Evidence in International Commercial Arbitration – Exploring a new Framework

By Hon. Peter Vickery QC FCIArb FACICA[91]

Abstract

Noting that the costs of arbitration are pervasively perceived by parties to be its 'worst feature', the Hon. Peter Vickery QC provides readers with insight into how the early adoption of evidentiary principles by arbitrators and parties to an arbitration can significantly reduce costs associated with the fact-finding process. In his article, his Honour outlines a 'concept architecture' of suggested evidentiary principles, which are drawn from samples of international case-law, bodies of arbitration rules and instruments that illustrate common themes. These common themes are largely embodied by what his Honour describes as the three 'Core Process Principles', namely flexibility, efficiency (expedition and cost-effectiveness) and fairness. Imbuing these Core Process Principles in a range of suggested evidentiary principles, his Honour then lays the foundations for filling a gap in the applicable rules relating to the burden of proof, standard of proof and relevance in arbitral proceedings.

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Introduction

Parties to an international commercial dispute often seek to resolve their differences through arbitration because of the perceived potential advantages over proceedings in courts. The advantages are well recognised:

- Capacity to select an arbitrator with experience suited to the case;
- Potential for arbitration to be completed faster, cheaper and with greater flexibility and informality than litigation in court, with time limits set for the process and limited avenues of appeal;
- The advantage of arbitration proceedings and arbitral awards being confidential;
- With the support of the *New York Convention*,[92] generally arbitral awards are more amenable to enforcement in other nation states than court judgments.

However, the findings of the 2018 Queen Mary International Arbitration Survey [93] signal that opportunity for improvement in the arbitral process needs to be kept under review. The Survey points to the need for a greater level of cost consciousness in the arbitral process, combined with a greater level of efficiency,

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92 The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958).

[93] Queen Mary, University of London, School of International Arbitration, "2018 International Arbitration Survey: The Evolution of International Arbitration" - 'Executive Summary – International Arbitration: The Status quo'.

proportionality and expedition in procedural management and ultimate disposition. "Cost" continues to be seen as arbitration's worst feature followed by a number of factors including "lack of speed".

Fact finding, unless appropriately managed, can give rise to excessive cost and delay in the arbitral process. At the same time, it is a critically important component of adjudication by arbitration, as it is in a court of law. It is upon the evidence that findings of fact are made by the arbitral tribunal on the 'critical path' towards resolving the issues presented for determination.

The importance of a proficient fact-finding process in arbitration is underscored by two other factors:

First: The dispute which the parties have committed to the arbitral tribunal for resolution has a public law element. Arbitration is an adjudicatory function which produces binding outcomes in the form of an award which is enforceable under the domestic law of most nation states.

Second: A rational approach on the part of the arbitral tribunal to the twin tasks of receiving the appropriate evidence to take into account, and the task of assessing and determining the findings of fact to be made on the evidence admitted, is essential to the legitimacy of the process of dispute resolution by arbitration and the maintenance of public confidence in the process.

A concept architecture of suggested evidentiary principles for parties and arbitrators to adopt in international arbitration is ventured in this paper. The principles are drawn from samples of international case-law and bodies of arbitration rules and instruments which illustrate common themes.

The 'Gap' - Lack of Pre-defined Rules of Evidence in International Arbitration

International arbitration rules, with the one exception discussed dealing with basic exclusionary rules,[94] share one omission in common – they contain no detailed rules of evidence. In international arbitration, as opposed to litigation conducted in a domestic court of law, in the interests of giving primacy to the agreement of the parties as to the conduct of their proceeding, the parties are generally free to agree upon the procedures to be adopted for their arbitration as well as the rules of evidence, if any, to be applied. In the absence of agreement, the arbitrator is generally conferred with the power to make the necessary determinations.

