effects on the progress of the case. First, the last brief of each party should include its witnesses and claims relevant to the expert witness intended to be appointed. Second, after ending the exchange of briefs, the arbitration parties are not entitled to change the assistance requests stated in their last briefs.

The third stage is obtaining the evidences in the court hearing. The court hears the parties and then the court examines the witnesses by itself or by the dispute

1 Ibid.
2 Ibid.

parties lawyers. The witness expert is appointed by the court.

The fourth stage is after lodging the final briefs, verbal pleading and examining the dispute parties, witness and expert witness. Then, the court schedules the subject matter for judgment.

The last stage is the judgment stage. This judgment is worded according to the traditions of the civil law in a language and method which is objective and non subjective.[1]

It is noted that the procedures in the civil law is that the judge plays a much bigger role than in the common law. Further, the trial procedures in the civil law are more organized compared to the common law, as they are carried out in a stage by stage process.

5. *Evidentiary means*

5.1 *Documentary evidence*

Documentary evidences are considered as the most significance evidence in the international commercial arbitration.[2] This is attributed to the international commercial arbitral tribunals' implementation of the best evidence rule, which depends on weighing the

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1 Ibid.

2 Bühler, M and Dorgan, C "Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbiration - Novel or Tested Standards?' [2000] Journal of International Arbitration 17, pages 1, 4.

evidence more than the extent of its admissibility.[1] This is because the commercial internal arbitration depends generally on evidences and the written witness statements more than relying on oral statements.[2] This may be attributed to the excessive concern of the arbitrators' desire to evaluate the credibility of the witnesses.[3] The expression "document" includes any form of statements which may be inferred through a written, visual or head text, for example emails exchanged between the arbitration parties, faxes, writings, minutes of meetings and protocols.[4] The IBA Rules of Evidence are the only rules which defined the document, contrary to others, as they defined the document as:

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."

The general rule is that the arbitration parties disclose these documents which they intend to rely upon, by depositing these documents during their lodging of their initial written summons or briefs.[5] the lawyers have the freedom to submit the summons in the form they deem suitable, unless the arbitrators order

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1 Redfern, A, Hunter, M, Blackaby, N and Partasides, C Law and Practice of International Commercial Arbitration (Sweet & Maxwell, 2004), page 298.

2 Pietrowski, "Evidence in International Arbitration" (2006) 22(3) Arbitration International 373, 391.

3 G.B. Born,International Commercial Arbitration, Vols 1 and 2 (The Hague: Kluwer Law International, 2009), p.1827.

4 Lew, Mistelis, Kröll, supra n 37.

5 Pietrowski, supra n 65, 373, 392.

the arbitration parties to follow a specific method. It is determined that there is no specific procedure for submission of documents in evidences.[1] Therefore, the question of the admissibility of documents is usually left to the assessment of the court tribunal. Nevertheless, article 3 (1) of the IBA Rules of Evidence requests each of the arbitration parties explicitly to submit all the documents relevant to the subject of the case.[2] According to article (1) 3, the arbitration parties or their lawyers should submit the evidence they intend to rely upon within the time specified by the arbitral tribunal. Further, it is assumed that the arbitration parties submit undisputed documentary evidences to the arbitral tribunal.[3]

There is a big difference between the civil law and the common law in the matters related to the methods of submitting documentary evidences in the international arbitration procedures.[4] In the common law, the disclosure of documents is a general duty, and therefore the arbitration parties may find a means of disclosing the documents in the other party's custody, which include all the documents, whether in favour of one of the arbitration parties or not. In the civil law system, the applicant should prove the existence of the documents required to be disclosed with the other party

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1 G.M.V. Mehren and C.T. Salomon, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide" (2003) 20(3) Journal of International Arbitration, 285, 287.

2 It can be found in the main Institutional rule, E.g. Article 25 (1, 2). Of the ICC Rules and Article 15(6) of the LCIA Rules.

