

Process and Evidence in International Construction Arbitration – ‘Tap Root’ Principles

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Abstract

The fact-finding process in arbitration conducted in the arena of construction adjudication is of central importance. It is also a major contributor to cost. “Cost” continues to be seen as arbitration’s worst feature, followed by a number of factors including “lack of speed”. These findings point to the need for a greater level of cost consciousness in the arbitral process, combined with a greater level of efficiency, proportionality and expedition in the procedural management of an arbitral proceeding and its ultimate disposition.

A selection of eleven bodies of rules which govern international commercial arbitration are examined. They reflect ‘Core Process Principles’ of Flexibility; Efficiency; and Fairness. These principles lie at the heart of the conduct of an arbitration, and ultimately provide the rationale for its existence as an accepted system of international adjudication. The process principles which apply are considered. However, a gap is revealed. To the Core Process Principles may be added a framework of evidentiary ‘ground rules’, called Core Evidence Principles, to govern the Burden of Proof, Standard of Proof and Relevance in the reception and assessment of evidence.

Procedural and evidentiary issues are important to resolve at an early stage of a factually driven arbitration. Where these principles conflict with one another on a particular issue, careful judgment needs to be exercised by the arbitral tribunal to achieve an appropriate balance tailor made to the case. This judgment needs to be made and communicated as early as possible in the arbitral process. Subject to the agreement of the parties, any applicable rules or law, and the needs of an individual arbitration, and consistently with the Core Process Principles, it is suggested that the Core Evidence Principles should most conveniently be set in place at an early stage in advance of the substantive hearing.

The evidentiary innovations discussed in this paper are presented for discussion in aid of advancing and supplementing the Core Process Principles of arbitration, being Flexibility, Efficiency and Fairness.

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Introduction – How is International Arbitration Fairing in Construction Disputes?

The findings of the latest 2018 Queen Mary International Arbitration Survey² conclude that 97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%). This is an increase of 7% on the last survey conducted in 2015.³

An overwhelming 99% of respondents would recommend international arbitration to resolve cross-border disputes in the future. This statistic is likely to be a function of the lack of any realistic alternative avenue to resolve cross-border disputes. Most international parties will be reluctant to accede to the jurisdiction of the courts of a foreign State, particularly if that court is the 'home court' of the opponent. Alternative fora such as the DIFC Courts or the Singapore International Commercial Court may provide an option, however, in most cases international arbitration is realistically the only viable facility for international commercial parties in dispute.

In particular, in relation to high value disputes arising from international construction and engineering and technology contracts, arbitration is commonly used and is likely to grow as the resolution mechanism of choice. In terms of the Energy and Construction sectors, the use of arbitration has for some time been found to be the preferred method of dispute resolution. The 2013 Queen Mary survey found that international arbitration was preferred in these sectors, and by some margin.⁴ The trend appears to be continuing. Respondents to the 2018 Queen Mary study believe that the use of international arbitration is likely to increase in the specialist areas of Energy, Construction/ Infrastructure, Technology, and Banking and Finance sectors.⁵

“Cost” continues to be seen as arbitration’s worst feature Queen Mary study, followed by a number of factors including “lack of speed”. This finding points to the need for a greater level of cost consciousness in the arbitral process, combined with a greater level of efficiency, proportionality and expedition in the procedural management of an arbitral proceeding and its ultimate disposition. More than half of respondents (61%) in the Queen Mary Survey are reported to be of the view that “increased efficiency, including through technology” is the factor that is most likely to have a significant impact on the future evolution of international arbitration.⁶

² Queen Mary, University of London, School of International Arbitration, “2018 International Arbitration Survey: The Evolution of International Arbitration”, Professor Stavros Brekoulakis, Mr Adrian Hodis (White & Case Research Fellow) and Professor Loukas Mistelis, - ‘Executive Summary – International Arbitration: The Status quo’.

³ Queen Mary, University of London, School of International Arbitration, 2015 *International Arbitration Survey: Improvements and Innovations in International Arbitration* (Sponsored by White & Case LLP, 2015) <<http://www.arbitration.qmul.ac.uk/research/2015/>> 5. [Last observed 13 July 2018].

⁴ *Ibid* - ‘Executive Summary – The Future’.

⁵ *Ibid* - ‘Executive Summary – The Future’.

⁶ *Ibid* - ‘Executive Summary – The Future’.

But here we must prepare to leave the dizzy realm of statistics, for fear of being likened to the drunken man who uses lamp-posts for support rather than illumination.⁷

Towards a Concept Architecture for Evidence in Arbitration

It is against this background, that fact finding in arbitration is considered in this paper. Unless appropriately managed, it is the single most obvious cause of excessive cost and delay in the arbitral process. At the same time, it is a critically important component of adjudication by arbitration, as it is in a court of law. It is of particular importance in the arena of conflict arising in technology, engineering and construction projects. Disputes arising in this area of activity are notoriously factually dense. It is upon the evidence that findings of fact are made by the arbitral tribunal on the 'critical path' towards resolving the issues presented for determination.

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

First: The dispute which the parties have committed to the arbitral tribunal for resolution has a public law element. Arbitration is an adjudicatory function which produces binding outcomes in the form of an award which is enforceable under the domestic law of most nation states.⁸

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

As Professor Carbonneau⁹ has put it in his essay "*Darkness and Light in the Shadows of International Arbitration*":¹⁰

"No adjudicator can render a ruling in a factual vacuum any more than an apple can grow without a tree. In terms of international arbitration, the questions about arbitration center upon the constitution or composition of the tree. What fact finding techniques should apply? Who bears responsibility for and has the final

⁷ Attributed to Andrew Lang, a Scottish poet, novelist, and literary critic (1844-1912).

⁸ The ultimate step in arbitration has been described as "plurilocalization," meaning that the enforceability of an award (and the legitimacy of the process that led to it) falls to be policed solely by the potential enforcement fora and with effects limited to each of them. This might conceivably lead to inconsistent results, as two countries take a different view of the enforceability of the same award, but it is a consequence of the fact that national legal systems are sovereign. See: Arbitration- Essential Features, Chapter 1, Marike Paulsson (University of Miami School of Law International Arbitration Institute) p.10.

https://www.arbitration-icca.org/media/8/49017824125308/paulsson_chapter_1.pdf [Last observed 31 August 2018].

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¹⁰ 'Carbonneau On International Arbitration Collected Essays', Thomas E. Carbonneau, 2011 Chap. 5 "*Darkness and Light in the Shadows of International Arbitration*" at p. 166.

authority in fact-finding? How much discovery should take place? What probative value should be given to variegated factual elements?"