In some cases, where the parties do not address the issue, this may conceivably result in no body of formal evidence rules at all being applied to the arbitration. The rules of the Singapore International Arbitration Centre (SIAC) 2016, for example, expressly provide that the arbitral tribunal is not required to apply the rules of evidence of any applicable law in making its determination as to the relevance, materiality and admissibility of the evidence. [95] Alternatively, in international arbitration, the parties may agree to dispense with the application of any rules of evidence, or the arbitrator, in the absence of agreement, may determine to take this course.

A suggested approach for an arbitral tribunal to deal with the evidence in the absence of a body of definitive rules of evidence applying is provided in this paper.

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[94] Article 9 of the IBA Rules.
[95] Article 19.2 of the SIAC Rules 2016.

Sample Arbitration Rules

Set out below is reference to a group of eleven rules of international arbitration in current use, which I will call the 'Sample Rules'. They are intended to provide a cross-section of international arbitration rules drawn from the UNCITRAL Model Law, and the arbitration rules of the great seats in Europe, Asia, the United Kingdom, America and the Asia-Pacific. [96] They will serve to provide illustrations of key concepts in the process of international arbitration.

The Sample Rules referred to are: The UNCITRAL 'Model Law' on International Commercial Arbitration (the '*Model Law'*); [97] the rules of Arbitration of the International Chamber of Commerce ('*ICC Rules')*; [98] the rules of the London Court of International Arbitration ('*LCIA Rules*'); [99] the rules of the Dubai International Arbitration Centre ('*DIAC Rules*'); [100] the rules of the Dubai International Financial Centre-London Court of International Arbitration ('*DIFC-LCIA Rules'*); [101] the rules of the Hong Kong International Arbitration Centre ('*HKIAC Rules*'); [102] the rules of the Singapore International Arbitration Centre ('*SIAC Rules*');[103] the rules of the Arbitration Institute of the Stockholm Chamber of Commerce ('*SCC Rules*');[104] the rules of the New Zealand International Arbitration Centre ('*NZIAC Rules*');[105] and the International Bar Association Rules on the Taking of Evidence in International Arbitration ('*IBA Rules*'); [106] and the rules of the International Centre for Dispute Resolution ('*ICDR Rules*).[107]

Core Process Principles

The analysis conducted here will first deal with three core organising principles classified as 'Core Process Principles'. These emanate from examination of the Sample Rules considered. They are principles which

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[96] The five most preferred arbitral institutions are the ICC, LCIA, SIAC, HKIAC and SCC, and the five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva. Ibid: Queen Mary, University of London, School of International Arbitration, "2018 International Arbitration Survey: The Evolution of International Arbitration"- 'Institutions' and 'Seats'.

[97] In this paper the Model Law means: the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

[98] The Rules of Arbitration of the International Chamber of Commerce make provision for establishing the facts of the case. The ICC Arbitration Rules are those of 2012, as amended in 2017 (the 'ICC Arbitration Rules'), effective as of 1 March 2017.

[99] The London Court of International Arbitration (LCIA) is one of the world's leading international institutions for commercial dispute resolution. The current Rules of the LCIA are effective from 1 October 2014.

[100] The Dubai International Arbitration Centre rules (as from 7 May 2007) are in the process of being amended by a 2018 update.

[101] The DIFC-LCIA Arbitration Centre adopted the DIFC-LCIA Arbitration Rules to take effect for arbitrations commencing on or after 1 October 2016. In all material respects, the DIFC-LCIA Arbitration Rules replicate the LCIA Arbitration Rules.

[102] The Hong Kong International Arbitration Centre (HKIAC) introduced new rules in 2013 known as the 2013 Administered Arbitration Rules. The Rules were developed after five years' experience in the use of the original 2008 Administered Arbitration Rules, several rounds of public consultation, review by the HKIAC Rules Revision Committee and extensive consultation with practitioners, arbitrators and other stakeholders.

[103] The Singapore International Arbitration Centre (SIAC) introduced the 6th edition of the Rules on 1 August 2016.