3 G.M.V. Mehren and C.T. Salomon, supra n 69.

4 Rubino-Sammartano, International Arbitration: Law and Practice, 2nd rev. edn (2001), p 670.

and their contents. Such documents should be those which each of the arbitration parties intend to rely upon.[1]

In implementation of the above, article 1460 (3) of the French Code of Civil Procedure stipulates that the arbitrator may mandate one of the litigants to submit the documents and evidences in his possession. Clause (7) of the American Federal Arbitration Law stipulates that arbitrators may summon any person in writing to appear in front of them as a witness and to bring with him in an appropriate manner any book, document, paper, register or any material evidence in the case. The English Arbitration Act gives the arbitral tribunals the authority to determine which documents should be disclosed and in which stage of the arbitration stages.

Although the language of a number of the institutional rules may be unclear in the obligatory disclosure of the documents, whereby article 24 (3) of the UNISTRAL Rules and article (21) of the American Arbitration Association Rules that the arbitral tribunal may instruct the arbitration parties to disclose and uncover the documents in their custody, the reason for which is attributed to its adoption of the common law.[2]

Therefore the IBA Rules presented a mechanism in connection with submitting the evidences, in an attempt to reconcile between the common law approach and the civil law approach. Article 3 (2) of the American Arbitration Association stipulates that the request to submit the documents should be submitted to each of the arbitral tribunal and the arbitration parties.

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1 Ekin Omeroglu, supra n 55.

2 LCIA, Arbitration Rules 1988 art. 22(1).

Article 3 (3) of the American Arbitration Association's rules stipulates in connection with taking evidences that the request to submit the documents should contain the disclosure of such documents and identify such documents.

Article 2 of the IBA Rules requests the arbitrator to consult with the arbitration parties in an early stage to address the issues relevant to the timing and method of submitting and accepting the evidences. Further, article 3 permits the arbitration party to request the documents relevant to the case subject matter. Article (3) of IBA rules also permit the arbitrators to consult with the arbitration parties to appoint independent and neutral experts to audit the documents to identify the extent of suitability of disclosing or objecting them.

However, in general, the arbitral tribunals lack the authority to command the submission of documents in custody of one of the arbitration parties, until and when such documents are relevant to the case subject matter.[1] Although this matter is criticized as arbitration is a form of justice which requires a sufficient amount of evidences and information in order to be established.[2]

It is also noted that International Accountants Association's Rules, although it adopted the common law rules relevant to the method reaching the truth by all the appropriate means, nevertheless it prefers to follow the approach of the civil law system.[3]

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1 Redfern, A, Hunter, M, Blackaby, N and Partasides, C, supra n 64.

2 Webster, TH, "Obtaining Evidence from Third Parties in International Arbitration" [2001] 17 Arbitration International 2, p 146.

3 Mauro Rubino- Sammartano, supra n 46, p 670.

E-Documents:

Those concerned with arbitration, who include the judges, counsellors and information technology experts, met in the Sedona Conference in 2002 to discuss the issue of disclosure of electronic documents in the litigation context.

They reached the principles of Sedona on the disclosure of e-documents issued in 2004 and 2007.[1] Therefore, the electronically saved information are considered as the latest and biggest challenges in international commercial arbitration process, as most of the commercial companies and corporations keep many of their data electronically. Therefore, many institutions such as the Chartered Institute of Arbitrators, the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and the International Institute of Conflict Prevention and Resolution (CPR)[2] were forced to facilitate the process of disclosure. Facilitating the process of using such electronic documents in the arbitration procedures is by holding an early meeting between the arbitration parties to lay down a mechanism for unifying the basic words, method, scope and way of searching for the electronic documents. It is observed that the IBA Rules in article (2) pointed to the significance of early meeting and at the right time for the arbitration parties and the arbitrator and invite each other to consult on the method of taking fair procedures to disclose and submit evidences.

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1 David Howell, "Development in Electronic Disclosure in International Arbitration (2009) 3(2) Dispute Resolution International 151-168.