It is considerations such as these which raise questions as to the mechanisms employed by international arbitral tribunals to determine the questions of fact assigned to them. The findings of the latest 2018 Queen Mary research earlier referred to, focus on the need to streamline adjudication of commercial conflicts and to make dispute resolution quicker and less costly in order to satisfy a fundamental rationale of the arbitral process.¹¹

These pointers call for examination with a view to determining whether the fruit on the apple tree is a little past its prime and there is need for fresh growth in the critical area of reception and assessment of evidence in arbitration. '*Times They Are a-Changin'*¹² or do they need to change? Professor Carbonneau in his essay has opined on a renewed approach to the problem based on his observations of the American experience of arbitration:¹³

"The streamlining of adjudication is achieved by a deliberate elimination or severe constraint of adversarial histrionics, by keeping the parties focussed on their real – as opposed to postured – conflicts, by obliging the parties and their representatives, in a word, not to abandon their rationality and common sense in their struggle for decision and by reason and a sense of the ultimate resolutive objective."

This paper seeks to expand upon this theme by suggesting some workable legal tools to achieve Professor Carbonneau's goal. It will seek to do so through an analysis of some fundamental or 'tap root' principles which support the apple tree and which underpin the ethos of arbitration.

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

The dictates of time and space call for the omission of discussion on a number of other key issues growing steadily on upper branches of the apple tree in this area of evidence. Important issues such as innovations in the management of an arbitral

¹¹ See too: 'Carbonneau On International Arbitration Collected Essays', Thomas E. Carbonneau, 2011 Chap. 5 "*Darkness and Light in the Shadows of International Arbitration*" at p. 162.

¹² Bob Dylan, 1964.

¹³ 'Carbonneau On International Arbitration Collected Essays', Thomas E. Carbonneau, 2011 Chap. 5 "*Darkness and Light in the Shadows of International Arbitration*" at p. 162. See too: RESOLUTION INSTITUTE Baker & McKenzie – Melbourne – 5 October 2016 'Evidence in Arbitration', The Hon K M Hayne AC QC, available at www.resolution.institute/documents/item/2282 [last observed 15 July 2018].

process;¹⁴ the use of IT to manage documentary evidence; the management of expert evidence, confidentiality, and choice of law issues which bear on evidence (such as the important question of admissibility of evidence that commonly arises in international commercial arbitrations as to the use that can be made of pre-contract negotiations for the purpose of contractual interpretation), must be left for another day.

Evidence

“It’s a beginning, but it’s a good way to begin.”¹⁵

The basic approach to evidence by an adjudication tribunal called upon to determine the facts in issue has two elements – First, the reception of material into evidence. This may be called the admissibility process, involving considerations of relevance and whether the evidence is probative. Second, an assessment process, which involves assessing the materiality and weight to be given to the evidence which has been admitted as part of the reasoning towards determining whether the evidence, when considered as a whole, establishes or does not establish a fact in issue. Further, in the area of the assessment of evidence, two additional critical elements need to be considered - the burden of proof and the standard of proof.

This is simple enough to state against the back-drop of a well-defined body of domestic evidence law and practice, whether founded upon the common law model of adjudication or that of the civil law. However, the treatment of evidence in international arbitration presents a number of often competing considerations which are unique to this process of adjudication. Central to these considerations are the following matters of importance.

Lack of Pre-defined Rules of Evidence

International arbitration rules almost universally share one thing in common – they contain no detailed rules in relation to evidence. In international arbitration, as opposed to litigation conducted in a domestic court of law, the parties are generally free to agree upon the procedures to be adopted for their arbitration as well as the rules of evidence, if any, to be applied. In the absence of agreement, the arbitrator is generally conferred with the power to make the necessary determinations. The various rules which may apply to international arbitration, in the interests of giving

¹⁴ As to which see: Professor Doug Jones AO, public lecture conducted at The University of Melbourne, 23 August 2018 entitled ‘*Innovations in International Infrastructure Arbitrations*’, See: <https://events.unimelb.edu.au/events/10837-innovations-in-international-infrastructure-arbitrations> [Last observed 25 August 2018].

¹⁵ Juan Mata Garcia, a Spanish professional footballer who plays as a midfielder for English club Manchester United and the Spanish national team, in commenting on the start of the soccer season on 21 August 2017, <https://juanmata8.com/en/blog/its-just-the-beginning-but-its-good-way-to-begin/> [Last observed 29 July 2018]

primacy to the agreement of the parties as to the conduct of their arbitral proceeding, provide ample facility for this to occur.

The lack of pre-determined detailed rules of evidence which may apply to international arbitration, at least in part is a result of there being no trans-national uniformity in approaches to fact finding by courts and adjudication tribunals. The gap, if it arises, must be filled by the agreement of the parties, or in the absence of their agreement, by direction of the arbitrator. In some cases, where the parties do not address the issue, this may conceivably result in no body of formal evidence rules at all being applied to the arbitration.

Dispensation of Rules of Evidence

Rules of evidence, which in common law systems were developed by generations of judges in the Anglo-American adversarial trial model, are not uncommonly excluded from the arbitration process. So too may the civil law rules of evidence be excluded, along with any other formal bodies of evidence law. This approach is premised on the assumption that facts can be fairly found in arbitral proceedings without resort to any rules of evidence. In practice this can give rise to a range of approaches to evidence sought to be put on in an arbitration.¹⁶

The rules of the Singapore International Arbitration Centre (SIAC) 2016, for example, expressly provide that the arbitral tribunal is not required to apply the rules of evidence of any applicable law in making its determination as to the relevance, materiality and admissibility of the evidence.¹⁷

Alternatively, in arbitration, the parties may agree to dispense with the application of any rules of evidence, or the arbitrator, in the absence of agreement, may determine to take this course. Should an arbitrator decide to proceed in this way, it would be wise to seek the consent of the parties at an early stage of the process. A less satisfactory mid-course is also open for the parties to agree that the arbitral tribunal is conferred with the power to determine and rule on admissibility of evidence progressively as the matter proceeds.

Cogent reasons can be advanced for parties dispensing with rules of evidence in arbitration.

¹⁶ See: The Hon. Kenneth Hayne AC QC (a former Justice of the High Court of Australia) RESOLUTION INSTITUTE Baker & McKenzie – Melbourne – 5 October 2016 ‘Evidence in Arbitration’, The Hon K M Hayne AC QC , *available at* www.resolution.institute/documents/item/2282 [last observed 15 July 2018]. Cited by Croft J in the concluding remarks to his paper ‘The Role of the Courts in Australia's Arbitration Regime’, Commercial CPD Seminar Series, Melbourne, Chief Justice James Allsop AO and Justice Clyde Croft 11 November 2015.

