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THE DISTINCTIVE CHARACTERISTICS OF COMMERCIAL AND INVESTMENT ARBITRATION PROCEEDINGS: *LEX MULTIPLEX, UNIVERSA CURIOSITAS, IUS UNUM?*

Abstract:
The thrust of this article is to examine a contemporary international arbitration process in commercial and investment cases, specifically the interplay of common law and civil law elements in the taking of evidence. It begins with a survey of the provisions of the most popular international arbitration instruments, including international arbitration rules and IBA Rules on the Taking of Evidence in International Arbitration. Following the discussion of some relevant examples of international arbitration instruments, the author tries to answer the question whether these instruments, in their current form, support the popular thesis that the international arbitration process has become largely harmonized. In trying to verify this thesis, the article also goes beyond the text of international arbitration instruments and considers the influence of the cultural biases of international arbitration actors.

Keywords: commercial arbitration, evidence, investment arbitration

Lex multiplex, universa curiositas, ius unum[1]

1. ALLEGED HARMONIZATION OF AN INTERNATIONAL ARBITRATION PROCESS

In 1986, the year the author of this article was born, M. Rubino-Sammartano – a Chartered Arbitrator and the President of the European Court of Arbitration – called

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[1] A motto of the first International Congress of Comparative Law (*Congrès international de droit comparé*) held in Paris in 1900. *See generally* Ch. Jamin, *Saleilles' and Lambert's Old Dream Revisited*, 50 American Journal of Comparative Law 701 (2002). *See also* Z. Brodecki, M. Konopacka, A. Brodecka-Chamera, *Komparatystyka kultur prawnych* [Comparing legal cultures], Wolters Kluwer, Warszawa: 2010, p. 18; R. Tokarczyk, *Komparatystyka prawnicza* [Comparative law], Zakamycze, Kraków: 2005, pp. 29-30.

for the "discipline of the rules of evidence and their harmonization" within international arbitration.[2] This suggestion, though not discussed in further detail at that time, constituted his proffered solution to reconcile the different approaches to the taking of evidence in civil law and common law countries, approaches that were often copied in the field of international arbitration.[3]

The significant number of changes in international arbitration practice and in the industry which have taken place over the last thirty years, including changes in arbitral institutions and international law firms – such as the consolidation of the international arbitration community, the widespread growth of arbitration sections within big law firms and the rise of their global popularity, or the series of amendments to the most frequently used international arbitration instruments – have brought about a new era in international arbitration processes.[4] Many contemporary commentators would probably agree today that Rubino-Sammartano's appeal for discipline of the arbitration rules and harmonization of the practice has become a reality, since many believe that in modern international arbitration processes common law and civil law elements blend together smoothly with each other.[5] As indicated by some distinguished practitioners, representing both the common law and civil law systems, we can observe an "emerging common procedural pattern"[6] in contemporary international arbitration, as well as "the emergence of a mixed practice as to the taking of evidence."[7] According to

[2] M. Rubino-Sammartano, *Rules of Evidence in International Arbitration: A Need for Discipline and Harmonization*, 3(2) Journal of International Arbitration 87 (1986), p. 92.

[3] For a general discussion on the procedural differences between civil law and common law, *see e.g.* M.A. Glendon, P.G. Carozza, C.B. Picker, *Comparative Legal Traditions: In a Nutshell* (3rd ed.), Thomson West: 2008, pp. 97-101. *See also* a general discussion on different approaches to procedure and the taking of evidence put into the context of international arbitration in: S.H. Elsing, J.M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18(1) Arbitration International 59 (2002).

[4] For a survey of these changes, *see* L. Nottage, *The Vicissitudes of Transnational Commercial Arbitration and the Lex Mercatoria: A View from the Periphery*, 16(1) Arbitration International 53 (2000), pp. 59-64. Drawing from the example of Japan, Nottage also depicts movements towards more international approaches to arbitration (*ibidem*, p. 64 et pass). *See also* L. Nottage, *In/formalisation and Glocalisation of International Commercial Arbitration and Investment Treaty Arbitration in Asia*, in: J. Zekoll, M. Bälz, I. Amelung (eds.), *Formalisation and Flexibilisation in Dispute Resolution*, Koninklijke Brill NV, Leiden, Boston: 2014, pp. 211 et pass.

[5] *See e.g.* E. Gaillard, J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International: 1999, p. 690. Similarly, M. Scherer is of the opinion that: "Over the past years and decades, arbitration has combined features from distinct legal traditions and has, as a result, forged a global 'best practice' for arbitral proceedings"; M. Scherer, *The Globalization of International Commercial Arbitration*, 2 La revue des juristes 64 (2010), p. 64. *See also* H.M. Holzmann, G. Bernini, *Conclusion by Judge Holtzmann and Professor Bernini*, in: P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, Kluwer Law International, ICCA Congress Series: 1987, p. 171.

[6] M. Kerr, *Concord and Conflict in International Arbitration*, 13(2) Arbitration International 121 (1997), p. 126. *See also* a very similar formulation in: J.D.M. Lew, L. Shore, *International Commercial Arbitration: Harmonizing Cultural Differences*, 54 Dispute Resolution Journal 33 (1999), p. 34.

[7] P.M. Patocchi, I.L. Meakin, *Procedure and Taking of Evidence in International Commercial Arbitration: The Interaction of Civil Law and Common Law Procedures*, 7 International Business Law Journal 884 (1996),

these opinions, the harmonization of international arbitration appears to cover both procedures and practice, and their authors suggest that the arbitration industry has discovered and established many solutions that satisfy the preconceptions of both civil law and common law traditions at one and the same time. In order to avoid conceptual confusion, in this article the term "harmonization" will often be used to refer to this general phenomenon.

In light of the above comments an outside observer, especially one not familiar with polymorphous international arbitration practice, might even argue that the current state of development of international arbitration procedures can be summed up by the fabled Latin epigraph: "Lex multiplex, universa curiositas, ius unum" – despite the fact that there are a range of different international arbitration instruments ("leges multiplex"), all of which deal with fairly universal, however, ambiguous procedural issues, for example, those concerning the taking of evidence ("universa curiositas"), it is still possible today to identify a set of standard solutions to most questions that arise in international arbitration procedure ("ius unum"). One could even suppose that the stratum of "ius unum" arose as the boundary between divergent legal cultures; i.e. the body of rules and customs, including specific and supranational procedural patterns, which are commonly accepted and resistant to ideological influences. In this sense, Saleilles' and Lambert's dream of one universal legal system would be true in some way.

2. CONCERNS ABOUT THE REAL EXTENT OF THE HARMONIZATION AND THE PROPOSED STRUCTURE FOR ITS FURTHER ANALYSIS

This article examines, and questions, whether the last few decades have really brought about a mixed transnational arbitration process that fully and smoothly harmonizes the different approaches to conducting commercial disputes. A key premise of the article is that the alleged harmonization of international arbitration is still not warranted to be free from cultural or other influences, which may on many occasions adversely impact the conduct of some international disputes. This is mostly due to the ambivalent nature of some international arbitration characteristics, including first and foremost its consensual nature, which will be discussed further in more detail. In this context, the meaning and practical relevance of the "harmonization" of international arbitration as described in the introductory section can be reasonably subject to question.

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p. 895. *See also* J.D.M. Lew, L.A. Mistelis and S.M. Kröll who argue that "[w]hile it is uncontroversial to state that each arbitration is unique and has its own procedure for presenting the case, it may be daring to go further and identify standard procedures for the taking of evidence. At least the emerging practice for taking of evidence in international commercial arbitration comprises elements of both civil and common law type procedures, other legal systems, and practices specially appropriate for an international process. (J.D.M. Lew, L.A. Mistelis, S.M. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International: 2003, p. 556).

Some arbitration enthusiasts can cast around for the "harmonization" of international arbitration through the process of reaching subtle procedural compromises in a given case – usually at its early stage or subsequent procedural conferences – which participants can adopt certain practices, patterns and habits directly or indirectly from one's legal culture, and even exactly from their home countries, or adopt patterns from more supranational sources such as different notes, guidelines, and protocols. Thus, on many occasions, international arbitration participants may strike merely an overall and rather unstable balance at the end of the case or at its particular stage. If this really so, then while it is possible to observe some harmonization in certain areas of international arbitration, many of its instruments are probably too flexible to argue the existence of "ius unum". As a matter of fact, arbitration practice remains multifaceted and is open to transformations. Therefore, it needs to be verified in greater detail whether, and to what extent, international arbitration is today resistant to irrational procedural aberrations; i.e. arrangements which are atypical and inefficient. To this end, the article first briefly discusses some chosen general characteristics of international arbitration procedure, including its flexibility. Once the distinguishing aspects of international arbitration have been described, the subsequent sections of the article focus on the two interconnected issues, briefly described below.

First, in section 4 the author tries to answer the question whether international arbitration instruments have implemented tried-and-true elements typical for common law and civil law procedures. Only when this process is verified can we find that the international arbitration procedure is a harmonized mix of distinct legal traditions and hence satisfies the opposing preconceptions. For the purpose of this discussion, a comparative analysis of some of the provisions of international arbitration instruments is carried out. It covers chosen international arbitration rules and the most popular guidelines, but only those that are not limited in their practical meaning to a single country (and some of which are applied in both commercial and investment disputes). The main area of focus of this article is on those provisions that shape the field of evidence-taking procedures; the area where common law and civil law principles traditionally stand in opposition, but which is often governed by identical evidentiary and disclosure guidelines for commercial and investment cases.

Secondly, having examined to what degree international arbitration instruments have borrowed elements typical for common law and civil law procedures, the conclusions of the comparative analysis conducted in the first part of this article is then qualified by practical and cultural considerations. In section 5 of the article, it is argued that the development of harmonized international arbitration instruments does not always result in conformity of approaches and practices. The latter may differ from time to time, or even fluctuate, even though the textual analysis of international arbitration instruments reflects a process of harmonization. Even truly international lawyers, practicing in more than one jurisdiction, may not be free of cultural biases. Combined with some other obstacles, such as strategic considerations, this factor has the potential to disrupt any internationally agreed-upon procedure.

In the two final sections, the author offers his conclusions and forecasts. It is argued that, ideally, cultural considerations should have no influence on how international arbitrations are conducted and an attempt is made to reconcile that position with the widespread consensus on the need for international arbitration to remain flexible. Unlike the commentators cited above, this article proposes that the true harmonization of international arbitration processes is, at best, a work in progress. This process may not necessarily end up with perfect solutions to all of the problems typical for the taking of evidence. It is also suggested that extensive empirical research should be carried out into international arbitration practices. The article concludes by presenting some more general research proposals and observations.

3. AMBIVALENT CHARACTERISTICS OF INTERNATIONAL ARBITRATION PROCEDURE

While this article is not a suitable place for a thorough discussion of all the characteristics of international arbitration procedures, there are two fundamental principles influencing the shape of international arbitration proceedings which must be considered.