[104] The SCC Rules; the Arbitration Rules and the Rules for Expedited Arbitrations, entered into force on 1 January 2017.

[105] The New Zealand International Arbitration Centre (NZIAC) provides a forum for the settlement and determination of international trade, commerce, investment, and cross-border disputes in the Trans-Pacific region. NZIAC has developed Standard Arbitration Rules which apply to all arbitrations in which the claim is for an amount greater than or equal to NZ$2.5 million. In other cases, a different suite of rules applies, depending upon the amount of the claim.

[106] The International Bar Association Rules on the Taking of Evidence in International Arbitration were adopted by a resolution of the IBA Council on 29 May 2010. The revised version of the IBA Rules of Evidence was developed by the members of the IBA Rules of Evidence Review Subcommittee which comprised 22 leading practitioners representing a range of legal systems and cultural backgrounds.

[107] The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association. The current ICDR rules as amended are effective from 1 June 2014.

lie at the heart of the conduct of an arbitration, and contribute to the rationale for its existence as an accepted system of international adjudication.

Three Core Process Principles identified are:

1. Flexibility;

2. Efficiency (in the interests of Expedition and Cost Effectiveness); and

3. Fairness.

To these may be added a fourth core principle developed in this paper. This principle focusses on evidence in arbitration by marshalling what may be described as 'Core Evidence Principles'. Together, these work to provide an evidentiary framework for dealing with the key issues of Burden of Proof, Standard of Proof and Relevance.

1. Core Process Principle - Flexibility

'Flexibility' in this context has two basic elements:

(a) a facility to accommodate the agreement of the parties and give primacy to the manner in which they have agreed to conduct their proceeding; and
(b) a facility to satisfactorily accommodate the concept of 'internationality' in the conduct of an arbitral proceeding.

At the outset it needs to be noted that flexibility, although oft stated as a hallmark of arbitration, is not an absolute. In the management of individual cases, other factors need to be balanced – for example, the desirability of developing a reasonable level of procedural certainty. This emerges as an important consideration particularly from the time of the first Pre-hearing conference when the 'ground rules' for the particular arbitration are set in place. The parties are then put on notice as to the procedures that will be followed and the approach of the arbitral tribunal in dealing with the issues. In the interests of avoiding a series of 'flip flop' procedural decisions, a level of certainty and consistency is clearly desirable.

This approach seeks to instil confidence in the process, manage expectations, and provide a framework for the parties to prepare their cases in an efficient and cost-effective manner. Nevertheless, if the proceeding so demands as it progresses, a reasonable level of flexibility needs to be built in. How the balance is struck is developed from the input of the parties, and failing agreement, to the judgment of the arbitrator.

The Sample Rules generally do not provide expressly for the key theme of 'flexibility'. The rules do however, by the procedures established, by implication provide examples of flexibility in dealing with evidence. The key concepts drawn from the international instruments may be summarised:

(a) The parties are generally free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings;
(b) Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate;
(c) The arbitral tribunal determines the admissibility, relevance, materiality and weight of the evidence offered;
(d) The arbitral tribunal is generally given power to control the examination of witnesses. It may, for example, limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome or duplicative.

A typical provision illustrating the principle of 'flexibility' is found in the *Model Law* in Article 19. 'Determination of rules of procedure':

> "(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 of any evidence."

Other expressions of the principle of 'flexibility' are to be found in the *IBA Rules* (Article 8)*;* the *ICC Rules* (Article 19); the *DIAC Rules* (Article 27.2); the *SIAC Rules* (Article 19.2); the *HKIAC Rules* (Article 22.2); the *SCC Rules* (Article 31)*;* the *NZIAC Rules* (Article 31); and the *ICDR Rules* (Article 20.1).