¹⁷ Article 19.2 of the SIAC Rules 2016 provide: ‘The Tribunal shall determine the relevance, materiality and admissibility of all evidence. **The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination**’. [Emphasis added]

First, and perhaps a major reason, is to avoid what is seen as the technicality of rules of evidence and the expense, inconvenience and delay which is perceived to flow from their application. Both the parties and the arbitral tribunal may view a determination to exclude rules of evidence as means to enhance the prospects of conducting the proceeding in a manner which reduces the risk of disproportionate cost and delay and unreasonable burden.

Second, in international arbitration, which may commonly involve parties and their advocates from different countries accustomed to different legal practices, bodies of law and legal culture, the interests of maintaining the 'internationality' of the process,¹⁸ and fairness to the participants, may point to this being desirable. On the occasion of the fortieth anniversary of the New York Convention,¹⁹ in 1998, the UN Secretary-General Kofi Annan said in relation to the international character of arbitration supported by the Convention:

"This landmark instrument has many virtues. It has nourished respect for binding commitments, whether they have been entered into by private parties or governments. It has inspired confidence in the rule of law. And it has helped ensure fair treatment when disputes arise over contractual rights and obligations. ...International trade thrives on the rule of law: without it parties are often reluctant to enter into cross border commercial transactions or make international investments."

Added to this consideration, no doubt, is the present practical impossibility of producing a universal body of evidence rules for use in international arbitration which can successfully accommodate the potentially divergent systems of law of the nation states of the participating parties.

In this context, sound practice would suggest that the arbitrator should endeavour to facilitate agreement of the parties as to the applicable rules of evidence to govern the arbitration. In the event that this is not possible, the interests of maintaining integrity of the process and fairness for the parties may point to the desirability of dispensing with a body of formal rules of evidence.

However, in this circumstance, should the parties be entirely free to submit any evidence they wish in order to prove the facts necessary to establish their respective cases? How should an arbitral tribunal proceed to deal with evidence in the absence of a body of definitive rules of evidence applying? Does it proceed in a vacuum?

Diplock LJ in *R v Deputy Industrial Injuries Commissioner; Ex parte Moore*²⁰ said this of the approach to considering material before a tribunal absent any rules of evidence:

'It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, have some probative

¹⁸ Hereafter called 'internationality'.

¹⁹ Formally called the 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958)', now promoted under the auspices of UNCITRAL.

²⁰ [1965] 103 456 at 488. See too: Lord Denning MR said in *TA Miller Ltd v Minister of Housing and Local Government*, [1968] WLR 992 at 995.

value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for a person to whom Parliament has entrusted the responsibility of deciding the issue.'

Australian jurisprudence has adopted a similar approach.

In *Australian Broadcasting Tribunal v Bond*²¹ Deane J said in the context of a domestic tribunal:

'If a statutory tribunal is required to act judicially, it must act rationally and reasonably. Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on preconceived prejudice or suspicion ... When the process of decision-making need not be and is not disclosed, there will be a discernible breach of such a duty if a decision of fact is unsupported by probative material. When the process of decision-making is disclosed, there will be a discernible breach of duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact.'

A suggested approach for an arbitral tribunal to deal with the evidence in the absence of a body of definitive rules of evidence applying, based on these principles described by Deane J and derived from logic and experience, is ventured in the conclusion to this paper.

Before embarking on an analysis of these matters, some further evidentiary issues of importance need to be canvassed.

Burden of Proof

It is generally accepted that the term 'burden of proof' incorporates two elements:

First, the evidentiary burden (or the burden of production). This is a minimal burden to produce at least enough evidence for the trier of fact to *consider* a disputed claim. In common law systems, procedures which have been devised to give effect to this process include summary dismissal of a claim, consideration of a 'no case to answer' submission, or the withdrawal of an issue, or indeed the entirety of the claimant's case, from the jury.

Second, the burden of persuasion. If the evidentiary burden is met, and a claim goes forward to be considered by a trier of fact, the party making the claim then generally assumes the burden of persuasion. This can also be called the 'legal burden of proof'. That is, in order to succeed on an issue in controversy, the party which seeks to advance that element of the claim must persuade the factfinder to the requisite degree that the particular fact advanced should be accepted as true.

²¹ (1990) 170 CLR 320 at 367.

The legal burden of proof lies on a claimant, if the fact in issue is an essential element in the cause of action advanced by it. The onus however, may also fall on a respondent/defendant, if the allegation is not a mere denial, but is a positive allegation, which, if established, will constitute a good defence. Thus the legal burden of proof may thus change according to the matter in issue.

Importance of the Burden of Proof and Standard of Proof

The legal burden of proof can be of critical importance, indeed it can be decisive, when the evidence is evenly balanced.²² As such, it is not uncommonly defined in international rules governing arbitration.²³ If a party does not discharge the legal burden which is upon it, the consequence is that it will fail on the issue. This may result in loss of the entire case.

The famous Australian High Court case of *Nesterczuk v Mortimore*²⁴ provides an example. This case involved a motor car collision involving two motor cars, apparently driving on a road towards each other, where there was a paucity of evidence as to the cause, leaving open a number of plausible possibilities. Owen J, with whom Kitto and Windeyer JJ agreed, in dismissing the appeal and the case advanced in negligence because the burden of proof had not been satisfied, stated:²⁵

“The learned trial judge was unable to determine whether the collision had occurred on the northern or the southern side or in the centre of the road and no good reason has been shown why, on the meagre evidence, an appellate court should take a different view. In the circumstances of the case, to say that the probabilities favour the view that both drivers were to blame rather than one or the other was wholly responsible, would be a mere guess.”

Another example in the TEC List of the Supreme Court of Victoria, Australia, is *Moama Bowling Club Ltd v Thomson & Ors* [2013] VSC 744 (24 December 2013). This proceeding arose out of a fire which occurred in 2008 and which caused extensive damage to the premises of the Moama Bowling Club, in northern Victoria, Australia. The plaintiff Club sought to place the blame for the disastrous fire on a floodlight containing a tungsten-halogen lamp which had been installed inside the building by an electrical contractor, the defendant, in July 2007.

As the trial judge I found that, although the possibility of floodlamp failure was a plausible source of ignition, so too was the possibility of a ceiling cavity conflagration

²² Williams, CR "Burdens and Standards in Civil Litigation" [2003] SydLawRw 9; (2003) 25(2) Sydney Law Review 165.