A central feature that influences all aspects of international arbitration procedures is its flexibility; specifically, the procedural flexibility that arises from the principle of party autonomy.[8] Unlike traditional rules of civil procedure, which are usually of a strictly mandatory character, the rules governing international arbitration are largely dispositive under national arbitration laws.[9] The UNCITRAL Model Law on International Commercial Arbitration 1985, together with the amendments adopted in 2006 (UNCITRAL Model Law) lays down some common ground in this area.[10] Art. 19.1 of the UNCITRAL Model Law reads: "[s]ubject 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."[11]

Accordingly, the participants of an international arbitration procedure are, in most cases, free to determine "a custom-made procedure that is suited to the efficient and fair resolution of their particular dispute."[12] This should form the bed-rock for the

[8] *See generally* Ch. Bühring-Uhle, L. Kirchhof, M. Scherer, *Arbitration and Mediation in International Business*, Kluwer Law International: 2006, p. 65; or S.P. Finizio, D. Speller, *A Practical Guide to International Commercial Arbitration: Assessment, Planning and Strategy*, Thomson Reuters, London: 2010, pp. 10-11. *See also* a discussion on the principle of party autonomy in the procedural context in: G.B. Born, *International Commercial Arbitration*, Kluwer Law International: 2009, pp. 1748-1758; or T. Wiśniewski, M. Hauser-Morel, *Postępowanie arbitrażowe* [Arbitration proceedings], in: A. Szumański (ed.), *System prawa handlowego*, CH Beck, Warszawa: 2010, pp. 457 et pass.

[9] *See* Born, *supra* note 8, pp. 1751-1753.

[10] *See* the official website of UNCITRAL with the text of and information on the UNCITRAL Model Law, available at: http://tinyurl.com/oafrx23 (accessed 20 April 2016).

[11] *See* Art. 19.1 of the UNCITRAL Model Law.

[12] *See* Finizio & Speller, *supra* note 8, p. 10.

emergence and development of some standardized procedures. These common procedures would naturally emanate from certain common concerns of all parties to an international arbitration, such as the need to conduct an efficient evidence-taking process. From this point of view, one might assume that parties would always lean towards tried-and-tested international practices.

Perhaps it is important to add that in the countries that have adopted the UNCITRAL Model Law, there are only a few mandatory procedural rules which can be found in national legislation.[13] These rules are definitely not excessive and impose only some necessary constraints on the autonomy of the parties and arbitrators. They simply guarantee the basic procedural rights, including, for example, the right to be heard or equal treatment of the parties.[14] Thus, national arbitration laws clearly provide some room for maneuver in establishing a convenient middle-ground procedure for parties from different legal backgrounds; i.e. they offer the ability to resolve transboundary disputes in a culturally neutral forum. This can be seen as one of the main advantages of international arbitration over litigation at a chosen national forum – a dispute resolution method which assumes that one party will familiarize itself with *lex fori procesualis*.

In addition to discussing arbitration laws, it is relevant to the thrust of this article to note the role of institutional arbitration rules. Pursuant to the principle of party autonomy, parties can choose to arbitrate in accordance with institutional arbitration rules.[15] It may even be plausibly argued that we are observing the institutionalization of international arbitration, together with competition between different arbitration centers.[16] In theory, once parties opt into a given set of rules, their discretion as to the procedure to be followed becomes somewhat limited. It can usually be exercised only if the institutional rules are silent on certain issues and do not shift the discretion away from the parties to the arbitral tribunal.[17] In practice, however, it is not necessarily the case that the parties lose the power to exercise the final say on procedural issues. Most international arbitration rules are drafted broadly.[18] In cases where discretion lies with

[13] However, the same applies to some countries that did not implement the UNCITRAL Model Law; *see* Art. 4 of the Arbitration Act, available at: http://tinyurl.com/mdsp4dp (accessed 20 April 2016).

[14] *See* Art. 18 of the UNCITRAL Model Law providing for the duty of due process.

[15] *See generally* Born, *supra* note 8, pp. 1753-1754.

[16] *See generally* N.G. Ziadé, *Reflections on the Role of Institutional Arbitration between the Present and the Future*, 25(3) Arbitration International 427 (2009); O.E. Browne, *London v. Paris: Territorial Competition in International Commercial Arbitration*, 7:1 International Arbitration Law Review 1 (2004); or L.A. Mistelis, *Arbitral Seats: Choices and Competition*, in: S.M. Kröll, L.A. Mistelis, P.P. Viscasillas, V.M. Rogers (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Kluwer Law International: 2011, p. 367.

[17] *See e.g.* Art. 19 of the International Chamber of Commerce Arbitration Rules, effective 2012 (ICC Rules), available at: http://tinyurl.com/j5pqypw. *But cf.* Art. 14.2 of London Court of International Arbitration Rules, effective 1 October 2014 (LCIA Rules), which are more generous towards the parties, available at: http://tinyurl.com/gl9cons (both accessed 20 April 2016).

[18] In this context it may be worth noting the provisions regulating the arbitral tribunal's power over the proceedings, *see* Art. 19.1 of the ICC Rules or Art. 14.2 and 14.4 of the LCIA Rules, *ibidem*. These provisions merely require the arbitral tribunal to ensure that each party will be given an opportunity to be

the arbitral tribunal, arbitrators will usually consider issues relating to the conduct of the proceedings raised by the parties.[19] This can take place either during the organizational conference at the outset of the proceedings, or during the pre-hearing conference before the evidentiary hearings.

A second characteristic of international arbitration procedure is central to this article. Namely, it is widely agreed that "parties' counsel should not bring the rule books from their home courts"[20] to international arbitration hearing facilities. Therefore, unless explicitly agreed otherwise between the parties, such rules do not apply throughout the arbitration proceedings. This is because domestic procedural rules are not appropriate for adjudicating disputes involving actors from different cultural backgrounds. As it has been rightly suggested in one of the leading monographs on international arbitration, "national civil procedure rules are normally designed for domestic litigation before state courts, not for the arbitration of international cases."[21]

Hence, while it is possible to use domestic legal provisions under the guise of party autonomy, any such application of a particular civil procedure undermines the assumption of "*ius unum*". This goes against the underlying objectives of international arbitration. Fortunately, this practice is rather rarely encountered in institutional arbitrations held under the aegis of the most popular arbitration centers.[22] Similarly, any other home-oriented trend in the arrangement and construction of rules of international arbitration procedure contradicts the underlying basis for common procedural patterns of international arbitration. That fits in with the reason why most parties choose international arbitration over lengthy and sometimes hostile court procedures (the resolution of their dispute(s) in a different forum than the state courts).[23]

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heard; *i.e.* they neither regulate typical stages of proceedings nor impose any other detailed requirements as to their organization. *See also* Art. 13.1 of Hong Kong International Arbitration Centre Administered Arbitration Rules, 2013 edition (the HKIAC Rules), available at: http://tinyurl.com/pfoxmc3; or Art. 16.1 of Arbitration Rules of the Singapore International Arbitration Centre, 2013, 5th edition (SIAC Rules), available at: http://tinyurl.com/qzjgom8. For a similar regulation in ad hoc arbitration, *see* Art. 17.1 of United Nations Commission on International Trade Law Arbitration Rules, as revised in 2010 (UNCITRAL Rules), available at: http://tinyurl.com/277eo76 (all accessed 20 April 2016).

[19] *See* Born, *supra* note 8, pp. 1754-1755.

[20] N. Blackaby, C. Partasides, A. Redfern, M. Hunter, *Redfern and Hunter on International Arbitration*, Oxford University Press, Oxford: 2009, para. 6.02. *See also* G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International: 2012, p. 111.

[21] *See* Lew et al., *supra* note 8, p. 524. *See also* a pinpoint opinion on this issue offered by J. Waincymer in his recent monograph: "There are ... problems of lack of familiarity with foreign court procedures and variances in norms. Where parties come from different legal families, there will always be a problem in that the court selected will not be able to establish neutral procedures from the parties' perspectives. For example, local courts may apply evidentiary principles that are far removed from the norms previously experienced by the foreign party." (J. Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International: 2012, p. 4).

[22] W.L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, Oceana Publications, New York: 2000, p. 426.

[23] This contention was perhaps put best by M. Mcilwrath & J. Savage: "... when they [ed. note: parties] contract out of local court litigation by choosing arbitration, they don't expect to find themselves in

Both of the characteristics of international arbitration procedure discussed above – namely its flexibility and the non-application of domestic civil procedure laws – are important in the context of this article. These principles are also a starting point for any further analysis. As will be shown later in more detail, the parties' freedom to determine the international arbitration procedure may have far-reaching consequences for the harmonization of its typical conduct. Paradoxically, it can not only assist in the harmonization of international arbitration, but also backfire in the process, which may happen should the parties decide to import domestic elements or civil procedural patterns into the framework of their dispute, or insist on non-standard solutions. While this thesis may seem controversial at first glance, the discussed characteristics of international arbitration procedure are very ambivalent and the power of this paradox should not be underestimated.

4. COMPARATIVE ANALYSIS OF CHOSEN INTERNATIONAL ARBITRATION INSTRUMENTS

The analysis of international arbitration instruments in this section will be split into an overview of: (4.1) the leading international arbitration rules frequently employed in institutional and ad-hoc arbitrations around the globalised world; followed by a more detailed discussion of: (4.2) non-binding or indirectly binding guidelines influencing the international arbitration procedure which were prepared under the aegis of UNCITRAL or the International Bar Association.[24] Considering the wide range of regulations potentially important to the topic at hand, this article mainly focuses on those provisions which either concern or somehow influence the taking of evidence. These include, *inter alia*, provisions on memorials and documentary evidence, and on hearings and witness examination.

4.1. Provisions of frequently used international arbitration rules

In the first instance, regulations contained in the frequently adopted international arbitration rules should be examined. Wherever possible, the author has attempted to track down their origin or the legal patterns that gave birth to these rules.

For comparative purposes, the author has selected international arbitration rules drafted under the auspices of institutions seated in jurisdictions with very different legal heritages. Thus, for example, the analysis covers the UNCITRAL Rules, which are ad hoc rules and appear to be the most international and universal set of arbitration rules,

a private proceeding that simply replicates what they would have experienced in the local court. Instead they have come to expect a method of dispute resolution that is not attached to any one legal system or culture, that reflects the international nature of the parties' relationship, and that is adapted to resolving disputes arising out of that international relationship" (M. Mcilwrath, J. Savage, *International Arbitration and Mediation: A Practical Guide*, Kluwer Law International: 2010, para. 5-002).

[24] *See* references to the official websites of these organizations and the guidelines prepared under their auspices, *infra* notes 61-62.

as well as the following institutional rules: the ICC Rules; the LCIA Rules; the VIAC Rules; the SCC Rules; the HKIAC Rules; and the SIAC Rules.[25]

Because repeated references to the provisions of different international arbitration rules could confuse a reader and take the edge off the analysis of those provisions, to the extent possible their essence is summarized, while where appropriate the full text is cited in the footnotes (or hyperlinks to these rules provided). The discussion of their provisions is categorized into three different subject areas relating to the taking of evidence: (4.1.1) written submissions and documents; (4.1.2) oral hearings; and (4.1.3) witnesses and experts. This categorization is aimed at making the overview of the international arbitration rules more reader-friendly.

4.1.1. Written submissions and documents

Many scholars suggest that sweeping generalizations concerning civil law and common law systems should be avoided.[26] It is not an exaggeration, however, to state that extensive reliance on written submissions and documents is typical for civil law systems.[27] In a similar manner, in international arbitration much emphasis is placed on written advocacy and the documentary evidence attached to briefs.[28]

When we examine the leading international arbitration rules, it is clear that the written word plays a fundamental role in international arbitration proceedings from their very beginning. The initial written memorials commencing the proceedings, whether referred to as "Request for Arbitration"[29] or "Notice of Arbitration"[30], or sometimes straightaway as the "Statement of Claim"[31], are pretty much harmonized

[25] The listed acronyms for official titles of the rules are defined in footnotes as they are introduced.