2. Core Process Principle – Efficiency (Expedition and Cost-Effectiveness)

The Hon. Ken Hayne QC [108] has lamented: "*Speed and simplicity were once properly seen as defining characteristics of arbitration.*"[109]

Yet the objective of providing an efficient, timely and cost-effective resolution of the real issues in dispute remains a central goal of the arbitration process. Although attainment of the objective in practice has become a challenge in contemporary arbitration, it remains as a key standard. It finds expression in many international instruments which support the process and define the rules of arbitration.

The process of arbitration must also be considered against the background of this core principle of Expedition, Efficiency and Cost-Effectiveness, which may compendiously be called the 'Efficiency Objective'.

International rules reflect common key themes in addressing this issue:

> (a) The vices of delay and expense are commonly linked together as two elements which, unless appropriately managed, are regarded as inimical to a viable arbitral process;
>
> (b) A variety of mechanisms are suggested for the attainment of the Efficiency Objective;
>
> (c) A number of rules exhort the arbitral tribunal and the parties to make every effort to achieve the Efficiency Objective, in some cases in mandatory terms, with at least one body of rules providing for sanction in the event of breach, demonstrating the importance of this principle.

Examples of the 'Efficiency Objective' are provided for in the *Model Law* as adopted domestically by States in Australia. In New South Wales, the *Commercial Arbitration Act 2010* (NSW) by section 1C defines the paramount object of the Act in the following terms:

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[108] A former Justice of the High Court of Australia (1997 until his retirement in 2015).
[109] 'Evidence in Arbitration' The Hon K M Hayne AC, Resolution Institute Baker & McKenzie – Melbourne – 5 October 2016, www.resolution.institute/documents/item/2282 [Last observed 14 July 2018].

"(1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals **without unnecessary delay or expense**. [Emphasis added]

(2) This Act aims to achieve its paramount object by:

(a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest), and

(b) providing arbitration procedures that enable commercial disputes to be resolved in a cost-effective manner, informally and quickly.

(3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved."

The *Commercial Arbitration* acts of other Australian States are in similar form.[110]

International Rules follow suit, such as the ICC Arbitration Rules (Article 22), which makes provision for the conduct of the arbitration. The central advances in the ICC Rules, which focus on cost and time efficiencies, came into operation on 1 January 2012. The reforms seek to address the growing concerns within the international arbitration community as to delay and inefficiency over the last decade.

A principal amendment to the ICC Rules was to introduce an express requirement by Article 22(1) that the arbitral tribunal and the parties must conduct the arbitration in an "expeditious and cost-effective manner, having regard to the complexity and value of the dispute". Moreover, a sanction is provided where a party fails to do so. The Rules countenance by Article 38(5) that the arbitral tribunal may make orders against the defaulting party when determining costs.

Further, a new provision introducing a case management conference (or Pre-hearing conference) at the outset of an arbitration became a mandatory process under Article 24. The new approach is supplemented by a new Appendix IV to the Rules which provide for a check list of case management practices which are open for adoption by the parties and the tribunal.[111]

All of the 2012 amendments are retained in the present ICC Arbitration Rules of 2017.

Further examples of the Efficiency Objective are provided in: the *LCIA Rules* (Article 14); the *HKIAC Arbitration Rules* (Article 13); the *SCIAC Rules (*Article 19.1); the SCC Rules (Articles 2(1) and Article 23(2); the *NZIAC Rules* (Clause 25.1); the *ICDR Rules* (Article 20.2); and the Preamble to the *IBA Rules*.

These express statements of principle establish accepted norms of the arbitral process. Effective implementation of the principles must be left to the management skills, flexibility and creativity of the arbitrator and the commitment of the parties to undertake, in good faith, the contractual obligations reflected in their arbitration agreement.

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[110] Commercial Arbitration Act 2010 (NSW); Commercial Arbitration Act 2011 (SA); Commercial Arbitration (National Uniform Legislation Act 2011 (NT); Commercial Arbitration Act 2011 (Tas); Commercial Arbitration Act 2011 (Vic); Commercial Arbitration Act 2012 (WA); Commercial Arbitration Act 2013 (Qld).