²³ For example: the rules of the Hong Kong International Arbitration Centre ('*HKIIAC Rules*'); the rules of the New Zealand International Arbitration Centre ('*NZIIAC Rules*'); and the rules of the Dubai International Arbitration Centre (*DIAC Rules*) (Art. 27.1).

²⁴(1965) 115 CLR 140.

²⁵ *Ibid* at 155.

resulting from an electrical failure in the Club computer system installed in the ceiling cavity. In sum, the state of the evidence was such that it was not possible to say with the level of conviction required that it was more likely than not that the floodlamps were to blame. Because the plaintiff carried the legal burden of proof, its action failed.

The Court of Appeal upheld this decision.²⁶

In another fire case in the TCC²⁷ of the United Kingdom, *Fosse Motor Engineers v Conde Nast* [2008] EWHC 2037 (TCC), there were 5 possible causes of the fire in question. Akenhead J described the case as having some features of a "whodunit"²⁸ and certainly what "done it". His Honour said:

"What is not acceptable, at the very least in a case like the current one, is to identify that there are, say, (as here) five possible causes, rank them each in percentage terms as possibilities and then select the possibility with the highest percentage as the probable cause. The only circumstances in which it would be legitimate would be if the highest ranked cause was the one which on all the evidence the judge was satisfied was the probable cause of the incident or loss in question...I consider that it is dangerous and generally a fruitless occupation to seek to rank possibilities or probabilities in percentage terms in any event. If there are five possibilities of which four are remote or extremely improbable, that conclusion may go to support a judge's finding that the remaining 'possibility' is in fact the probable cause or explanation for the event in question."

The reader is to be kept in suspense as to the outcome of this "whodunit". The inquisitive are welcome to read the authorised report of the case.

Differences between Common Law and Civil Law Procedures for Trial of Civil Cases

Worldwide, the most pronounced differences in domestic trials of civil cases arise between the approaches to procedure of the common law jurisdictions on the one hand, and those of civil law countries on the other.

As the former Chief Justice of Australia, the Hon Murray Gleeson AC, has said:²⁹

"The common law tradition assumes an adversarial process in which the parties present such information as they seek to rely upon, and there are laws of

²⁶ *Moama Bowling Club Ltd v The Thomson Group Pty Ltd* [2014] VSCA 245 (3 October 2014).

²⁷ Technology and Construction Court (commonly abbreviated as TCC) is a sub-division of the Queen's Bench Division, part of the High Court of Justice, which is one of the senior courts of England and Wales.

²⁸ A story or play or movie about a crime, not uncommonly a murder, in which the identity of the perpetrator is not revealed until the end.

²⁹ The Hon Murray Gleeson AC "Evidence in International Commercial Arbitration: Some Issues", Melbourne, 23 June 2015.

evidence which, in the event of dispute, bind the court as to what information will be received and what must or may be rejected.

In the civil law tradition there are of course principles and rules that guide the judge in making decisions of fact, but the common law technique does not apply.”

The differences in approach to procedure and evidence are a product of history. They are well summarised by Professor Caslav Pejovic of Kyushu University³⁰ in his article “Civil Law and Common Law: Two Different Paths Leading to the Same Goal”.³¹

Professor Pejovic explains:³²

“Differences in procedural law between the civil law and common law are even more obvious than those in substantive law. Common law procedure is usually called "adversarial", which means that the judge acts as neutral arbiter between the parties in dispute as they each put forward their case. The parties in a dispute lead the proceedings, while the position of judge is rather passive as he or she does not undertake any independent investigation into the subject matter of the dispute. The role of judge is not to find the ultimate truth. The judge's main task is to oversee the proceedings and to ensure that all aspects of the procedure are respected. The judge does not himself interrogate the witnesses, but his task is to ensure that the questions the parties put to the witnesses are relevant to the case. At the end, the judge should decide the case according to the more convincing of the competing presentations.

Civil law procedure is usually called "inquisitorial", because the judge examines the witnesses, and the parties in dispute practically have no right of cross-examination. Compared to common law, the judge in civil law plays a more active role in the proceedings, eg by questioning witnesses and formulating issues. This is because the court has the task to clarify the issues and help the parties to make their arguments. The judge plays the main role in establishing the material truth on the basis of available evidence. The judge does not have to wait for the counsels to present evidence, but he or she can actively initiate introducing of relevant evidence and may order one of the parties to disclose evidence in its possession. The judge has a task not merely to decide the case according to the stronger of the competing presentations, but to ascertain the definite truth and then to make a just decision.”

It should be noted that, even within common law or civil law jurisdictions in a federated nation state, both substantive law and the rules of evidence may vary.

³⁰ Professor Caslav Pejovic is Associate Professor of Private International Law, Kyushu University. Kyushu University, abbreviated to Kyudai, is a Japanese national university located in Fukuoka, in the island of Kyushu. It is the 4th oldest university in Japan and one of the former Imperial Universities.

³¹ (2001) 32 VUWLR [Victoria University of Wellington Law Review], 817.

³² *Ibid* at pp.830-831.

By way of conclusion, Professor Pejovic concludes his article with the following observation of some relevance to international arbitration by noting the buoyant global trend marching steadily towards convergence of the two systems of law: ³³

“The examination of common law and civil law reveals that there are more similarities than differences between these two legal systems. Despite very different legal cultures, processes, and institutions, common law and civil law have displayed a remarkable convergence in their treatment of most legal issues. Under the contemporary pressure of globalisation, modern civil law and common law systems show several signs of convergence.”

In the contemporary context of international arbitration, it seems we do indeed have a climatic change upon us with a steady drifting of the two great jurisprudential icebergs towards each other, resulting in a potential for “Two Different Paths Leading to the Same Goal”.³⁴

Common Law / Civil Law Approaches to Standard of Proof

The tectonic event described in the preceding section, however, has not yet approached a precision blending of the ice cubes. In at least one area there is little sign of movement towards convergence of the two systems, and that lies in different approaches to the standard of proof.

In civil cases conducted between two or more individuals or entities in common law countries, the requisite degree of satisfaction applicable to the trier of fact is usually on the “balance of probabilities” or “on a preponderance of the evidence” as it is commonly referred to in the United States. This translates into a “more-likely-than-not test”. The civil standard is met under the common law if the proposition of fact in question is more likely to be true than not true. Lord Denning, in *Miller v. Minister of Pensions*,³⁵ described it simply as “more probable than not” in the following economical passage: “If the evidence is such that the tribunal can say ‘we think it more probable than not’ the burden is discharged, but if the probabilities are equal it is not.”³⁶

In Australia, the courts may also have had regard to the nature and consequence of the fact or facts to be proved in determining whether they are driven to actual persuasion of the existence of those facts in a variety of circumstances. The standard of proof encompassed by the expression ‘balance of probabilities’, as interpreted by Dixon J in *Briginshaw v Briginshaw*,³⁷ gives the court a degree of flexibility in applying

³³ *Ibid* at p. 840.