[26] Nothing illustrates this better than the famous debate between Lord Staughton and C. Reymond on the inquisitorial character of civil law and common law procedures. *See generally* Ch. Lord Staughton, *Common Law and Civil Law Procedures: Which Is the More Inquisitorial? A Common Lawyer's Response*, 5(4) Arbitration International 351 (1989); C. Reymond, *Civil Law and Common Law: Which Is the Most Inquisitorial? A Civil Lawyer's Response*, 5(4) Arbitration International 357 (1989). *See also* L.E. Trakman, *'Legal traditions' and international commercial arbitration*, 17 American Review of International Arbitration 1 (2006), pp. 13-17, who distinguishes between "legal cultures" and "legal traditions", highlights the subcategories of each legal tradition, and calls attention to mixed jurisdictions.

[27] *See e.g.* R. Pietrowski, *Evidence in International Arbitration*, 22(3) Arbitration International 373 (2006), p. 375. *See also* Bühring-Uhle, *supra* note 8, pp. 18-19.

[28] As put by Patocchi and Meakin: "[m]any have described the emphasis on written proof and arguments in international arbitration and this emphasis can be seen to be the very strong influence of continental civil law procedures on arbitration." (Patocchi & Meakin, *supra* note 7, p. 890). In an opinion of Waincymer: "Because parties come from different geographical regions, as may the arbitrators, it is natural that international arbitration relies heavily on written submissions and communications." (Waincymer, *supra* note 21, p. 479). *See also* Pietrowski, *supra* note 27, p. 391. *Cf.* a more restrained opinion in: A. Dimolitsa, *Giving Evidence: Some reflections on oral evidence vs documentary evidence and on the obligations and rights of the witnesses*, in: L. Lévy, V.V. Veder (eds.), *Arbitration and Oral Evidence*, ICC Publishing S.A., Paris: 2005, p. 13.

[29] *See* Art. 4 of the ICC Rules or Art. 1 of the LCIA Rules.

[30] *See* Art. 3 of the UNCITRAL Rules; Art. 4 of the SIAC Rules; and Art. 4 of the HKIAC Rules.

[31] *See* Art. 7 of the Rules of Arbitration and Conciliation of the Vienna International Arbitral Centre, effective 1 July 2013 (the VIAC Rules), available at: http://tinyurl.com/jtedrxv (accessed 20 April 2016).

with respect to their minimum formal content.[32] However, most international arbitration rules do not specify how detailed the information has to be when stating the case in the written request for commencing proceedings.[33] Civil law, more than American standards for preparing such initial briefs, rather prevails in today's practice.[34] Consequently, the initial submissions are often relatively comprehensive and include documentary evidence.[35] Also, other written submissions, including memorials such as the "Answer to the Request"[36] and "Response to the Notice of Arbitration"[37] or, when subsequent exchanges of memorials are also envisaged, the "Statement of Claim"[38] and "Statement of Defense"[39], are a central subject of many international arbitration rules.

Even though not all international arbitration rules expressly provide for more than one round of written submissions, parties and/or arbitrators are given discretion in this respect.[40] Scheduling of additional written submissions, including, for example, statements of rebuttal and rejoinders, is a common practice. All of the written submissions are prepared with a view toward efficiency as well as legal and factual detail.[41] The crucial importance of written advocacy in international arbitration is thus apparent.[42] There is, therefore, a parallel between international arbitration and civil law procedures in this regard.

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[32] The formal requirements include, inter alia, the following: identification of the parties and their agreement to arbitrate, description of the dispute, and initial specification of claims. *See generally* the relevant arbitration rules, *supra* notes 29-31.

[33] Most notably Arts. 4.3(c) and 5.1(c) of the ICC Rules provide that the initial submissions should contain: "a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made" and subsequently in response to that "comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made". Even though these provisions do not specifically require stating "the particulars of all claims", in the past they have been interpreted in this way. *See* Craig, *supra* note 22, pp. 427-428, especially fn. 1 at 428. *Cf.* Finizio & Speller, *supra* note 8, p. 96.

[34] *See* Waincymer, *supra* note 21, p. 219.

[35] *But see* A. Tweeddale, K. Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford University Press, Oxford: 2005, para. 8.42; Bühring-Uhle, *supra* note 8, p. 73.

[36] *See* Art. 5 of the ICC Rules.

[37] *See* Art. 4 of the UNCITRAL Rules.

[38] *See* Art. 24.1 of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, effective 1 January 2010 (the SCC Rules), available at: http://tinyurl.com/oeqglxw (accessed 20 April 2016). *See also* Art. 20 of the UNCITRAL Rules.

[39] *See* Art. 24.2 of the SCC Rules. *See also* Art. 21 of the UNCITRAL Rules.

[40] Among rules that expressly envisage more than one round of written briefs are, for example, the UNCITRAL Rules; and the SCC Rules. See also, Arts. 4; 5; 16; and 17 of the HKIAC Rules. Additionally, some international arbitration rules expressly provide for the possibility of further submissions. *See e.g.* Art. 20 of the HKIAC Rules.

[41] *See* Bühring-Uhle, *supra* note 8, pp. 78-79.

[42] *See generally* B. Legum, *The Ten Commandments of Written Advocacy in International Arbitration*, 29(3) Arbitration International 1 (2013). *See* in particular Commandment No. 2 at 2, where Legum discusses cultural differences between actors involved in an international arbitration.

Finally, many international arbitration rules encourage both parties to support their written submissions with all documents that "may contribute to the efficient resolution of the dispute"[43] or even require that their written submissions "be accompanied by all documents and other evidence"[44] that the parties intend to rely on. In any case, provisions of the leading international arbitration rules facilitate a dispute management model in which the relevant documentary evidence is gathered long before potential hearings begin.[45] This conforms to the preconceptions of civil-law trained advocates, who are accustomed to relying on their client's documentary resources from the very beginning of the litigation campaign, but probably differs from the procedural expectations of many common-law trained lawyers.

It is therefore probably correct to state that "arbitration proceedings are conducted principally though submission of written evidence rather than oral testimony."[46] This would *prima facie* make it possible to conclude that the written stage of contemporary international arbitration processes often resembles high-profile private law disputes in civil law countries.

4.1.2. Oral hearings

It is common for many commentators to state that "common law proceedings place the emphasis on hearings."[47] The importance of continuous trials to the Anglo-American procedure was well-portrayed by M.R. Damaška in his watershed book on evidence law.[48] Similarly Lord Wilberforce, when commenting on the English legal system in one of his papers, expressed the profound opinion that "the principle of orality shapes the whole of [ed. note: English] legal process."[49] The question arises: Are oral hearings equally important to international arbitration?

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[43] *See* Arts. 4.3 and 5.1 of the ICC Rules. Art. 4.3 in fine provides that: "[t]he claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute." Similarly, Art. 5.1 of the ICC Rules provides that the respondent may submit with his or her Answer to the Request any documents it considers useful. *See also* the following opinion of A. Tweeddale & K. Tweeddale: "[i]t would be unusual in an English domestic arbitration to find that the statement of claim includes a party's evidence. In contrast, memorials, which are commonly ordered to be exchanged in international commercial arbitrations, will set out the facts of the case, the relevant law, and the evidence on which the parties intend to rely, including any documents which the parties consider necessary in order to prove their respective cases." (Tweeddale, *supra* note 35, para. 8.43).

[44] *See* Arts. 20.4 and 21.2 the UNCITRAL Rules. *See also* Art. 15.6 of the LCIA Rules in the 1998 version, available at: http://tinyurl.com/h5j8kkc (accessed 20 April 2016); and Art. 24.1(iii) of the SCC Rules.

[45] *See* Blackaby, *supra* note 20, para. 6.100.

[46] *See e.g.* R.K. Ward, *The Flexibility of Evidentiary Rules in International Trade Disputes: Problems Posed to American-Trained Lawyers*, 13(3) Journal of International Arbitration 5 (1996), p. 14.

[47] Craig, *supra* note 22, p. 419.

[48] M.R. Damaška, *Evidence Law Adrift*, Yale University Press, New Haven: 1997, pp. 58-73.

[49] R.O. Lord Wilberforce, *Written Briefs and Oral Advocacy*, 5(4) Arbitration International 348 (1989), p. 348.

The only safe, albeit vague, response to that query is "it depends". Perhaps somewhat surprisingly, most international arbitration rules do not make oral hearings mandatory.[50] In addition, in cases when a party requests an oral hearing, or if so ordered by the arbitral tribunal, it may often somewhat differ from what is known to common-law trained lawyers from domestic court rooms.[51] Most notably, international arbitration rules do not provide strict provisions for admissibility of evidence during hearings. It is sometimes suggested that this may pose a problem to American attorneys, who will not be able to "utilize the 'objection' skills ... to exclude hearsay, impeach the witness via cross-examination, and bar the admission of certain prejudicial evidence."[52] Similarly, although this may be an oversimplification some commentators are of the opinion that oral hearings in international arbitration are seen by common law lawyers as relatively short.[53] This is mainly because oral hearings in international arbitration do not need to be continuous and are not lengthened by objections (so do not fully match the preconceptions of the English-speaking world). The other side of the coin, however, is that fairly analogous comments to the ones offered could be made by civil-law trained lawyers, who may be equally surprised by international arbitration hearings.

For instance, when confronted for the first time with international arbitration hearings, a number of Polish attorneys are surprised by their length and level of detail. Thus, many international arbitration hearings may be quite lengthy in the eyes of civil-law trained lawyers. Although oral hearings do not need to follow the system of a continuous single trial, parties and arbitrators often schedule a single hearing to encompass all of the evidentiary issues. In other words, the rudimentary provisions of most international arbitration rules regarding hearings do not necessarily support hearing patterns which civil-law trained lawyers are accustomed to.

Overall, due to the discretionary character of oral hearings, it is difficult to make any definitive observations. While many commentators have expressed opinions that "the idea of a hearing itself in an international arbitration is largely drawn from the common law model"[54] and that "many international arbitration hearings, in structure and

[50] *See e.g.* Art. 28 of the UNCITRAL Rules. *See also* Art. 27 of the SCC Rules, or Art. 30 of the VIAC Rules and Art. 19.1 of the LCIA Rules. Also, virtually all leading arbitration rules, even those which include a presumption that a hearing should be held, make it possible to hold a "document-only-arbitration". *See* Arts. 25.2 and 25.6 of the ICC Rules; or Art. 21.1 of the SIAC Rules.

[51] A stark opinion on this issue was expressed by the first president of the ICC, J. Robert, who wrote that: "... oral hearing is in any case quite different in character from the oral hearing under common law ... the arbitrators are no longer ignorant of the dispute involved as they might be under common law because they are already to a large extent informed by the exchange of statements and the production of documents" (J. Robert, *Administration of Evidence in International Commercial Arbitration*, I Yearbook of Commercial Arbitration 221 (1976), p. 224).

[52] Ward, *supra* note 46, p. 15.

[53] *See* Bühring-Uhle, *supra* note 8, pp. 81-82. *See also* Finizio & Speller, *supra* note 8, pp. 253-254; or Kerr, *supra* note 6, p. 126, who believes that "the oral hearings will usually be remarkably short by English standards."

[54] A.F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 Michigan Yearbook of International Legal Studies 163 (1985), p. 174.

form, are conducted in a manner which resembles, to a greater or lesser degree, a common law hearing"[55], any such comments should be treated with caution.