[111] Appendix IV. 30 ICC Publication 880-4 ENG ICC Arbitration Rules THE ARBITRAL PROCEEDINGS.

Core Process Principle – Fairness

The requirement to provide procedural fairness is an overarching norm central to the proper administration of the arbitral process. The following finding was made in the 2013 Queen Mary survey: [112] "Several interviewees who are frequent users of arbitration explained that, regardless of whether they are a claimant or respondent, "fairness" – above all other considerations – is what companies look for in a dispute resolution mechanism."

Procedural fairness is an issue to be addressed during the dispute adjudication process, before the outcome has been determined.[113] It provides a critical reference point against which key decisions as to process are made. It finds expression in many international instruments which support the process and define the rules of arbitration.

The requirement to provide procedural fairness can be variously expressed, but has two basic elements: [114] a requirement for the arbitral tribunal to act free of bias and be impartial and moreover, appear to so act (*nemo iudex in causa sua)*; and a requirement that each party has a right to be fairly heard so that each is given a reasonable opportunity to present its case and each has reasonable opportunity to respond to the case of the other (*audi alteram partem*).

Nevertheless, the obligation of the arbitral tribunal is to provide "a fair but not limitless opportunity for the parties to present their respective cases".[115] Determination of the limits calls for judgment and a careful balance to be achieved by the arbitral tribunal after taking into account the flexibility and efficiency objectives earlier discussed. How the balance is struck is a matter for the arbitrator in the individual circumstances of the case.

On this subject, the international rules reflect key themes:

(a) A number of the rules combine the two elements of procedural fairness in a rolled up requirement;
(b) Most of the rules provide in effect that the right to present a case is not limitless. Generally, the facility afforded is confined to a *reasonable* opportunity to present a case; and
(c) As a practical matter, some rules also provide, as a component of a fair hearing, an entitlement for each party to know, reasonably in advance of any evidentiary hearing or any fact or merits determination, the evidence on which an opposing party relies**.**

The Model Law by Article 18 provides a typical example:

Article 18. Equal treatment of parties
The parties shall be **treated with equality** and each party shall be given a **full opportunity of presenting his case**. [Emphasis added]

The requirements for fairness and impartiality in the international arbitral process are also reflected in: the *ICC Arbitration Rules* (Article 22); the *LCIA Rules (*Article 14.4); the *DIAC Rules (*Article 17.2); the

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[112] Queen Mary, University of London, School of International Arbitration 2013 International Arbitration survey "Corporate choices in International Arbitration Industry perspectives" at p. 6.
http://www.arbitration.qmul.ac.uk/research/2013 [Last observed 3 August 2018].
[113] See: Caroline Larson "Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeals Process?" The International Journal of Arbitration, Mediation and Dispute Management, Vol. 84 Issue 2, April 2018, 104 at p. 106.
[114] Reflecting the principle of natural justice in Anglo-American common law.
[115] Quoted from 'Carbonneau On International Arbitration Collected Essays', Thomas E. Carbonneau, 2011 Chap. 5 "Darkness and Light in the Shadows of International Arbitration" at p. 163.

*HKIAC Rules (*Article 13.1); the *SIAC Rules* (Article 19.1); the *SCC Rules* (Article 23(2); the *NZIAC 2018 Rules (Article* 25.1); and the Preamble to the *IBA Rules.*

Core Evidence Principles – An Evidentiary Framework for determining the Burden of Proof, Standard of Proof and Relevance in the reception and assessment of Evidence

In arbitration, as opposed to litigation in a court of law where applicable rules are established and known in advance of an adjudicative hearing, the arbitral tribunal is generally required to determine the necessary procedural tools to answer the ultimate questions. These building blocks can be distilled to: the burden of proof; the means to determine what evidence is to be received and taken into account through the critical prism of relevance and other necessary exclusionary rules; and the standard of proof pursuant to which assessment of the evidence is undertaken.