2 Ibid.

5.2 Witness Testimony

The main factor in the hearing sessions and investigation of evidences is the examination of the witnesses, and therefore the arbitration procedures should determine who and in what form it is possible to hear a person and examine him as a witness. The giving of a testimony does not preclude the existence of a relationship between the witnesses and the arbitration parties, whether they are their employees or involved in the dispute.[1] In the international commercial arbitration, any person, including the arbitration parties and their lawyer, are permitted generally to present their statements as witnesses.[2]

In international arbitration, the method through which the witnesses are interrogated tend to borrow factors from each of the civil law and the traditions of the common law. Despite this, we find that in some countries which adopt the civil law (such as France and Germany) there is a ban against accepting one of the arbitration parties as a witness.[3] Further, the arbitral tribunal has the authority to evaluate the witness evidences and control their examination. The arbitral

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1 Laurent Lévy, "Testimonies in the contemporary practice: witness statements and cross-examination", in Arbitral Procedure at the Dawn of the New Millennium, Reports of the International Colloquium of CEPANI (Brussels: Bruylant, 2005), pp.107–131 at 112.

2 Libananco Holdings Co Ltd v Republic of Turkey, ICSID Case No. ARB/06/8.

3 Poudret, J F, Besson, S, Berti, S V and Ponti, A Comparative Law of International Arbitration (Thomson, Sweet & Maxwell, 2007), p. 557; Turner, P and Mohtashami, R A Guide to The LCIA Arbitratio Rules (Oxford University Press, 2009), page 134.

tribunal may raise questions to the witnesses. However, mostly it is permitted to interrogate the witnesses by the legal representative of the litigant party.[1] Article 4 (2) of the IBA Rules stipulates that any person may be a witness, including the arbitration parties, their officials or employees or representatives. It is noted that in many arbitration cases, the basic witnesses are the employees, because they are the persons who most informed of the case facts.[2]

Witness statements are either written statement or oral statement. The oral statement is applicable in the countries which adopted the common law system, and are less significant in the civil law countries. The documentary evidence in the countries which adopt the civil law (such as France) is the main evidence. For this purpose, the plaintiff and defendant submit the documents which support their claims. The ICC rules stipulate that the arbitrator is entitled to decide the dispute according to the relevant documents. In Dalmia Dairy Industries Limited (India) v. National Bank of Pakistan,[3] professor Lalive refused to hear the parties on the basis that it would have been possible for him to decide the case properly according to the documents alone. In the ICC case No.1512, the arbitrator observed that the case may be decided pursuant to the documents submitted by the arbitration parties without hearing the oral evidence.[4]

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1 Pietrowski, supra n 65 at 394-395.
2 Ashford, P, supra n 32, p 99.
3 [1978] 2 LIyd's Rep 223.
4 Magnum, Y. W. NG Evidence in Arbitration(VDM Verlag Dr. Müller, 2009),p. 33-35.

As for the matter of examining the witnesses, the procedure in the international arbitration may be governed by foreign practice, where the witnesses may be examined and cross examined according to the common law practices in most of the European jurisdictions, particularly France and Switzerland, provided the arbitration parties agree on the issue of examining the witnesses, or this is carried out according to a procedural order issued by the arbitration panel after consultation with the arbitration parties. However, the oral testimony may not be necessary from the viewpoint of the court or requested from the litigant party. On the contrary, the written testimony may include alone sufficient information which may support the efficiency of the judicial procedures and reduce the period of deliberating the case.[1]

The rules of the laws of a number of the civil law countries ban with various degrees in terms of intensity (including France, Germany, Italy and Belgium) communicating with or meeting the witnesses by the arbitration parties before giving their testimonies in the hearing session. This is considered by the court as a breach of the judicial sovereignty. In the international commercial arbitration, regardless of the situation in the national procedure, it is well acknowledged that the witnesses may be met. Therefore, the arbitrator shall ensure that such matters are clear at an early stage of the procedures to guarantee that the arbitration parties receive fair treatment in their preparation for their cases.

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1 Oetiker, C "Witnesses before the International Arbitral Tribunal' [2007] 25 ASA Bulletin 2, p 254; Born, G, International Arbitration: Law and Practice (Kluwer Law International, 2012), p 168.

In Azinianetal v. United Mexican States,[1] the arbitral tribunal permitted the plaintiff to meet the defendant's witnesses and observed that it is permitted to conduct this matter. This is confirmed by article 20 (5) of the LCIA Rules and article 25 (2) of the Swiss Rules of International Arbitration (Swiss Rules) which permit meeting with the witnesses.