4.1.3. Witnesses and experts

Perhaps the greatest differences between the common law and civil law procedures lie in the role of witnesses and experts.[56] These differences lie not only in structural issues such as the appointment and calling of witnesses, the manner in which these persons are briefed and examined by counsel, or the existence of a distinction between witnesses and parties, but also in cultural factors. As one well-known Polish arbitrator pointed out, in many international arbitrations "the scope and nature of witness testimony may differ depending on the forum, the nationality of a witness and/or the nationality of the lawyers examining the witness."[57] Further discussion of this phenomenon will be omitted here, but it will be continued in section 5.2 of the article, which relates to cultural differences between international arbitration participants.

Considering the different manner in which witnesses and experts are treated by common law and civil law procedures, drafters of most international arbitration rules probably deliberately leave many questions largely unanswered regarding the taking of evidence from witnesses and experts.[58] Even those international arbitration rules which

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[55] Patocchi & Meakin, *supra* note 7, p. 892. *See also* Gaillard, *supra* note 5, p. 690, where the authors state that the oral stage of international arbitrations is today dominated by "Anglo-American techniques".

[56] *See generally* L.M. Pair, *Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?*, 9 ILSA Journal of International & Comparative Law 57 (2002), p. 65; R.S. Rifkind, *Practices of the Horseshed: The preparation of witnesses by counsel in America*, in: Lévy & Veder (eds.), *supra* note 28, p. 55; H. van Houtte, *Counsel-witness relations and professional misconduct in civil law systems*, in: Lévy & Veder (eds.), *ibidem*, p. 105; G. von Segesser, *Witness Preparation in International Commercial Arbitration*, 20(2) ASA Bulletin 222 (2002). *See also* F. von Schlabrendorff, *Interviewing and Preparing Witnesses for Testimony in International Arbitration Proceedings: The Quest for Developing Transnational Standards of Lawyers' Conduct*, in: M.Á. Fernández-Ballesteros, D. Arias (eds.), *Liber Amicorum Bernardo Cremades*, La Ley: 2010, pp. 1161-1182. For a discussion on the different roles of experts in common law and civil law procedures based on the example of French and English civil procedure, *see* D. Brown, *Oral evidence and experts in arbitration*, in: Lévy & Veder (eds.), *ibidem*, p. 77. With respect to experts, *see also* D. Dave, *Should Experts Be Neutrals or Advocates?*, in: A.J. van den Berg (ed.), *Arbitration Advocacy in Changing Times*, ICCA Congress Series 2010, Kluwer Law International: 2011, p. 149; and B. Krużewski, *Biegły w postępowaniu arbitrażowym* [An expert witness in arbitration proceeding], in: J. Okolski, A. Całus, M. Pazdan, S. Sołtysiński, T. Wardyński, S. Włodyka (eds.), *Księga pamiątkowa 60-lecia Sądu Arbitrażowego przy Krajowej Izbie Gospodarczej w Warszawie*, Sąd Arbitrażowy, Warszawa: 2010, pp. 218-219.

[57] P. Nowaczyk, *'Clash of Cultures': The Cross-Culture Aspects of a Witness Examination: Transcript of a Presentation Given at the Vienna Arbitration Days, 21st February, 2009*, 10 Biuletyn Arbitrażowy 88 (2009), p. 91.

[58] Art. 25 of the ICC Rules provides a flagship example of the discussed approach. *See also* Art. 29 of the VIAC Rules. The provisions of the LCIA Rules and the SIAC Rules appear to be more elaborate, however. *Cf.* Arts. 20 and 21 of the LCIA Rules; and Arts. 22 and 23 of the SIAC Rules. Similarly, *see* Arts. 28 and 29 of the SCC Rules; and Arts. 27.2; 28.2; and 29 of the UNCITRAL Rules.

elaborate on these issues are not really specific; while they provide for a possibility to deliver testimony in the form of written documents,[59] or, for example, expressly grant the power to an arbitral tribunal to appoint its own experts,[60] they do not reconcile all the differences between the common law and civil law approaches to witnesses and experts. Therefore, the leading international arbitration rules respect the different expectations that parties may have regarding the use of witnesses and experts and leave substantial discretion to international arbitration participants. However, many counsel, especially those familiar only with their domestic court processes, will probably find the discussed provisions either too ambiguous or not detailed enough to provide an accurate and holistic legal framework for conducting a commercial law dispute. The efficient conduct of an international arbitration solely in reliance on the text of some chosen arbitration rules is therefore extremely unlikely. Parties wishing to make their meaning precise and reach an agreement on these and other issues concerning the taking of evidence usually refer to internationally accepted guidelines on the conduct of international arbitration proceedings.

As the author will try to show in the sections below, the non-binding guidelines and regulations introduced in the last two decades by different international arbitration organizations constitute a milestone in the development of fairly harmonized international arbitration practices. Perhaps today they are even more important to the harmonization of international arbitration processes than the constantly changing, and relatively broadly drafted, international arbitration rules. However, one may ask whether their popularity adds much to the development of "*ius unum*"?

4.2. Guidelines on the conduct of international arbitration proceedings

In view of the broad-brush approach in the provisions of most international arbitration rules, the UNCITRAL Notes on Organizing Arbitral Proceedings (the UNCITRAL Notes)[61] as well as the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules)[62] deserve particular attention. While the latter set of guidelines is more specific, and accordingly appears to be more important in today's practice, the subse-

[59] *See e.g.* Art. 27.2 of the UNCITRAL Rules; or Art. 20.2 of the LCIA Rules.

[60] *See e.g.* Art. 21 of the LCIA Rules; or Art. 23 of SIAC Rules. *See also* Art. 29 of the SCC Rules.

[61] *See* the official website of UNCITRAL for the text and information on the UNCITRAL Notes, available at: http://tinyurl.com/zenmm2w (accessed 20 April 2016). For a discussion on the UNCITRAL Notes, *see e.g.* R. Ceccon, *UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence: A new approach to international arbitration*, 14(2) Journal of International Arbitration 67 (1997).

[62] *See* the official website of IBA with the 2010 version of the IBA Rules, available at: http://tinyurl.com/355m4bo (accessed 20 April 2016). For a discussion on the IBA Rules and their latest revisions, *see e.g.* D. Kühner, *The Revised IBA Rules on the Taking of Evidence in International Arbitration*, 27(6) Journal of International Arbitration 667 (2010); and G. von Segesser, *The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010*, 28(4) ASA Bulletin 735 (2010). *See also* a general evaluation of the IBA Rules and their changes in: O. de Witt Wijnen, *Collection of Evidence in International Arbitration*, in: Fernández-Ballesteros & Arias (eds.), *supra* note 56, pp. 352-354 and 365-359.

quent subsections briefly present provisions from both of these instruments, and the discussion on the UNCITRAL Notes and the IBA Rules is carried out jointly in each subsection. The discussion is categorized into three topics: (4.2.1) document production; (4.2.2) witness statements and expert reports; and (4.2.3) the organization of oral hearings in international cases.

It should be kept in mind, however, that the UNCITRAL Notes and the IBA Rules serve different purposes. As provided in the foreword to the IBA Rules, they are expressly aimed at reconciling different approaches to the taking of evidence.[63] They also somewhat formalize the arbitral proceedings by proposing specific solutions to many procedural issues or legal technicalities, in particular those directly related to organizing the oral stage of proceedings. If adopted into the legal framework of an international arbitration, the IBA Rules map out the arbitral proceedings. Unlike the IBA Rules, which involve a compromise solution between different civil procedure systems, the UNCITRAL Notes are rather a list of suggestions to discuss when organizing arbitral proceedings. Therefore, the UNCITRAL Notes are not suitable for incorporation into Procedural Order No. 1, which sets out the details of the international arbitration process and largely reflects the outcome of the conference held before the commencement of the proceedings. For this reason, the IBA Rules are probably more important for the harmonization of international arbitration and the development of "*lex evidentia*".

The recent shape of the IBA Rules is the product of a committee comprised mostly of distinguished practitioners from global law firms.[64] The Anglo-American law firms not only had a direct impact on the latest revision of the IBA Rules, but they also play an important role in spreading them around the world.[65] However, notwithstanding

[63] *See* the introduction to the IBA Rules, which states: "The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures". *See also* P. Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide*, Cambridge University Press, Cambridge: 2009, p. 11; and T. Zuberbühler, D. Hofmann, Ch. Oetiker, T. Rohner, *IBA Rules of Evidence: commentary on the IBA Rules on the taking of evidence in international arbitration*, Schulthess, Zürich: 2012, pp. 2-3. The different purpose of the UNCITRAL Notes becomes apparent when we consider para. 1 of this instrument, which provides that: "[t]he purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful." *See also* Tweeddale, *supra* note 35, para. 10.03.

[64] Including such honourable names as R.H. Kreindler, D. Arias, C.M. Baker, P. Bienvenu, A. Cohen Kläsener, A. Dimolitsa, P. Friedland, N. Gamboa, J. Gill QC, P. Heckel, S. Jagusch, X. Ji, K. Kim, T.T. Landau QC, A. Mourre, H. Raeschke-Kessler, D.W. Rivkin, G. von Segesser, E. Al Tamimi, G.S. Tawil, H. Tezuka, and A. Ye. Members of the Working Party included D.W. Rivkin, W. Kühn, G.M. Ughi, H. Bagner, J. Beechey, J. Buhart, P.S. Caldwell, B.M. Cremades, E. Gaillard, P.A. Gélinas, H. van Houtte, P.A. Karrer, J. Paulsson, H. Raeschke-Kessler, VV. Veeder, QC, and O. de Witt Wijnen.

[65] *See generally* Nottage, *supra* note 4, p. 227-238. Nottage in his recent article that was published after a conference in Frankfurt (20–21 July 2013) argues that: "[ed. note: international law firms] increasingly dominate the arbitral institutions and 'soft law' bodies relevant to ICA, such as the International Bar Association (IBA), as well as the policy-making initiatives at international and national levels." (*Ibidem*, pp. 230-231). *See also* R.P. Alford, *The American Influence on International Arbitration*, 19(1) Ohio State Journal on Dispute Resolution 69 (2003), p. 80.

the growth in importance of global law firms, and especially those that were originally established in common law jurisdictions, the widely-held view that Anglo-American law firms have turned contemporary international arbitration into almost American-style litigation should be refuted.[66] While it is true that today we can observe some formalization of international arbitration, together with a substantial growth in common law styles of advocacy, most elements of the international arbitration procedural framework are changeable and may vary depending on a number of factors. This "changeability" of international arbitration will be described in more detail later. Before addressing this issue in detail however, the legal framework created by the IBA Rules (as well as the UNCITRAL Notes) will be discussed.

The analysis of the IBA Rules and the UNCITRAL Notes is supplemented by some marginal references to guidelines and protocols prepared by the Chartered Institute of Arbitrators (CIArb), which is one of the leading professional membership organizations representing the interests of alternative dispute resolution practitioners.[67] In the Western Hemisphere there are also other instruments used for harmonizing international arbitrations; i.e. two well-known American institutions have promulgated evidentiary guidelines. The esteemed International Institute for Conflict Prevention & Resolution published the Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, and the International Centre for Dispute Resolution published Guidelines for Arbitrators Concerning Exchanges of Information.[68] As both of these instruments are rarely encountered in the European practice and seem to be used mostly in transcontinental cases in the Western Hemisphere, they are outside the scope of the analysis contained in this article. For similar reasons, the author omits discussion of the recently promulgated new China International Economic and Trade Arbitration Commission Guidelines on Evidence, which are recommended when an international arbitration is seated in the People's Republic of China.[69]

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[66] *See* F.T. Schwarz, Ch.W. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria*, Kluwer Law International: 2009, para. 20-013. *See also* H. van Houtte, *Counsel- Witness Relations and Professional Misconduct in Civil Law Systems*, 19(4) Arbitration International 467 (2003). p. 459; E.V. Helmer, *International Commercial Arbitration: Americanized, "Civilized", or Harmonized?*, 19(1) Ohio State Journal on Dispute Resolution 35 (2003), p. 6; E. Bergsten, *Americanization of International Arbitration*, 18(1) Pace International Law Review 289 (2006), p. 300; S.L. Karamanian, *Overstating the "Americanization" of International Arbitration: Lessons from ICSID*, 19(1) Ohio State Journal on Dispute Resolution 5 (2003). *But see* Y. Dezalay, B.G. Garth, *Dealing in Virtue*, The University of Chicago Press, Chicago, London: 1996, p. 53; or Alford, *supra* note 65, p. 87.