Further, in arbitration proceedings, it is generally important to establish these evidentiary building blocks as early as possible in the process, at the Pre-hearing conference. This provides opportunity to maximise the efficiency by enabling the parties to prepare their cases in accordance with the approach that is to be adopted by the tribunal and communicated to them.

Early disclosure of the evidentiary approach to be adopted will also serve a secondary and important object – that of providing an element of protection against any subsequent challenge to the award on the ground of denial of procedural fairness. It will have the advantage of giving fair notice to the parties of the approach to be taken by the arbitral tribunal, consistently with the fair hearing principle.

There is considerable value in undertaking an early determination of these issues with the participation of the parties. Such an approach may well provide an opportunity for the parties to consent to an agreed evidentiary protocol, including agreement as to the parameters to be employed in excluding classes of evidentiary material, or in some cases where the issue is obvious, actually determining the admissibility of defined bodies of material at an early stage in the process.

Burden of Proof

Some bodies of international rules do expressly provide for the burden of proof. However, most of the principal international rules of arbitration are silent on the question.

This phenomenon is not unusual in commercial law having international reach. Take for example the 1980 *Vienna Sales Convention on Contracts for the International Sales of Goods* (CISG). No express provision is made for the burden of proof, save for one provision Article 79.[116] However, the prevailing contemporary case law appears to have evolved to provide that the issue of burden of proof is a matter governed implicitly by the CISG,[117] and that the burden of proof under the CISG to prove defective goods is based upon the principle *ei incumbit probatio, qui dicit, non qui negat* meaning that a party has to prove the existence of the factual prerequisites contained in the legal provision from which it seeks to derive beneficial legal consequences, and a party claiming an exception has the burden of proving its prerequisites.[118] This

[116] Article 79 provides that a breaching party has to prove that its failure to perform was due to an impediment beyond its control. In so providing, Article 79 is said to imply that proof of the breach under Article 35 should be offered by the other party -- i.e., the party who was to receive the performance.

[117] **"Burden of Proof under the CISG" Franco Ferrari**
available at https://cisgw3.law.pace.edu/cisg/biblio/ferrari5.html [Last observed 16 July 2018].

[118] Ibid.

approach has been applied in a number of international cases, including the seminal 'Italian shoe case', *Tribunale di Vigevano* [119] decided by Judge Alessandro Rizzieri in the year 2000.
Some international arbitration rules provide for the burden of proof adopting the *ei incumbit probatio, qui dicit, non qui negat* principle.[120] They follow a similar form, and it is contended, reflect an international legal norm, reflected in the Model Law (Article 27(1): "Each party shall have the burden of proving the facts relied on to support its claim or defence", [121] and the Rules of the DIAC, HKIAC and NZIAC.

In the absence of a specific applicable rule, or agreement from the parties, a valuable default position for the arbitral tribunal is to adopt something close to the Model. This approach also has the advantage of being generally consistent with a well-accepted norm of international commercial adjudication, as evidenced by the current case law on the CISG. The following default position is suggested:

"**Each Party will bear the burden of proving the facts relied upon to support its Claim or any affirmative Defence**".

Relevance

In his paper 'Evidence in Arbitration', [122] the Hon K M Hayne AC QC exhorts his audience of arbitration practitioners to adopt the following central tenet: "when we are considering what evidence is to be given in an arbitration, we can, and we must, always be able to answer that one question: '*How will this help the panel decide the dispute?*'

The wisdom of this observation in expressing the need to focus on the relevance of evidentiary material in arbitration is beyond question. It provides the basis for another important default direction which can be made at an arbitration Pre-hearing Conference.

With one exception found in the Sample Rules, none of the provisions seek to define specific grounds of exclusion of evidence. The exception is provided by the *IBA Rules*:

Article 9, dealing with 'Admissibility and Assessment of Evidence', elaborates in some detail grounds for exclusion of evidence as follows:

"1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.