According to article 8 (1) of the IBA Rules, one of the arbitration parties or the arbitral tribunal may request the witness of the facts or the expert appointed by the parties or arbitral tribunal to be present personally to give his testimony in the hearing session to investigate the evidences. Usually, this happens when the testimony of one of the witnesses who presented a written testimony does not conform with the witness testimony who are actually present in the hearing session.[2] The court may her witness by using technological means such as the videoconference instead of being present in the hearing session. The arbitral tribunal does not regard the testimony of the witness who gave a written testimony if he refuses to present his testimony in the hearing session.[3] This confirms with the provision of article 4 (7.8) of the IBA Rules.

5.3 Expert Evidence

If the arbitral tribunal does not possess the required technical experience, then the arbitral tribunal may use

1 ICSID Case No. ARB (AF) 97/2; O' Malley, ND Rules of Evidence in International Arbitration (1st ed, Informa Law from Routledge, 2012) p 115.

2 Kühner, D "The Revised IBA Rules on the Taking of Evidence international Arbitration" [2010] 27 Journal of International Arbitration 6, p 674.

3 Moses, Margaret L. Supra n 9, p 185.

the opinion of experts. This evidence may take the form of giving a testimony or submitting reports or information. It is accustomed that these evidences assist the arbitral tribunal in evaluating the case which requires a specialized knowledge in technology, constructions, engineering, oil and gas.[1]

Experts are either appointed by the arbitration parties or appointed by the arbitral tribunal,. Article 5 and 6 of the IBA Rules stipulate the obtaining of evidences from expert witnesses who may be appointed by the arbitral tribunal or the arbitration parties. Article (29) of the UNCITRAL Arbitration Rules stipulate the details of how to obtain evidence from experts appointed by the arbitral tribunal. In the countries which adopt the civil law, the experts are appointed by the arbitral tribunal to assist it in evaluating the case.

Therefore, the experts appointed by the arbitration parties work to assist the arbitration parties in the preparation for the hearing sessions, investigation of the evidences and presenting their case in the appropriate manner. Therefore, the expert appointed by the arbitration parties shall submit the "expert report" which is a written statement presented by the expert.[2] This report shall include the name of the expert, his address, qualifications, experience and training, and a statement of his independence from the arbitration parties, a description of the methods, evidences, and information used in his working method, the results

1 Moses, Margaret L, Ibid, Lew, JDM, Mistelis, A and Kroll, S M, supra 37, p 575, Pietrowski, supra n 65, 373, 396.

2 Article 5 (1) of the IBA Rules.

reached and his signature of the same, with the identification of the date and place.[1] Further, the arbitral tribunal may request meeting of the experts appointed by the arbitration parties to discuss the issues set forth in their reports before submitting them to the arbitral tribunal, in order to reach an agreement between them.[2]

In many instances, the arbitral tribunal hires experts to assist in evaluate the case, as they enjoy experience and know-how in technical matters which the arbitral tribunal does not possess.[3] Mostly, this is preferable in many legal systems.[4] The expert appointed by the arbitral tribunal is a person or firm appointed by the arbitral tribunal to submit a report to it on specific cases determined by the arbitral tribunal. Therefore, before appointment of the expert, the arbitral tribunal shall consult with the arbitration parties in connection with his name and qualifications, and confirm on the absence of conflict of interests with the arbitration parties and their legal consultants.[5] Further, the expert appointed by the arbitral tribunal may claim the arbitration parties to submit information or documents which are fundamentally relevant to the case for inspection. In the event of non compliance on part of any party with cooperation, the expert shall write the same in his report.[6] As for the content of the report

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1 Article 5 (2) of the IBA Rules.
2 Article 5 (4) of the IBA Rules.
3 Oetiker, C, supra n 87, p 245.
4 S. 37 of the English Arbitration Act, Article 25(4) of the ICC Rules Art, Articl 21 of the LCIA Rules, Article 29 of the UNCITRAL Rules; Article 27 of the swiss Rules.
5 Article 6 of theIBA Rules.
6 Article 6(3) of theIBA Rules.