[67] *See* the official website of CIArb with its evidentiary guidelines, available at: http://tinyurl.com/q7z3dld (accessed 20 April 2016).

[68] *See* the official websites of these American institutions with the aforementioned guidelines, available at: http://tinyurl.com/grgo648; and http://tinyurl.com/q7yokcb (both accessed 20 April 2016).

[69] *See* the official website of this institution with its new guidelines, available at: http://tinyurl.com/o664rnb (accessed 20 April 2016).

4.2.1. Document production

Most international arbitration rules grant the power to the arbitral tribunal to either request[70] or order[71] the production of certain documents. However, the preferences of international arbitration actors may substantially differ in this regard. As explained in the UNCITRAL Notes:

> [p]rocedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.[72]

If the parties adopt the IBA Rules, provisions of this instrument can be useful in harmonizing different practices with respect to the production of documents.[73] The core of the document production process, including the increasingly important e-disclosure, is regulated in Arts. 3 and 9.2 of the IBA Rules.[74] P. Ashford has accurately observed that: "The length of Article 3 and of the IBA Commentary is no mistake: Article 3 is the heart of the Rules."[75] With respect to e-disclosure in international cases, the CIArb Protocol for E-disclosure in Arbitration is also extremely helpful in bridging differences.[76] In case of a heavy load of electronic documents, in order to avoid the

[70] *See e.g.* Art. 29.1 of the VIAC Rules.

[71] *See e.g.* Art. 24.1(g) of the SIAC Rules and Art. 22.3 of the HKIAC Rules. *See also* Art. 27.3 of the UNCITRAL Rules.

[72] Para. 50 of the UNCITRAL Notes. *See also* Zuberbühler, *supra* note 63, p. 31.

[73] The IBA Rules may be of particularly assistance, and it has been noted that: "Reference to the IBA Rules has steadily increased over the last decade; as a result it may be said, without exaggeration, that the IBA Rules have developed into a commonly accepted standard in international arbitration proceedings"; Kühner *supra* note 62, p. 667. *See also* Zuberbühler, *supra* note 63, p. 32; and the opinion of H. van Houtte, who believes that: "Gone is the gap between Anglo-American arbitration, which relied heavily upon document production and Party-appointed experts, and Continental-European arbitration, with Tribunal appointed experts and document production 'à la carte'. Today 'up front' document production and evidence from Party-appointed experts have become a current feature of Continental-European arbitration as well." (H. van Houtte, *The Document Production Master and the Experts' Facilitator: Two Possible Aides for an Efficient Arbitration*, in: Fernández-Ballesteros & Arias (eds.), *supra* note 56, p. 1147).

[74] Art. 3 of the IBA Rules deals, inter alia, with: production of documents available to the parties (Art. 3.1); production of documents in the possession of the opposing party (Arts. 3.2-3.8); production of documents from a person who is not a party to the arbitration (Art. 3.9); and the form of production of documents (Art. 3.12). In 2010 new language relating to e-disclosure was added to Art. 3.3(a)(ii) of the IBA Rules. Art. 9.2 of the IBA Rules sets forth reasons for objection against a Request to Produce (as defined in the IBA Rules). *See* Arts. 3 and 9 of the IBA Rules. *See generally* N. Darwazeh, *The IBA Rules on Evidence in Practice: Document Discovery*, IBA Arbitration & ADR News 51 (2003). *See also* Segesser, *supra* note 62 at pp. 743-746; or Kühner, *supra* note 62, pp. 671-672. For a more detailed overview of electronic document production, *see* A. Bouchenaki, *The IBA Rules lay the ground for solutions to address electronic document production disputes*, 13(5) International Arbitration Law Review 180 (2010).

[75] *See* Ashford, *supra* note 63, p. 58.

[76] *See* the official website of CIArb with the CIArb Protocol for E-disclosure in Arbitration, available at: http://tinyurl.com/hhf597v (accessed 20 April 2016).

"Americanization" of procedure its usage should be preferred over the Sedona Principles: Second Edition Best Practices Recommendations & Principles For Addressing Electronic Document Production (2007), and a similar set of these Sedona Principles issued in Canada, both of which are intended primarily for North-American litigation or domestic arbitrations.[77]

The provisions of Art. 3 of the IBA Rules that outline the process involved in the production of documents in the opposing party's possession, including the regulation of a request to produce documents in Art. 3.3 of the IBA Rules, are the most vital for the international arbitration procedure.[78] It bears mentioning, however, that it is sometimes difficult to determine those documents that "are relevant to the case and material to its outcome."[79] From the perspective of the author, who is a representative of the civil law tradition (the CEE legal systems to be precise), in which the institution of disclosure is often limited, the discussed provisions of Art. 3 of the IBA Rules, especially those pertaining to the production of documents in the opposing party's possession, appear to be a little bit incongruous and somewhat surprising. While from the standpoint of all civil-law trained advocates the novelty of these provisions should not be exaggerated – as some disclosure is usually possible in the continental Europe – neither should it be overlooked. The interpretation of the phrase "relevant to the case and material to its outcome" may easily open a Pandora's box of cultural differences. If interpreted liberally, which is possible in case of arbitral tribunals consisting of common-law trained lawyers, the cited provision allows for a very extensive disclosure of information. Therefore, depending on the cultural backgrounds of the international arbitration participants, and on the strength of each party's case, Art. 3 of the IBA Rules may prove to be a double-edged sword for counsel. J. El Ahdab and A. Bouchenaki were right to state: "If these principles [ed. note: embedded in the IBA Rules] seem to reflect a reasonable compromise, which is ... [ed. note: a] *mariage de raison* ..., this does not mean, however, that it led to a 'happy marriage', where 'life is a long quiet river'."[80]

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[77] *See generally* M.E. Schneider, *A Civil Law Perspective: Forget e-discovery*, in D.J. Howell (ed.), *Electronic Disclosure in International Arbitration*, JurisNet LLC, New York: 2008, pp. 26-27.

[78] *See* Ashford, *supra* note 63, p. 59. *Cf.* M. Scherer, *The Limits of the IBA Rules on the Taking of Evidence in International Arbitration: Document Production Based on Contractual or Statutory Rights*, 13(5) International Arbitration Law Review 195 (2010). M. Scherer argues that: "The IBA Rules have led to an increase in document-production requests. Therefore, to some extent, they regulate a problem of their own making, although they do at least provide a framework for finding solutions to that problem. The IBA Rules however set forth only procedural rules, not substantive ones. This is clear from the foreword to the Rules, as well as from their terms. They govern the taking of evidence in the framework of arbitration proceedings only. Yet, document production is not necessarily premised on procedural rules nor does it require a pending arbitration. Indeed, the right to obtain documents from another party can derive from other sources and apply even where no arbitration or court proceedings are ongoing." (*Ibidem*, p. 195).

[79] *See* Art. 3(b) of the IBA Rules.

[80] J. El Ahdab, A. Bouchenaki, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?*, in A.J. van den Berg (ed.), *Arbitration Advocacy in Changing Times*, ICCA Congress Series, Kluwer Law International: 2011, p. 100.

At the end of the day, one party to an arbitration agreement, or even both parties if they come from the same legal culture, may be disappointed over the scope of disclosure in international arbitration. This short article is not suitable for addressing these elaborate provisions and their practical operation/effect in great detail, although one further observation concerning their understanding will be presented in section 5.2. It is enough to observe here that the different approaches to the production of documents are deep-rooted in cultural differences between lawyers with a common-law background and civil-law trained advocates.[81] The latter are familiar with the Latin epigraph "*nemo tenetur edere instrumenta contra se*", which makes them skeptical about the usefulness of disclosure. The differences may affect both the scope of requests for production of documents and their results. While the IBA Rules are intended to help bridge the gap in this area, they are also prone to many different interpretations.

Overall, although the wording of Art. 3 of the IBA Rules leaves substantial discretion to the arbitral tribunal, the legal framework permitting an order to produce documents is still relatively precise.

4.2.2. Witness statements and expert reports

Issues connected with the taking of evidence from witnesses and experts are extensively discussed in the UNCITRAL Notes;[82] however they do not offer any ready-made solutions to these issues. In order to verify the thesis that the international arbitration process has become harmonized, it is therefore arguably more relevant to discuss the standards concerning witnesses and experts that have been laid out in the IBA Rules.

Art. 4 of the IBA Rules, concerning witnesses of fact, concurs with the common law practice of submitting written witness statements. It also permits counsel to interview their witnesses before submitting their statements and discuss the future testimony of those witnesses with them prior to any oral hearing (known in the vernacular as "coaching the witness"), which is a controversial practice in civil law countries.[83] In addition to this provision, Guideline 24 of the IBA Guidelines on Party Representation in International Arbitration provides that a party representative may meet and interact with witnesses and experts in order to discuss and prepare their prospective testimony.[84] Civil-law trained lawyers from countries which inherit elements of their procedural systems from the Code Napoleon are likely to consider these provisions to be extremely generous to counsel. Likewise, the possibility of compensation for the loss of time

[81] *See* R. Hill, *The New Reality of Electronic Document Production in International Arbitration: A Catalyst for Convergence?*, 25(1) Arbitration International 87 (2009), p. 88.

[82] *See* paras. 39-68 as well as paras. 69−73 of the UNCITRAL Notes.

[83] *See* Arts. 4.4 and 4.5 of the IBA Rules. *See also* van Houtte *supra* note 66, p. 458; P. Hollander, *Brussels Bar Lifts the Traditional Prohibition on Preparatory Contacts between Attorneys and Witnesses*, IBA Arbitration & ADR News 81 (2011). For a thorough discussion on practices developed under Art. 4 of the IBA Rules, *see* A.V. Wittmer, *Witness Statements*, in: Lévy & Veder (eds.), *supra* note 28, p. 65.

[84] *See* Guideline 24 at the official website of IBA, together with the 2013 Guidelines on Party Representation in International Arbitration (IBA Guidelines on Party Representation), available at http://tinyurl.com/hup2kgn (accessed 20 April 2016).

incurred by a witness in testifying or preparing to testify in international arbitration may be seen as a novelty in the field of dispute resolution as it plausibly allows offering more than just the equivalence of *lucrum cessans* (Guideline 25 of the IBA Guidelines on Party Representation[85]). Many continental counsel, especially if not experienced in transnational cases, are likely to be taken off guard by it in an international arbitration framework. Art. 4.2 of the IBA Rules also negates the traditional civil law distinction between parties and witnesses.[86] At the same time, however, any new document on which a witness relies must accompany his or her written witness statement.[87] This can be seen as bizarre by counsel educated in common law jurisdictions. Therefore it may be said that, in this regard, the IBA Rules follow the civil-law model of gathering all evidentiary documents early in the proceedings.[88]

As regards experts, the provisions of Arts. 5 and 6 of the IBA Rules marry different legal cultures by allowing both the use of party-appointed experts, which are characteristic for common law proceedings, and tribunal-appointed experts, which are characteristic for civil law traditions.[89] The aforementioned provisions are culture-neutral. While the practice of international arbitration is most likely evolving towards reliance on party-appointed experts[90] and will therefore resemble the adversarial system of taking evidence adopted in common law jurisdictions, the IBA Rules do not promote this system over the inquisitorial approach, where experts are designated by the arbitral tribunal.