³⁴ The title to Professor Pejovic’s article.

³⁵ *Miller v. Minister of pensions* [1947] 2 All ER 372.

³⁶ *Ibid*.

³⁷ [1938] HCA 34; (1938) 60 CLR 336; confirmed by the High Court of Australia in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*, (1992) 110 ALR 449 at 449 -450).

the civil standard. In that case his Honour expressed the following celebrated statement:³⁸

“The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.”

This approach, as formulated by an eminent judge of the common law world,³⁹ has all the attributes of an approach which should find general acceptance world-wide. It is founded on immense legal experience and sound principle.

In contrast, the prevailing standard of proof for civil cases in civil-law systems is indistinguishable from the standard applied in criminal cases: the judge must be *firmly convinced* that the facts alleged are true. A classic comparative study of German civil procedure “Phases of German Civil Procedure” makes the following observation:⁴⁰

“What is the degree of conviction to which the civil court must be brought in ordinary situations before it is justified in holding that the burden of establishing a proposition has been met? “The judge may and must always content himself with a degree of certainty that is appropriate for practical life, one which silences doubts without entirely excluding them.” Evidently a rather high degree of probability is called for, and there is a tendency toward at least verbal equation with the civil and criminal standard.”

³⁸ (1938) 60 CLR 338 at 362 per Dixon J.

³⁹ Dixon J.

⁴⁰ Kaplan, von Mehran & Schaefer, “Phases of German Civil Procedure” Part 1, cited in 71 Harvard Law Review 1193, 1245 (1958), referred to by Kevin M. Clermont & Emily Sherwin, “A Comparative View of Standards of Proof”, (2002) Cornell Law Faculty Publications, paper 222, 243. <http://scholarship.law.cornell.edu/facpub/222> [Last observed 20 July 2018].

Other civil law countries have followed the German example. The standard of proof in civil cases conducted under French law, by way of example, is effectively the same as the German.⁴¹

The result is a dramatic difference between the standard of proof applied in civil cases in common law countries, as opposed to that applied in countries which apply civil law. This issue is of fundamental importance in arbitration, as it is in litigation conducted in the courts. Potentially different outcomes could result, depending upon which approach is adopted by the trier of fact.

Sample Arbitration Rules

Set out below is a short description of a group of eleven selected rules of international arbitration in current use, which I will call the ‘Sample Rules’. They are intended to provide a cross-section of international arbitration rules drawn from the UNCITRAL Model Law, and the arbitration rules of the great seats in Europe, Asia, the United Kingdom, America and the Asia-Pacific.⁴² They will serve to provide illustrations of key concepts in the process of international arbitration.

The Sample Rules referred to are: The UNCITRAL ‘Model Law’ on International Commercial Arbitration (the ‘*Model Law*’);⁴³ the rules of Arbitration of the International Chamber of Commerce (‘*ICC Rules*’);⁴⁴ the rules of the London Court of International Arbitration (‘*LCIA Rules*’);⁴⁵ the rules of the Dubai International Arbitration Centre (‘*DIAC Rules*’);⁴⁶ the rules of the Dubai International Financial

⁴¹ See: Kevin M. Clermont & Emily Sherwin, “A Comparative View of Standards of Proof”, (2002) Cornell Law Faculty Publications, paper 222, 243. <http://scholarship.law.cornell.edu/facpub/222> [Last observed 20 July 2018].

⁴² The five most preferred arbitral institutions are the ICC, LCIA, SIAC, HKIAC and SCC, and the five most preferred seats of arbitration are London, Paris, Singapore, Hong Kong and Geneva. *Ibid*: Queen Mary, University of London, School of International Arbitration, “2018 International Arbitration Survey: The Evolution of International Arbitration” - ‘Institutions’ and ‘Seats’.

⁴³ In this paper the *Model Law* means: the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006). The *Model Law* has been open for adoption by Nation States. Australia for example has closely adopted the *Model Law* in its *International Arbitration Act 1974 (Cth)*, as amended. Under Division 2 of the Act by section 16, the *Model Law* has the force of law in Australia.⁴³ Further, the Uniform Commercial Arbitration Acts which govern Australian domestic arbitrations, and which have been enacted in every State and Territory other than the Australian Capital Territory, similarly give effect to the *Model Law*.

⁴⁴ The Rules of Arbitration of the International Chamber of Commerce make provision for establishing the facts of the case. The ICC Arbitration Rules are those of 2012, as amended in 2017 (the ‘ICC Arbitration Rules’). They are effective as of 1 March 2017.

⁴⁵ The London Court of International Arbitration (LCIA) is one of the world’s leading international institutions for commercial dispute resolution. The current Rules of the LCIA are effective from 1 October 2014.

⁴⁶ The Dubai International Arbitration Centre rules (as from 7 May 2007) are in the process of being amended by a 2018 update.

Centre-London Court of International Arbitration (*'DIFC-LCIA Rules'*);⁴⁷ the rules of the Hong Kong International Arbitration Centre (*'HKIAC Rules'*);⁴⁸ the rules of the Singapore International Arbitration Centre (*'SIAC Rules'*);⁴⁹ the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (*'SCC Rules'*);⁵⁰ the rules of the New Zealand International Arbitration Centre (*'NZIAC Rules'*);⁵¹ and the International Bar Association Rules on the Taking of Evidence in International Arbitration (*'IBA Rules'*);⁵² and the rules of the International Centre for Dispute Resolution (*'ICDR Rules'*).⁵³

Core Process Principles

The analysis conducted here will first deal with three core organising principles classified as 'Core Process Principles'. These emanate from examination of the Sample Rules considered. They are principles which lie at the heart of the conduct of an arbitration, and ultimately provide the rationale for its existence as an accepted system of international commercial adjudication.

Three Core Process Principles identified are:

1. Flexibility;
2. Efficiency (in the interests of Expedition and Cost Effectiveness); and
3. Fairness.

⁴⁷ The DIFC-LCIA Arbitration Centre adopted the DIFC-LCIA Arbitration Rules to take effect for arbitrations commencing on or after 1 October 2016. In all material respects, the DIFC-LCIA Arbitration Rules replicate the LCIA Arbitration Rules.