2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome;

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;

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[119] Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A.; 12 July 2000, 2001 GIURISPRUDENZA ITALIANA 280-288 20 J.L. & COM. 209 at [24-25, available at http://cisgw3.law.pace.edu/cases/000712i3.html [Last observed 21 July 2018].

[120] ei incumbit probation qui dicit, non qui negat: The burden of proof rests upon the one who affirms, not the one who denies.

[121] For example: the DIAC Rules; the HKIAC Arbitration Rules; and the NZIAC 2018 Rules (Clause 26.1).

[122] Ibid RESOLUTION INSTITUTE Baker & McKenzie – Melbourne – 5 October 2016 'Evidence in Arbitration', The Hon K M Hayne AC QC , available at www.resolution.institute/documents/item/2282 [last observed 15 July 2018].

(c) unreasonable burden to produce the requested evidence;

(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred; and

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."

However, with this exception noted, it appears that international arbitration rules almost universally leave the question open for the arbitrator to determine.

In this context, some international arbitrators encourage the parties before them to adopt Article 9 of the *IBA Rules* for the purposes of the arbitration, or in the absence of agreement, and where power is conferred to do so, may direct that these be adopted.

However, whether or not this approach is adopted, it is suggested that the object of relevance may be achieved at the point of determining reception of the evidence, by application of a general principle that an award, insofar as it is based on findings of fact, be rationally made and supported by probative material, and if inferences of fact are to be made, they are reasonably and rationally drawn from the findings of fact. The mechanism to achieve these ends is for the arbitral tribunal to refuse admission into evidence of material which is not probative in the sense that it will not logically tend to establish or controvert a fact in issue.

In the end, although this process of reasoning may be expressed in ways that differ from the rubric of a common law system or a civil law system, the end result may well be not all that different.

Subject to the agreement of the parties and the particular needs of an individual arbitration, early evidentiary directions dealing with relevance could be framed along the following lines:

"Material will be received as evidence in the arbitration which will assist the arbitral tribunal to deliver an award which is rationally made and supported by relevant and probative evidence (the 'Relevance Test').

Material proffered which, in the opinion of the arbitral tribunal does not satisfy the Relevance Test, will not be received as evidence.

The arbitral tribunal may receive material in evidence on a provisional basis, pending a final determination as to whether it satisfies the Relevance Test.

The arbitral tribunal may adopt Article 9 of the IBA Rules as grounds for the exclusion of material proffered as evidence."

Standard of Proof

Most international arbitration rules do not address the question of how the arbitral tribunal is to go about assessing the evidence. The standard of proof is left open to the arbitrator often expressed as conferring on the arbitral tribunal the power to determine, inter alia, the "weight of evidence".[123]

In the usual case, where the applicable rules or agreement of the parties do not expressly provide any guidance as to the standard of proof, it is suggested that considerations of rationality and fairness and maintenance of confidence in the competency of the award are best served by leaving the matter to the arbitral tribunal to determine. After all, the parties have entrusted their tribunal of choice to make the necessary findings of fact on the issues presented to it.

If a default position is called for in the absence of any applicable rule or agreement of the parties, a possible formulation for a Pre-hearing direction may be as follows:

> *"At the point of assessing the admitted evidence, the weight to be attached to it is a matter for the arbitral tribunal which has been entrusted by the parties to decide the issue to its reasonable satisfaction, having regard to the matter to be proved."*

Conclusion

It is suggested that, where there is a gap in the applicable rules as to what laws of evidence should apply, default evidentiary directions dealing with the burden of proof, standard of proof and relevance may be coined at an early stage of an arbitral proceeding in a Pre-hearing conference.

The evidentiary innovations discussed in this paper are presented for discussion in aid of advancing and supplementing the Core Process Principles of the arbitral process, namely: flexibility, efficiency and fairness.

[123] See for example: IBA Rules (Article 9(1).