In summary, each of the provisions cited in this section combine features characteristic of both common law and civil law traditions. None of these two traditions definitively prevails in the text of the IBA Rules, but some procedural solutions, for example those relating to witness statements, adhere to the preconceptions of lawyers from common-law countries rather than those of civil-law advocates. The discussed provisions concerning the taking of evidence from witnesses and experts reflect the compromise struck between the representatives of various legal systems who were members of the IBA Rules of Evidence Review Subcommittee. It would appear that the drafters of the IBA Rules have tried to encompass a range of different approaches to witnesses and experts in a single document – this attempt may seem *prima facie* challenging, but it turns out to be coherent and satisfying.

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[85] *See* Guideline 25 (a)-(b) of the IBA Guidelines on Party Representation.

[86] *See* Art. 4.2 of the IBA Rules. *See also* Ashford, *supra* note 63, p. 99; Zuberbühler, *supra* note 63, p. 86.

[87] *See* Art. 4.5(b) of the IBA Rules.

[88] *See* Kühner, *supra* note 62, p. 672.

[89] *See* Arts. 5 and 6 of the IBA Rules. *See also* Ashford, *supra* note 63, pp. 110 et pass.; Zuberbühler, *supra* note 63, pp. 111 et pass. *See generally* E.F. Ricci, *Evidence in International Arbitration: A Synthetic Glimpse*, in: Fernández-Ballesteros & Arias (eds.), *supra* note 56, pp. 1026-1027.

[90] One should also note that CIArb prepared a separate set of guidelines on party-appointed experts. *See* the official website of CIArb with the Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration, available at http://tinyurl.com/ojvtu3e (accessed 20 April 2016).

4.2.3. The organization of oral hearings

The organization of oral hearings is dealt with in both the UNCITRAL Notes and the IBA Rules. Each of these instruments largely complements the other, as neither of them on its own establishes an exhaustive regulation of all the technicalities associated with oral hearings, nor do they waive the need for consultation between the parties and arbitrators (resulting in the issuance of a Pre-hearing Order).

The UNCITRAL Notes address the organization of oral hearings by presenting a range of alternatives from which the parties and arbitrators can choose at the pre-hearing conference. The drafters of the UNCITRAL Notes believed that if the parties were given a choice of issues to consider, they would pick the solutions best suited to their case. This in turn could enhance the efficiency of the manner in which the hearing process was conducted. According to the UNCITRAL Notes, among other things the following issues should be considered at the organizational conference: whether a single continuous hearing should be held; whether there should be a limit on the amount of time allocated to each party for oral advocacy; the order in which arguments will be presented; the total length of the hearings; and arrangements for transcripts.[91] All of these issues are often addressed differently in common law and civil law cultures.

For instance, owing to linguistic issues that often arise in the international context, minutes that are a verbatim transcription of the evidentiary hearings are preferred in international arbitration, instead of lengthy recordings coupled with summarized protocols of the hearings. However, prior to their first participation in international arbitration hearings, Polish attorneys are usually accustomed only to the latter model of transcription and hence are not familiar with using the software tools aimed at enhancing the accuracy of transcriptions. The same may apply in certain cases to domestic arbitrators from civil law countries, who sometimes seem to avoid verbatim citations and referencing transcripts in their awards. This also demonstrates that the counsel and arbitrators at an oral hearing may have quite different habits of mind. Neither of these two models of transcription is necessarily better than the other. Depending on the strengths of each party's case, for example, and on the nationality of witnesses and their command of English, the different approaches to transcription can be exploited to provide a procedural advantage.

At the same time, the IBA Rules do not fully tackle all the procedural details that must be decided before the oral hearings. As observed by G. von Segesser, Art. 8 of the IBA Rules sets only "a general guideline and framework for the procedure to be followed at the evidentiary hearing."[92] It fairly harmonizes, however, issues such as the appearance of witnesses at oral hearings, the sequence of their examination, or the giving of testimony by party-appointed and tribunal-appointed experts. At the same time, Art. 2.1 of the IBA Rules encourages the arbitral tribunal to consult the parties on evidentiary issues "with a view to agreeing on an efficient, economical and fair process for the taking

[91] *See* paras. 74-85 of the UNCITRAL Notes.
[92] Segesser, *supra* note 62, p. 749. *See also* Art. 8 of the IBA Rules.

of evidence."[93] According to Art. 2.2 of the IBA Rules, this consultation should, among other issues, also cover "the taking of oral testimony at any Evidentiary Hearing."[94]

Taking into account the rather high degree of latitude in arranging the oral hearings, the UNCITRAL Notes, and to a large extent also the IBA Rules, are uniform toolboxes from which the parties and arbitrators can select the most appropriate methods and techniques for managing the oral stage of the proceedings. It is worth mentioning, however, that the hearing pattern set out in the IBA Rules has become a relatively standard approach in the last few years. Hence, it would appear that the IBA Rules have somewhat harmonized the conduct of oral hearings in most international arbitrations.

5. SUMMARY OF THE INSTRUMENTS DISCUSSED SO FAR: THE NECESSITY TO LOOK BEYOND THE HARMONIZED TEXTS

In light of the above, it is apparent that many provisions of international arbitration instruments are flexibly drafted, and that several essential issues have been somewhat harmonized, either at the level of international arbitration rules or through more detailed instruments, in particular the IBA Rules.

The leading international arbitration rules are characterized by some universal similarities, possible to identify in each and every one of them, which at a very general level seem to relatively harmonize many aspects of disputes conducted under the most popular international arbitration rules. The broad-brush provisions of most international arbitration rules makes it possible for them to be used in different kinds of disputes, even if they are conducted in different parts of the world. At the same time, the IBA Rules harmonize many vital procedural technicalities, and also to some extent formalize international arbitration proceedings, at a more detailed level. It is thus apparent that in international arbitration we can observe some harmonization of evidentiary rules. In many cases, the discussed international arbitration instruments clearly and coherently combine elements borrowed from different legal traditions and/or permit parties to choose between them.

However, does all of this mean that the arbitration world has already developed a sort of harmonized procedure, including a consistent system of evidence-taking, which is adaptable to the needs of arbitrators and parties from diverging legal cultures, but at the same time resistant to irrational, including for example ideological, influences? Arguably, it does not.

5.1. Modern law and society theories and the process of international arbitration

Contrary to many enthusiastic, or even affirmative opinions from the international arbitration milieu, according to this author the answer to the above-posed question

[93] *See* Art. 2.1 of the IBA Rules. *See also* Ashford, *supra* note 63, pp. 33 et pass.; Zuberbühler, *supra* note 63, p. 2.

[94] *See* Art. 2.2 of the IBA Rules.

remains neither obvious nor simple. One should not underestimate the consequences of the flexibility of the international arbitration procedure, its inherent characteristic which is often portrayed as a strength of international arbitration. The aim of this article is not to argue against such flexibility, and in particular not to diminish its relevance to international arbitration. Rather, the author would like to remind readers that the flexibility of the international arbitration procedure may have an unexpected, and sometimes adverse, influence on its conduct. In other words, the flexibility of the international arbitration procedure is a tool which must be used with caution.

Due to the principle of party autonomy, which allows procedures to be tailored to the parties' specific needs, there is arguably a necessity to look beyond the text of international arbitration instruments. To put it another way, it is crucial to examine the "law in action" as applied in transnational arbitration cases rather than the legal framework of international arbitration; i.e. it is important to examine what dispute resolution lawyers actually do when they organize an international arbitration.[95] Once we take into account the perspective proposed in the literature on law and society, the thesis that some procedural "*ius unum*" exists becomes less compelling. To put it simply, according to the North-American movements such as legal realism or law and society, an interpretation of any legal provision or fact by lawyers will always be subjective and prone to bias.[96] Most lawyers, often subconsciously, follow behavioral patterns determined by their past experiences, including, for example, the university education they received or socio-political ideas that influenced their way of thinking.[97] The social and philosophical constraints put on lawyers will therefore play a significant role in the process of application of the international arbitration rules and guidelines. Following this line of reasoning, it may prove challenging for a common-law trained lawyer, or a civil-law trained attorney, to abandon ideas that have shaped his or her legal tradition as well as influenced a large chunk of his or her education and training. When confronted with a text of an international arbitration instrument, each lawyer will be tempted to read it in light of his or her own legal tradition.

It is therefore essential to look not only to the text of the harmonized international arbitration instruments, but also to the transnational context in which these instruments are applied. The so-called cultural studies of law movement, stemming from the realists' approach to law, has gained much significance in the academic community.[98] The cultural analysis is particularly important since the flexibility of international

[95] *See* an interesting discussion on different approaches to law and culture/ society, including the legal realism movement and its younger variations in: M. Mautner, *Three Approaches to Law and Culture*, 96 Cornell Law Review 839 (2011), pp. 857-861.

[96] It should be remembered, however, that legal realism is not a uniform school of thought. *See generally* E.V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 Rocky Mountain Law Review 123 (1962); or M.S. Green, *Legal Realism as Theory of Law*, 46(6) William & Mary Law Review 1915 (2005).

[97] *See* Rostow, *supra* note 96, pp. 125-126.

[98] *See generally* N. Mezey, *Law as Culture Symposium: Approaches to the Cultural Study of Law*, 13(1) Yale Journal of Law & Humanities 35 (2001); P.W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13(1) Yale Journal Law & Humanities 141 (2001).

arbitration, coupled with the broad-brush provisions employed in many international arbitration rules, leave room for substantial unpredictability in the conduct of proceedings. While in theory the principle of party autonomy should stimulate choices of only tried-and-tested procedural solutions – and therefore assist in settling cultural differences[99] – it is not necessarily so in practice. As phrased by R. Hussain in his recent paper on culture and practices of international arbitration:

> [t]he flexibility is the beauty of arbitral procedure but besides it also creates room for divergent opinions by the parties and the exercise of discretion by the arbitrators, who may tend to incline towards the opinion closer to their own legal backgrounds.[100]

Many provisions of international arbitration instruments are broad enough to generate diverse ideas on how to conduct the proceedings.[101] They do not prevent deviations from the typical or usual ways of conducting proceedings which are most frequently employed by international arbitration practitioners.[102] Although the institutional arbitration rules do not fully address all procedural questions, the incorporation of any additional standard guidelines into the conduct of international arbitration proceedings is not mandatory.[103] The IBA Rules are adopted in about 60% of international arbitrations, but only in 7% of cases as binding rules.[104] This opens the door for the arbitrators', attorneys' and parties' legal background to play a potentially significant role in shaping the proceedings.[105]

In a nutshell, the broad formulations used in many international arbitration rules, even the IBA Rules, may encourage international arbitration participants to fill in the gaps with local practices, tendencies, or customs.[106] This home-oriented trend, if present, may in some cases strongly undermine the uniform application of any harmonized instruments.

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[99] *E.g.*, in this context, according to Ch.M.J. Kröner: "the procedural flexibility of arbitration offers the promise of bridging the cultural differences that remain among the parties"; Ch.M.J. Kröner, *Crossing the Mare Liberum: The Settlement of Disputes in an Interconnected World*, in: E. Verdera y Tuells, J.C. Fernandez Rozas (eds.), 4(3) Arbitraje Revista de Arbitraje Comercial y de Inversiones 653 (2011), p. 659.