⁴⁸ The Hong Kong International Arbitration Centre (HKIAC) introduced new rules in 2013 known as the *2013 Administered Arbitration Rules*. The Rules were developed after five years' experience in the use of the original *2008 Administered Arbitration Rules*, several rounds of public consultation, review by the HKIAC Rules Revision Committee and extensive consultation with practitioners, arbitrators and other stakeholders.

⁴⁹ The Singapore International Arbitration Centre (SIAC) introduced the 6th edition of the Rules on 1 August 2016.

⁵⁰ The SCC Rules; the Arbitration Rules and the Rules for Expedited Arbitrations, entered into force on 1 January 2017.

⁵¹ The New Zealand International Arbitration Centre (NZIAC) provides a forum for the settlement and determination of international trade, commerce, investment, and cross-border disputes in the Trans-Pacific region. NZIAC has developed Standard Arbitration Rules which apply to all arbitrations in which the claim is for an amount greater than or equal to NZ\$2.5 million. In other cases, a different suite of rules applies, depending upon the amount of the claim.

⁵² The International Bar Association Rules on the Taking of Evidence in International Arbitration were adopted by a resolution of the IBA Council on 29 May 2010. The revised version of the IBA Rules of Evidence was developed by the members of the IBA Rules of Evidence Review Subcommittee which comprised 22 leading practitioners representing a range of legal systems and cultural backgrounds.

⁵³ The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association. The current ICDR rules as amended are effective from 1 June 2014.

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

1. Core Process Principle - Flexibility

'Flexibility' in this context has two basic elements:

- (a) a facility to accommodate the agreement of the parties and give primacy to the manner in which they have agreed to conduct their proceeding; and
- (b) a facility to satisfactorily accommodate the concept of 'internationality'⁵⁴ in the conduct of an arbitral proceeding.

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

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

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

- (a) The parties are generally free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings;

⁵⁴ See *Ibid*: fn. 18.

- (b) Failing such agreement, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate;
- (c) The arbitral tribunal assigned to determine the admissibility, relevance, materiality and weight of the evidence offered;
- (d) The arbitral tribunal is given power to control the examination of witnesses. It may, for example, limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome duplicative, including the power to limit or exclude any question to, answer by or appearance of a witness, and the Arbitral Tribunal may exclude from evidence or production of any Document, statement, oral testimony or inspection for any of a number of stated following reasons, including lack of relevance, legal impediment, unreasonable burden of production, loss of a document, confidentiality, and considerations of procedural economy, proportionality, fairness or equality of the parties which are compelling.

Management of the process of arbitration needs to be undertaken in the context of maintaining procedural flexibility.

Model Law

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

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

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

This is reinforced by Article 27, which provides specifically in relation to evidence:

"4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

IBA Rules

Other expressions of the principle of 'flexibility' are to be found in the *IBA Rules*:

"Article 8 Evidentiary Hearing 2. The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such

question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome duplicative.”

ICC Rules

Article 19 of the *ICC Rules* provides for the general rules which govern the arbitral proceeding conducted under its regime:

“The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.”

DIAC Rules

Article 27.2 of the *DIAC Rules* provides:

27.2 The Tribunal shall have the power to decide on the rules of evidence to be applied including the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Tribunal.

SIAC Rules

The *SIAC Rules* follow suit:

“19.2 The Tribunal shall determine the relevance, materiality and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination.”

HKSIAC Rules

The *HKSIAC Rules* confer on the arbitral tribunal the mandatory power to determine whether to apply strict rules of evidence in Article 22.2:

“22.2 The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence, including whether to apply strict rules of evidence.”

SCC Rules and NZIAC Rules

The *SCC Rules* and the *NZIAC Rules* are identical in that both provide by Article 31:

“Article 31 Evidence

- (1) The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine. “

ICDR Rules

The *ICDR Rules* by Article 20.1 are expressed to confer a wide and flexible power on the arbitral tribunal to conduct the proceedings:

“Article 20.1: Conduct of Proceedings

1. Subject to these Rules, the arbitral tribunal may conduct the **arbitration in whatever manner it considers appropriate**, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.” [Emphasis added]

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

The Hon. Ken Hayne QC ⁵⁵ has lamented: “*Speed and simplicity were once properly seen as defining characteristics of arbitration.*”⁵⁶

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

The process of arbitration must also be considered against the background of this core principle of Expedition, Efficiency and Cost-Effectiveness, which I call compendiously the ‘Efficiency Objective’.

On this subject, the international rules reflect common key themes:

(a) The vices of delay and expense are commonly linked together as two elements which, unless appropriately managed, are regarded as inimical to a viable arbitral process;

(b) A variety of mechanisms are suggested for the attainment of the Efficiency Objective;

(c) A number of rules exhort the arbitral tribunal and the parties to make every effort to achieve the Efficiency Objective, in some cases in mandatory terms, demonstrating the importance of this principle.

Model Law (as adopted domestically in the State of New South Wales, Australia)

⁵⁵ A former Justice of the High Court of Australia (1997 until his retirement in 2015).

⁵⁶ ‘Evidence in Arbitration’ The Hon K M Hayne AC, Resolution Institute Baker & McKenzie – Melbourne – 5 October 2016, www.resolution.institute/documents/item/2282 [Last observed 14 July 2018].

In the State of New South Wales, Australia, the *Commercial Arbitration Act 2010* is an example of a domestic incorporation Act which incorporates the *Model Law* into State domestic law. By section 1C the paramount object of the Act is defined in the following terms:

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

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

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

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

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

The *Commercial Arbitration* acts of other Australian States are in similar form.⁵⁷

ICC Arbitration Rules (International Chamber of Commerce)

Article 22 of the ICC Arbitration Rules (1 March 2017) makes provision for the conduct of the arbitration, including:

“The arbitral tribunal and the parties shall make every effort to conduct the arbitration **in an expeditious and cost-effective manner**, having regard to the complexity and value of the dispute.” [Emphasis added]

The principle advances in the ICC Rules, which focus on cost and time efficiencies, were introduced in the 2012 amendments which came into operation on 1 January 2012. These reforms reflect the growing concern within the international arbitration community about these matters over the last decade.