submitted by the expert appointed by the arbitral tribunal, it is the same content of the report submitted by the expert appointed by the arbitration parties.[1]

6. *Burden of Proof Standard in International Commercial Arbitration*

In the civil law jurisdictions, the burden of proof is considered as a substantive matter. In the countries which adopt the common law (UK), the burden of proof constitutes a part of the proof law classified as being descriptive instead of the substantive law.[2] According to article 24 91) of the UNCITRAL Arbitration Rules, the general rule is that the burden of proof is borne by the plaintiff in the facts claimed by him, and the burden of proof is borne by the defendant in connection with the defence submitted by him.

Whereas the main arbitration laws did not lay down any clause indicating on whom the burden of proof falls, therefore the role of the international arbitration is manifested here in identifying who shoulders the burden of proof, which is a matter relevant to the substantive or procedural law. Therefore, in the event of the arbitrator's violation in his implementation of the burden of proof of an explicit or implicit provision, then his decision will be disregarded in light of the corresponding provisions in many the national arbitration laws and in light of Article VI of the New York Convention of 1958.

Similarly, the wrong implementation of the burden of proof contradicts with the substantive law which

1 Article 6(4) of theIBA Rules.

2 Keane, The Modren Law of Evidence,(2nd ed, Butterworth, United Kingdom,1989), p 1.

governs the dispute. By reference to the 1980 EU Convention of 1980, in connection with the applicable law on the contractual obligations (Roma Agreement) article 14 (1):

"The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof"

Whereas Reiner argues that the applied burden of proof is always governed by the applicable law on the dispute subject matter.[1]

Dicey[2] notes that the problem arises in two cases: the first case is in the event of whether the court law provision in connection with the burden of proof is substantive but the provision of the law for the case reasons is procedural, it is natural that the rule relevant to the burden of proof is inapplicable. The second case is whether the provision of the court law is procedural and the provision of the case subject matter in connection with the burden of proof is substantive. This leads to a conflict in the rules. Mark Huleatt observes that this does not represent any problem in arbitration. In the first case, the arbitrator should search for direction in the procedural law in the substantive law country. In the second case, the arbitrator should apply the substantive law provision.[3]

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1 A. Reiner et al. "The Standards and Burden of Proof in International Arbitration" (1994) 10 Arb. Int'I 317.

2 Dicey and Morris, The Conflict of Laws, (12th ed, Sweet & Maxwell, 1993) p 179.

3 Mark Huleatt-James, "The Laws and Rules Applicable to Evidence in International Commercial Arbitrations, and some Issues releating to their Determination and Application", 1997, Arbitration 273.

In the countries which adopt the common law traditions, we find that article 34 of the English Arbitration Act of 1996 stipulates that in the procedural and proof matters:

(1) it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) procedural and evidential matters include:

(f) whether to apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion.

Contrary to this English approach, the French law confined t he thinking in the burden of proof matter to the case of whether the judge has doubt that the party shouldered with the burden of proof shall not succeed. In Germany, article 261 of the German Criminal Procedure Code stipulates the following:

"the court shall decide on the result of the evidence taken according to free conviction gained from the hearing as whole"

Further, article 286 of the Civil Procedures Code stipulates the following:

"The court shall decide in consideration of the whole contents of the proceeding, the results of the evidence taken and according to its free conviction whether an alleged fact shall be considered true or untrue. Within the judgment the court shall indicate the conductive reasons for its opinion."

It is observed that the burden of proof in the criminal and civil law are the same.

In Scotland, as applicable in the UK, there are standards for proof relevant to the criminal law and others applied on the civil law. Despite this, the balance of probabilities may differ from one case to the other, as per the effects resulting from them, as in the case of proof and weighing of the evidences in the forgery case in a civil case is more than what is required to proof breach of the contract.

In Italy, the standard of proof differs from that applicable in the common law. There are two types of binding evidences such as confession and freedom of proof. Therefore, the court's decision should be in line with the results of such evidences. In the event its decision is contradicting with such evidences, then its decision shall be subject to objection.