[100] R. Hussain, *International Arbitration–Culture and Practices*, 9(1) Asian International Arbitration Journal 1 (2013), p. 19.

[101] *See e.g.* Tweeddale, *supra* note 35, paras. 10.01-10.02.

[102] As put by R.K. Ward when discussing evidentiary procedures, "nothing is carved in stone"; Ward, *supra* note 46, p. 13.

[103] According to G.B. Born, parties usually agree on "only broad outlines of the arbitral process..."; Born, *supra* note 8, p. 1782.

[104] Queen Mary College, University of London and White & Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (published previously at the White & Case website) http://tinyurl.com/gwq338d (accessed 20 April 2016), p. 11.

[105] In support of this conclusion, *see e.g.* Pair, *supra* note 56, p. 73.

[106] As rightly observed by M. Mcilwrath & J. Savage in their monograph on alternative dispute resolution: "Alongside that group of 'truly international' arbitrations, there are as many or perhaps more 'local' international arbitrations, staffed by arbitrators and lawyers who are more familiar with national courts or domestic arbitration practice, and who therefore follow procedures that resemble the local practice more than any 'transnational' arbitration-specific procedures" (Mcilwrath, *supra* note 23, para. 5-001).

5.2. Reasons for and examples of the different approaches to international arbitration instruments

This subsection examines the various explanations and possibilities for contradictory interpretations of international arbitration instruments. Most of the observations offered in the pages that follow are based either on personal experiences or on anecdotes heard from older colleagues about their experiences with cross-border disputes. While many of the comments below can be criticised as speculative, the author believes that international arbitration is not necessarily an empirical field of study; i.e. it is practiced in many countries and involves multi-cultural, multi-linguistic, and multi-experienced participants. In light of these factors, its procedural organization can be considered from many different angles. Any discussion of disputes with transnational aspects requires delicate formulations rather than definitive comments and far-reaching dogmas.

As suggested above, parties may sometimes rely on being able to proceed in accordance with the legal or advocacy patterns that they are most familiar with. This may be either for ideological motives, including various cultural and/or subconscious patterns, or perhaps more often simply out of pragmatic (strategic) motives.[107] Also, both of these motives may overlap in a number of cases. For example, choosing domestic procedural patterns for pragmatic reasons might be in some cases a quite natural temptation faced by counsel accustomed exclusively to their civil procedure rules. If so, the difference between the ideological and strategic motivation can be hard to discern. One should keep in mind that not all international claims are handled by knowledgeable and experienced professionals, for example by persons active in international institutions who are very familiar with international arbitration procedure and practice. A number of small or mid-sized international cases are conducted by domestic or regional law firms, whose everyday exposure to international cases is limited.[108] Sticking to the rules, customs or habits which they know (domestic ones) puts most of such inexperienced lawyers in a better procedural position and makes them feel more comfortable with new tasks. Having little know-how in the provision of international services, lawyers from such law firms may sometimes quite rationally depart from the traditional way of conducting international arbitrations (although it may seem an irrational impulse to do so). As a result, in some cases where the parties come from different legal backgrounds, it is possible to imagine that the organizational conference at the outset of the proceedings could become a battleground between divergent views on some procedural issues. The possibility of such a scenario, which may happen if the parties have starkly contrasting procedural interests, or are represented by inexperienced counsel, would somewhat revitalize the "clash of legal cultures" concept; an idea which is considered as becoming irrelevant in

[107] J.D.M. Lew and L. Shore believe that: "[t]he approach of most experienced advocates and arbitrators is rather more case-driven than ideological. Depending on the strength of a case or of a particular witness or of a single document, common law lawyers may well be comfortable in seeking limited cross-examination, no discovery, and lengthy witness statements. Depending on the nature of a particular case, civil law lawyers may seek a procedure in which oral submissions are extensive" (Lew & Shore, *supra* note 6, p. 38).

[108] Mcilwrath, *supra* note 106, where the perfect opinion on this issue was cited in length.

international arbitration these days.[109] This tug-of-war situation between two parties with different ideas on some procedural issues may also be troublesome for arbitrators. Some inexperienced arbitrators, especially those debuting at the international forum, may allow some fairly confusing situations to develop without intervening.

Looking from the psychological perspective, which affects mainly inexperienced arbitration participants, it is natural that most people, probably also including lawyers who work in an international setting, tend to choose solutions they are familiar with. This tendency in the human decision-making process has been described as the so-called "status quo bias".[110] When offered a range of alternatives to choose from, and especially when some alternatives involve new options, people do not necessarily select the one which is objectively most effective, and hence offers the most widespread possibilities, but rather stick to options that they have already tested in the past. Therefore at the organizational conference at the outset of an international arbitration, counsel from different countries may, for various personal or tactical reasons, insist on some non-standard elements in the arbitral process, even though they are objectively less effective than those which are the most popular in international practice or codified in the different sets of guidelines. Such elements will likely distract the attention of the opposing counsel from the merits of the case and make him or her focus on offsetting the technicalities that he or she is unfamiliar with. An example of this strategy would be a proposition from a civil-law trained attorney to completely resign from the cross-examination of witnesses, which conforms to the practice of lawyers from common law systems, and to verify witness statements through witness conferencing, which assumes a more active role for the presiding arbitrator.

For similar behavioral reasons, in the oral stage of international arbitration inexperienced counsel may stick to their domestic oral advocacy styles; e.g. many American attorneys may question witnesses slightly more aggressively than their continental colleagues from the same law firm. At the same time a number of continental arbitrators may be more willing to interrupt witness questioning by counsel and step in with their own questions, even if they understand that this distracts cross-examiners and diminishes the value of cross-examination.

Also, the length and character of oral testimony may differ depending on a number of cultural factors. For instance, the syntax of certain Slavonic languages, including Czech, Slovak, or Polish, is much more complex than English grammar. Witnesses who testify in these languages may give the impression of being talkative, but at the same time vague or imprecise. Most English transcripts of their testimonies will be lengthy and full of "pause" sounds. Therefore, lawyers need to either convince them to testify in English or coach them to use only short sentences in their mother tongues, which are easy to interpret into English. The length of testimony may equally depend on the

[109] *See e.g.* B.M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, 14 Arbitration International 157 (1998), p. 159-60; Helmer, *supra* note 66, p. 37.

[110] W. Samuelson, R. Zeckhauser, *Status Quo Bias in Decision Making*, 1(1) Journal of Risk & Uncertainty 7 (1988), p. 8.

wording of an oath. In some civil law countries, such as Poland, the Czech Republic, Slovakia, Romania and Turkey – even though procedures for administering an oath often apply in civil law jurisdictions only to public court disputes – witnesses are accustomed to concealing nothing that is known to them.[111] This makes witnesses from certain civil law jurisdictions naturally more talkative at the international arbitration hearings than witnesses with an Anglo-American background. As anecdotally reported by P. Nowaczyk in his speech at the 2009 Vienna Arbitration Days, it happened that in one extreme case a Polish witness testified for 15 days in an international arbitration hearing conducted under the aegis of a South-Asian institution.[112] Witness preparation for international arbitration may flatten out some of the basic differences between witnesses in opposing languages, concepts and styles of non-verbal communication, but it will never eliminate them entirely.

On the other hand, in those cases where the parties and arbitrators come from countries which share the same legal culture, it is conceivable that they will deliberately resign from or modify certain standard elements of an arbitral procedure. For instance, two parties from continental Europe represented by teams of civil law-trained lawyers are likely to be reluctant to agree to provisions potentially introducing elements of the common-law style of cross-examination.[113] Unless they are confronted with some pressure from the arbitral tribunal, there is, *prima facie*, no reason why they should agree to those procedural elements which are foreign to them and with which they do not feel comfortable.[114] It should be remembered, above all, that choosing international arbitration instead of litigation is for the convenience of the disputing parties. The introduction of any procedural element which is foreign to the parties and their counsel also increases the costs associated with an arbitration. Local attorneys will often need to consult colleagues from a different jurisdiction. If the language of the proceedings is English, and for some reason the parties represented by civil law-trained lawyers agree on extensive oral hearings, it may be advisable to seek the support of attorneys who are not only native-speakers, but who are also very familiar with the Anglo-American style of oral advocacy. It is not uncommon to request assistance from common-law colleagues before witness examination, particularly if they work for the same law firm. While enlarging the legal team by including some common-law trained lawyers may help to prevail at hearings, it also adds significant costs to the entire international arbitration process. Even if colleagues educated in common law jurisdictions are not

[111] *See* Nowaczyk *supra* note 57, p. 92.

[112] *Ibidem*.

[113] For a discussion on cross-examination, including its potential advantages and disadvantages, *see generally* A.L. Marriott, *Evidence in International Arbitration*, 5(3) Arbitration International 280 (1989), pp. 285-286. *See also* some remarks on questioning styles in: D.J.A. Cairns, *Advocacy and the Functions of Lawyers in International Arbitration*, in: Fernández-Ballesteros & Arias (eds.), *supra* note 56, pp. 301-302; van Houtte, *supra* note 66, pp. 459-460.

[114] *See generally* T. Ereciński, K. Weitz, *Sąd arbitrażowy* [Arbitration tribunal], Lexis Nexis, Warszawa: 2008, pp. 306-307.

consulted, one should remember that advocacy in a foreign language requires much longer preparation than analogous advocacy in one's mother tongue. Accordingly, there might exist some tension between the efficiency of the process and the desire to keep to the internationally-accepted procedural path. Whatever the case may be, the above-mentioned example of possible resignation from some element of cross-examination probably contradicts the existing international practice.[115] A typical international arbitration hearing includes cross-examination.

In addition, we should keep in mind that many aspects of the international arbitration process differ depending on the type of arbitration. For example, it can be assumed that the document production process is more extensive and costly in investment arbitration than in commercial arbitration. This difference can probably be explained by the fact that it may prove challenging for investors to obtain from a host state all documents relevant to their case. Hence, the arbitral tribunal in an investment dispute may be more empathetic to a request for the production of documents than it would be in a commercial case. Interestingly, in both these cases the disclosure orders will likely be based on the same instrument, namely the text of the IBA Rules.

However, perhaps there is another explanation for the aforementioned difference. During the 1990s the practice of investment arbitration, in particular under the auspices of the International Centre for Settlement of Investment Disputes (ICSID),[116] became somewhat dominated by U.S. attorneys, who are accustomed to broad disclosure orders. The heavy volume of cases brought under the North American Free Trade Agreement (NAFTA)[117] probably left its mark on the international practice of investment arbitration. Nowadays even those investment cases that are adjudicated ad hoc by non-ICSID panels often involve extensive production of documents. Unlike investment cases, many commercial disputes, at least those seated in continental countries, are characterized by an extremely limited disclosure. In particular, when lawyers from civil law jurisdictions predominate in a proceeding, the disclosure process may present a number of cultural challenges (as litigators from civil law countries prefer a more strict application of the rule that it is for each party to present all evidence supporting its case).[118] Therefore many international arbitration participants, including

[115] *See* Art. 8.3 of the IBA Rules which deals oral testimony at hearings. As far as a witness was directly examined by its legal advisors, the opposing counsel is presumptively entitled to cross-examination. *See also* M. Wirth, *Fact witnesses*, 13(5) International Arbitration Law Review 207 (2010), p. 209; Waincymer, *supra* note 21, p. 718.