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

⁵⁷ *Commercial Arbitration Act 2011 (SA); Commercial Arbitration (National Uniform Legislation Act 2011 (NT); Commercial Arbitration Act 2011 (Tas); Commercial Arbitration Act 2011 (Vic); Commercial Arbitration Act 2012 (WA); Commercial Arbitration Act 2013 (Qld).*

Further, a new provision introducing a case management conference at the outset of an arbitration will become a mandatory process under Article 24. The arbitral tribunal was previously empowered to adopt such procedural measures as considered to be appropriate, which the parties were required to comply with. The new approach was supplemented by a new Appendix IV to the Rules which provide for a check list of case management practices which are open for adoption by the parties and the tribunal.⁵⁸

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

LCIA Rules

Article 14 of the *LCIA Rules* provides a similar exhortation:

“14.4 Under the Arbitration Agreement, the Arbitral Tribunal’s general duties at all times during the arbitration shall include:

.....

(ii) **a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute.**

14.5 The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith **for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal’s discharge of its general duties.** [Emphasis added]

HKIAAC Arbitration Rules (Hong Kong International Arbitration Centre)

Article 13 of the Arbitration Rules of Hong Kong known as the *2013 Administered Arbitration Rules* provides:

“Article 13 – General Provisions

13.1 Subject to these Rules, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order **to avoid unnecessary delay or expense**, having regard to the complexity of the issues and the amount in dispute, and provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case.” [Emphasis added]

SCIAC Rules

⁵⁸ Appendix IV. 30 ICC Publication 880-4 ENG ICC Arbitration Rules THE ARBITRAL PROCEEDINGS.

The Singapore International Arbitration Centre Rules, 6th edition, provide by

Article 19:

“19.1 The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, **to ensure the fair, expeditious, economical and final resolution of the dispute.**” [Emphasis added]

SCC Rules

The SCC Rules by **Article 2 provide:**

“Article 2 General conduct of the participants to the arbitration

(1) Throughout the proceedings, the SCC, the Arbitral Tribunal and **the parties shall act in an efficient and expeditious manner.**” [Emphasis added]

Article 23(2) further provides:

“Article 23 Conduct of the arbitration by the Arbitral Tribunal

(2) In all cases, the Arbitral Tribunal shall conduct the arbitration in **an impartial, efficient and expeditious manner**, giving each party an equal and reasonable opportunity to present its case.” [Emphasis added]

NZIAC Rules

The *NZIAC Rules* provide by Clause 25.1 as to procedure:

“25.1 The Arbitral Tribunal has the widest discretion permitted by law to resolve the dispute in a **just, speedy, cost effective, and final manner** in accordance with these Rules and the principles of natural justice.” [Emphasis added]

IBA Rules

The Preamble to the *IBA Rules* provides in part:

“Preamble 1. These IBA Rules on the Taking of Evidence in International Arbitration **are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations**, particularly those between Parties from different legal traditions.” [Emphasis added]

ICDR Rules

The *ICDR Rules* include the following mandatory direction in Article 20.2:

“Article 20.2: Conduct of Proceedings

“2. The tribunal **shall** conduct the proceedings **with a view to expediting the resolution of the dispute.**” [Emphasis added]

Thus the international rules of arbitration in most cases signal in express and direct language the objectives of conducting arbitrations in a manner which achieves an efficient, timely and cost-effective resolution of the real issues in dispute.

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

3. *Core Process Principle – Fairness*

The requirement to provide procedural fairness to the parties is another key standard of the arbitration process. The following finding was made by the 2013 Queen Mary survey:⁵⁹

“Several interviewees who are frequent users of arbitration explained that, regardless of whether they are a claimant or respondent, “fairness” – above all other considerations – is what companies look for in a dispute resolution mechanism.”

Indeed, it is an overarching norm central to the proper administration of the arbitral process. It also finds expression in many international instruments which support the process and define the rules of arbitration.

Procedural fairness is an issue to be addressed during the dispute adjudication process, before the outcome has been determined.⁶⁰ It provides a critical reference point against which key decisions as to process are made.

The requirement to provide procedural fairness has two basic elements – freedom from bias in the arbitral tribunal (in Latin expressed as: *nemo iudex in causa sua*), and the right to a fair hearing (in Latin expressed as: *audi alteram partem*).

These elements are variously expressed, but for present purposes may be stated as a requirement for the arbitral tribunal to be impartial and appear to act impartially; and a requirement that each party has a right to be fairly heard so that each is given a

⁵⁹ Queen Mary, University of London, School of International Arbitration 2013 International Arbitration survey “*Corporate choices in International Arbitration Industry perspectives*” at p. 6. <http://www.arbitration.qmul.ac.uk/research/2013> [Last observed 3 August 2018].

⁶⁰ See: Caroline Larson “*Substantive Fairness in International Commercial Arbitration: Achievable through an Arbitral Appeals Process?*” *The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 84 Issue 2, April 2018, 104 at p. 106.

reasonable opportunity to present its case and each has reasonable opportunity to respond to the case of the other.

In other words, the obligation of the arbitral tribunal is to provide “a fair but not limitless opportunity for the parties to present their respective cases”.⁶¹ Determination of the limits calls for judgment and a careful balance to be achieved by the arbitral tribunal after taking into account the flexibility and efficiency objectives earlier discussed. How the balance is struck is a matter for the arbitrator in the individual circumstances of the case.

On this subject, the international rules reflect key themes:

- (a) A number of the rules include freedom from bias, commonly expressed as a requirement for actual impartiality in the arbitral tribunal, as well as the appearance of impartiality, as a component of Procedural Fairness. It is often expressed as a requirement for equal treatment in the rules. This aligns with the principle of natural justice as it has developed in Anglo-American common law;
- (b) A number of the rules also provide for a fair hearing in both aspects of the concept – being a reasonable opportunity for parties to present their cases and deal with the cases presented by the other party. These elements also align with the *audi alteram partem* (right to be heard)⁶² principle of natural justice in Anglo-American common law;
- (c) Most of the rules provide in effect that the right to present a case is not limitless. Generally, the facility afforded is confined to a *reasonable* opportunity to present a case; and
- (d) As a practical matter, some rules also provide, as a component of a fair hearing, an entitlement for each party to know, reasonably in advance of any evidentiary hearing or any fact or merits determination, the evidence on which an opposing party relies.

Model Law

The Model Law by Article 18 provides that each party shall be given a full opportunity of presenting his case:

⁶¹ Quoted from ‘Carbonneau On International Arbitration Collected Essays’, Thomas E. Carbonneau, 2011 Chap. 5 “Darkness and Light in the Shadows of International Arbitration” at p. 163.

⁶² *Audi alteram partem* is a Latin phrase meaning “listen to the other side”, or “let the other side be heard as well”. It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

Article 18. Equal treatment of parties

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

ICC Arbitration Rules

Article 22 makes provision for the conduct of the arbitration, including:

.....