In the standard of proof from the viewpoint of Islamic Laws in criminal cases, doubt is always interpreted for the interest of the defendant. The standard of proof requires confirmation and certainty in proof. As in the civil cases, the rule is: the evidence is borne by the party claiming it and the oath for the party who denies. The burden of proof is shouldered by the plaintiff. As for the defendant, he has to swear the oath in front of the complainant's failure to submit convincing evidences.

Therefore, the relationship between the burden of proof and the arbitration procedures i.s as noted by Lorenzen that the burden of proof should be determined by the applicable substantive law, even if a number of the legal systems are not as such. Lorenzen discussed the following:

'... the statement that courts should enforce foreign substantive rights but not foreign procedural laws has no justifiable basis if the so-called procedural law would normally affect the outcome of the litigation.'[1]

In the role of the international courts in proving the facts of the case, Sandifer observes that: '... are generally not content to rest a decision simply upon the ground of a failure by a party to maintain the burden of proof resting upon him. If a party fails to bring forward satisfactory proof, tribunals in practice customarily exercise the discretion usually vested in them by requiring a further production of evidence by one or both parties or by appointing experts to make appropriate inquiries or making researches on their own initiative.'[2]

In specific facts in which the ordinary allocation of the burden of proof will lead to an unfair result, the judges in each of the common law countries and civil law intervene to lay down guideline principles which are the basis for handling these specific facts.

An example of this is in the English law (one of the common law countries) where is the doctrine of (the matter clarifies itself), in the event the thing is under the administration of the defendant, and that the incident cannot occur in the even the management applies reasonable care, then the burden of proof is transferred from the plaintiff to the defendant.[3] Similarly in the

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1 Lorenzen, Selected Articles on the Conflict of Laws (1947) p 134.

2 SANDIFER, D., Evidence Before International Tribunals, revised edition, University Press of Virginia, 1975, p. 131.

3 Scott v. London & St. Katherine Docks Co. (1865) 3 H. & C. 596, 159 Eng. Rep. 665.

German law, the law discharges the plaintiff in the products case from the burden of proving that the producing country has acted with negligence, as the details of the production process are only known to the producing company. Therefore, the law transfers the burden of proof from the plaintiff to the defendant.[1] In the English law, there was a case presented by the plaintiff in which he claimed the defendant to hand over to him precious stones in his custody. As the defendant refused to hand over the precious stones, the plaintiff brought a number of precious stones of a size and value equivalent to them, and thus the judge transferred the burden of proof to the defendant and issued an instruction to the jury that if the defendant does not present the precious stones, it is assumed that their value is estimated on the basis of the best quality.[2] In parallel form with the German Law, the court may carry out a free evaluation of the evidence, if the plaintiff fails to submit the evidence due to a reason attributed to the defendant who deliberately concealed or destroyed the evidence. Then, the court here transfers the burden of proof from the plaintiff to the defendant and accepts the claim in favour of the plaintiff on the basis of the intuitive evidence.[3]

7. *Conclusion*

This paper has attempted to highlight the impact of international commercial arbitration in civil legal system. In this regard, attempts have been made to elaborate the practical and theoretical context of applicability of arbitration rules and their governances

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1 Case BGH NJW 1969, p. 269.
2 Armory v. Delamirie, (1722) 1 Stra 505.
3 Beweisvereitelung BGH NJW 1986, p. 59.

in different legal systems. In order to give a holistic view of the subject, an insight of a civil law country has been presented in the aforementioned paragraphs. In the light of the above information, it may be construed that practice and procedures of international commercial arbitration varies depending on the legal norms of a particular civil law country. It is possible to conclude that most of the international commercial legislations and the institutional arbitration rules comprise a clause permitting the arbitration parties the freedom to determine the rules of taking evidences. Further, the arbitral tribunal controls the arbitration procedures and has the authority to determine the admissibility and significance of the evidences. In light of the difference between the legal systems in the common law and the civil law are not equivalent. As there is a support of the concept of freedom of the parties in the international commercial arbitration field, there is a need for compliance during the progress of the court with any binding or implicit rules for the procedures with full knowledge of the contract law systems.

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