[116] *See* the official website of ICSID with the text of and information on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, available at http://tinyurl.com/cxn7yok (accessed 20 April 2016).

[117] *See* the official website of the NAFTA Secretariat for the text of and information on the North American Free Trade Agreement, available at http://tinyurl.com/hnsqqzr (accessed 20 April 2016).

[118] *See* L. Vercauteren, *The Taking of Documentary Evidence in International Arbitration*, 23(2) American Review of International Arbitration 341 (2012), pp. 351-352; D. D'Allaire, R. Trittmann, *Disclosure Requests in International Commercial Arbitration: Finding a Balance Not Only between Legal Traditions But Also between the Parties' Rights*, 22(1) American Review of International Arbitration 119 (2011), p. 128.

a number of continental arbitrators familiar only with domestic cases, will liberally interpret grounds for objections against a document production request (Arts. 3.3 or 9.2 of the IBA Rules). This would be a perfect example of the *mariage de raison* referred to above in subsection 4.2.1.

On balance, the effect of differing legal traditions on the conduct of an international arbitration should be seen as complex. The interplay of the strengths and weaknesses of each party's case may have a number of permutations. Their transposition into the international arbitration procedure is often difficult to control or predict. Any discussion of this process will always be subjective and vary depending on a writer's legal culture, personal experiences, and convictions. Thus, in most cases the nature of the process makes drawing any firm conclusions a challenging and speculative enterprise.

6. CONCLUSIONS AND RESULTS OF THE SOCIO-CULTURAL ANALYSIS

Over the last three decades the many different instruments of international arbitration have been harmonized to a substantial degree. It is undeniable that during this time the international arbitration milieu has come together to develop instruments which coherently combine elements of different legal traditions, and that some harmonization of international arbitration can be found at the textual level. In this sense, it is possible to say that the M. Rubino-Sammartano's call for the discipline of different international arbitration instruments has been, whether consciously or not, received positively by the community of international arbitration enthusiasts.

Owing to this harmonization it is possible to argue that these widely accepted and applied international arbitration instruments, and especially the IBA Rules after the last set of amendments, have established a transnational procedural pattern of arbitral proceedings. This, together with certain other factors, including the substantial growth in the number of lawyers who regularly work on international arbitrations and are therefore familiar with their framework, as well as the emergence of international arbitration sections in large law firms, has ushered in a system of standard answers to most procedural questions.[119] The elements of this system are today harmoniously maintained by the mainstream international arbitration practitioners, who often work for major Anglo-American law firms around the world.

At the same time, it is also possible to state that the evidence-taking process typical for international arbitration cases is neither entirely based on the common law nor on the civil law model.[120] From this perspective, it often meets the usual expectations of

[119] Despite noting the harmonization of international arbitration instruments, some commentators appear to express an opinion to the contrary. *See e.g.* Born, *supra* note 8, pp. 1782-1784. *Cf.* Born, *supra* note 8, pp. 1780-1791, where he significantly softens his opinion.

[120] *See e.g.* Pietrowski, *supra* note 27, p. 375. Also, according to Ch. Bühring-Uhle, L. Kirchhof and M. Scherer: "... the procedure is conducted in a blend of Civil Law and Common Law elements, not only by

lawyers from both common law and civil law jurisdictions. In addition, the common law and civil law procedures are naturally evolving and any comparative reference to their characteristics may be considered simplistic.[121] It is sometimes even suggested that looking at international arbitration from the perspective of a clash between common law and civil law is no longer appropriate in the globalised world, in which many complex socio-economic changes are rapidly becoming a reality.[122] Perhaps international arbitration has already started developing rather independently of these two major civil procedure traditions.[123] This observation, if accepted as true, would take us close to the point where we could declare the existence of "*ius unum*" or "*lex evidentia*". Taking into account the harmonized texts of international arbitration instruments, the adversarial and inquisitorial approaches to the taking of evidence, which are typical for the common law and civil law traditions respectively, function smoothly together in most arbitrations.

That said, many facets of different international arbitrations seated, administered, and/or conducted in culturally and geographically distant jurisdictions often differ to some degree.[124] For instance, while 85% of international arbitration participants consider the adoption of the IBA Rules helpful, in 53% of cases they are applied as a non-binding instrument.[125] Therefore, even though it is possible to identify a set of typical solutions to many questions that arise in international arbitration, it remains a process still not free from cultural considerations. This ambiguity is today accepted by many experienced international practitioners.[126] Some cultural considerations may be quite irrational and inefficient; for example the case of the Polish witness testifying in an international arbitration seated in one of the South-Asian countries for 15 working days.

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way of a compromise over different procedural attitudes but also as the product of a search for efficient procedures that combine the respective strengths of both systems" (Bühring-Uhle et al., *supra* note 8, p. 71).

[121] *See* the introductory comments of O.G. Chase and J. Walker in: J. Walker, O.G. Chase (eds.), *Common Law, Civil Law and the Future of Categories,* LexisNexis: 2010, pp. l1-lxviii. *See also* O.G. Chase, *Legal Processes and National Culture*, 5(1) Cardozo Journal of International & Comparative Law 1 (1997), pp. 14-17.

[122] *See* Trakman, *supra* note 26, pp. 14-19.

[123] Some postulate that today there exists a separate "international arbitration culture". *But cf.* H.A. Grigera Naòn, *Cultural Clashes in International Commercial Arbitration: How Much of a Real Issue?*, in: Fernández-Ballesteros & Arias (eds.), *supra* note 56, pp. 557-560.

[124] At a conference in 2003, L. Nottage delivered a paper which concluded that certain international arbitration issues may possibly evolve towards "closed regionalism' (but generally arguing that the growth of arbitration will be accompanied by some shift to truly international practices). *See* L. Nottage, *The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration*, Sydney Law School Legal Studies Research Paper, 06/51, p. 29.

[125] Queen Mary College, *supra* note 105, p. 11.

[126] *E.g.* A.F. Lowenfeld is of the opinion that: "[i]nternational arbitrations tend to reflect judicial procedure in the state where the arbitration is held, particularly if the chairman comes from that state." (Lowenfeld, *supra* note 54, p. 168). By the same token, in the opinion of W.L. Craig, W.W. Park, J. Paulsson: "[i]n some international arbitrations it may be obvious – from the nationality of the parties, a concordance of the place of arbitration with the substantive law of the contract, or other factors – that problems of proof and the conduct of the hearings should clearly follow either civil-law or common-law procedures" (Craig *supra* note 22, p. 423. *See also* Mcilwrath, *supra* note 106).

This article posits that, ideally, cultural considerations, especially if leading to blatant inefficiencies or misused for personal or strategic purposes, should have no influence on how international arbitrations are conducted. To this end, international arbitration instruments should become less flexible in the future; i.e. probably too many of the existing instruments are framed as non-binding "guidelines", "codes", or "protocols". As long as cultural differences can be exploited by some lawyers for their own benefit, one can hardly speak about the existence of a global "ius unum" (or to be more precise "*lex evidentia*" in the field of evidence-taking procedures). At the same time, it would be naive to think that one day cultural factors will stop playing any role whatsoever. Taking into account the polymorphous nature of international arbitration – the many different forms and jurisdictions where it is practiced today – it looks as if the existence of cultural influences has to be accepted as a fact. At the end of the day, these considerations or procedural traditions are legitimate to the degree that they do not obstruct the efficiency of the international arbitration process. For example, it is a little bit strange, but fully acceptable, when a continental arbitrator interrupts the cross-examination of a witness with his own questions or requests clarifications. This should never lead, however, to a situation in which he or she becomes more active than the cross-examiner.

The relationship between the differing legal cultures of arbitration participants, including arbitrators, parties, and attorneys – or culture in general – and the development of international arbitration has received increased academic attention in recent years (a trend which hopefully will be continued). The final section of this article thus offers some general forecasts regarding its future evolution.

7. SOME FORECASTS FOR THE FUTURE: WHAT'S NEXT FOR CULTURAL STUDIES OF INTERNATIONAL ARBITRATION?

Taking in account the potential importance of culture in the establishment of evidentiary proceedings in international arbitration, should we try to objectively enhance, if possible, our understanding of the aforementioned correlation between the cultures of arbitration participants and its procedural conduct, or, as sometimes put by common-law trained lawyers, should we be happy to live with uncertainty?

According to this author, a deeper analysis of the influence of culture on the course of arbitral proceedings runs the danger of becoming too speculative, or can even trigger stereotypical thinking about the features of different legal traditions. The lack of objectivity in analyzing the issue may therefore have two dimensions; it may or may not be intentional. First, any discussion of cultural considerations will be in many cases intrinsically flawed by the fact that we lack reliable empirical or statistical data in this respect. It goes without saying that an attempt to gather the relevant data by outside observers, for example academics, is significantly hampered by the fact that a what takes place in large number of international arbitration proceedings remains

confidential.[127] While full confidentiality is not a strict rule, the private nature of an international arbitration can make it complicated to access all of the documents and pleadings or observe evidentiary hearings.[128] Second, even if we somehow were able to collect the relevant data, its analysis might be prejudiced by one's own cultural predilections. Also, again assuming that the required empirical study could be successfully carried out, it may prove challenging for an outsider who has not been involved in a given case to properly analyze its conduct, the procedural choices made by the parties and arbitrators, or their motivations. This analysis will likely be rather subjective and prone to bias.

However, despite the obstacles cited in the above paragraph, it would still probably be worthwhile to carry out an in-depth empirical study of arbitration practices. The international arbitration community probably needs some new initiatives in this respect. In this context, it is interesting to note a socio-linguistic driven project from Hong Kong which, among other goals, is aimed at examining whether international arbitration is becoming formalized, or even "colonized", by the litigation practices of its usual participants.[129] The multi-dimensional analysis applied in this Hong Kong project could be used in a deeper research study focused solely on evidentiary arrangements; i.e. the cultural preferences shaping the taking of evidence in arbitral proceedings. Arbitral institutions themselves would appear to be best-suited for designing and carrying out such a study. International arbitration actors, who have tight schedules and are busy with their work, will likely be more responsive to a survey request from a well-regarded institution than from an academic. The judicial staff working for arbitral institutions gain better insight into the practical aspects of a given case than outside academics. They are also not faced with confidentiality or privacy restrictions which may prevent an adequate analysis of the parties' procedural choices. It thus seems obvious that future research projects should be administered and conducted under the direction of international arbitration centers. It is symptomatic that the aforementioned Hong Kong project, which is very challenging and ambitious, seems to be proceeding at a slow pace.

It would definitely be interesting to learn more about how the biases of arbitration participants determine the way they tailor the procedure. Without further research into this field, any answer to the question whether a procedural "*ius unum*" exists will remain open-ended. For the moment, the only plausible answer to this question is that the development of "*ius unum*" is still a work in progress.

[127] Many international arbitration rules contain provisions providing either for a presumption of confidentiality or optional confidentiality ordered upon the request of any party. *See e.g.* Art. 30 of the LCIA Rules and Art. 22.3 of the ICC Rules. Some other rules state that "Hearings shall be private"; *see* Art. 30.2 of the VIAC Rules.

[128] *See* I.M. Smeureanu, *Confidentiality in International Commercial Arbitration*, Kluwer Law International: 2011, p. 1-7. *See also* Esso Australia Resources Ltd v. Plowman and Ors (1994-95) 183 CLR 10.

[129] *See* City University of Hong Kong, *International Commercial Arbitration Practices: A Discourse Analytical Study* (a socio-linguistic project) http://tinyurl.com/h8acdbu (accessed 20 April 2016).