4 In all cases, the arbitral tribunal shall act **fairly and impartially** and ensure that each party has a reasonable opportunity to present its case. [Emphasis added]

LCIA Rules

Article 14 makes provision for the conduct of the arbitration, including:

Article 14.4 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:

(i) a duty to act **fairly and impartially** as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and[Emphasis added]

DIAC Rules

The Proceedings Article 17 - General Provisions

17.2 In all cases, the Tribunal shall act **fairly and impartially** and ensure that each party is given a **full opportunity to present its case**. [Emphasis added]

HKIAC Rules

Article 13 - General Provisions

13.1 Subject to these Rules, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, having regard to the complexity of the issues and the amount in dispute, and **provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case**. [Emphasis added]

SIAC Rules

19.1 The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, **to ensure the fair**, expeditious, economical and final resolution of the dispute. [Emphasis added]

SCC Rules

Article 23 Conduct of the arbitration by the Arbitral Tribunal

(1)

(2) In all cases, the Arbitral Tribunal shall conduct the arbitration in an impartial, efficient and expeditious manner, **giving each party an equal and reasonable opportunity to present its case.** [Emphasis added]

NZIAC 2018 Rules

25.1 The Arbitral Tribunal has the widest discretion permitted by law to resolve the dispute in a just, speedy, cost effective, and final manner in accordance with these Rules **and the principles of natural justice.** [Emphasis added]

IBA Rules

Preamble 1. These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and **fair process for the taking of evidence** in international arbitrations, particularly those between Parties from different legal traditions.....

Preamble 3. The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely. [Emphasis added]

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

This section examines an approach to dealing with the ultimate factual questions presented to an arbitral tribunal for determination in its award.

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

Further, it would be important for this judgement to be exercised as early as possible in the arbitral process to maximise the efficiency of the proceedings by enabling the parties to prepare their cases in accordance with the approach that is to be adopted by the tribunal and communicated to the parties.

Early disclosure of the evidentiary approach to be adopted will also serve a secondary and important object – that of providing an element of protection against any subsequent challenge to the award on the ground of denial of procedural fairness or natural justice. Here again there is advantage in a party being forewarned as to the evidentiary approach to be taken at an early juncture and before the principal hearing. This approach provides the advantage of relative certainty as to how the hearing will proceed, and the approach the arbitral tribunal will adopt in going about its task of determining the facts in issue. It will have the advantage of giving fair notice to the parties of this approach, consistently with the Fair Hearing principle.

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

Burden of Proof

Some bodies of international rules do expressly provide for the burden of proof.

Insofar as they exist, the concepts in these rules relate to the legal burden of proof, there generally being no specific procedure provided for summary dismissal of a claim or a no case to answer or any other consequences which would flow from failure to meet an evidential burden. Having said that, it is noted that some rules, for example the SIAC Rules, do expressly provide for early dismissal of claims and defences where a party may apply to the Tribunal for the early dismissal of a claim against it or a defence advanced on the basis that a claim or defence is ‘manifestly without legal merit’. Other rules by implication may confer a power on the arbitrator to take this course.

However, most of the principal international rules of arbitration are silent on the question of the burden of proof. This phenomenon is not unusual in commercial laws having international reach.

Take for example the 1980 *Vienna Sales Convention on Contracts for the International Sales of Goods* (CISG). No express provision is made for the burden of proof, save for one provision Article 79.⁶³

⁶³ Article 79 provides that a breaching party has to prove that its failure to perform was due to an impediment beyond its control. In so providing, Article 79 is said to imply that proof of the breach under Article 35 should be offered by the other party -- i.e., the party who was to receive the performance.

Some claim the issue of burden of proof is not governed by the CISG. In an early ICC arbitral award delivered on the CISG in *Maaden v. Thyssen*⁶⁴ the Arbitral Tribunal found that the issue of burden of proof is not governed by the CISG. Rather, this was held to be governed by the applicable domestic law determined by the rules of private international law or by the *lex fori*, as a procedural issue. In 1997 a Swiss court came to a similar conclusion.⁶⁵

However, the prevailing contemporary view appears to be that the issue of burden of proof is a matter governed implicitly by the CISG,⁶⁶ and that the burden of proof under the CISG is based upon the principle *ei incumbit probatio, qui dicit, non qui negat* meaning that a party has to prove the existence of the factual prerequisites contained in the legal provision from which it seeks to derive beneficial legal consequences, and a party claiming an exception has the burden of proving its prerequisites.⁶⁷ This approach has been applied in a number of international cases.

The Italian 'shoe case', *Tribunale di Vigevano*⁶⁸ is an example. Here the Court held that plaintiff buyer failed to meet its burden of proof under the CISG. The buyer claimed that the goods delivered to it -- sheets of vulcanized rubber for use in the production of footwear -- were defective, which caused the damages that it claimed. A principal issue was whether the goods delivered were in conformity with the sales contract under Article 35 of the CISG. In the course of his reasons, Judge Alessandro Rizzieri said:⁶⁹

“[24] Unlike those issues which, because they are not governed by the United Nations Convention, must be resolved according to the law determined by the private international law rules of the forum, the issue of the burden of proof must, like other issues governed by but not expressly settled in the Convention, be resolved under Article 7(2) in conformity with the general principles upon which the Convention is based. The Convention's general principle on the burden of proof seems to be *ei incumbit probatio qui dicit, non qui negat*: *The burden of proof rests upon the one who affirms, not the one who denies.*

[25] Concerning the question of the lack of conformity of the goods in the instant case, the aforementioned general principle yields a result similar to the

⁶⁴ ICC Arbitral Award n. 6653, JOURNAL DU DROIT INTERNATIONAL 1040 (Int'l Comm. Arb. 1993).

⁶⁵ Tribunal de la Sane, 20 February 1997, SCHWIZERISCHE ZEITSCHRIFT FR INTERNATIONALES UND EUROPISCHES RECHT 195-96 (1999); Both cases cited in “Burden of Proof under the CISG” *Franco Ferrari* <https://cisgw3.law.pace.edu/cisg/biblio/ferrari5.html> [Last observed 16 July 2018].

⁶⁶ “Burden of Proof under the CISG” *Franco Ferrari* available at <https://cisgw3.law.pace.edu/cisg/biblio/ferrari5.html> [Last observed 16 July 2018].

⁶⁷ *Ibid.*

⁶⁸ *Rheinland Versicherungen v. S.r.l. Atlarex and Allianz Subalpina S.p.A.*; 12 July 2000, 2001 GIURISPRUDENZA ITALIANA 280-288, available at <http://cisgw3.law.pace.edu/cases/000712i3.html> [Last observed 21 July 2018].

⁶⁹ *Ibid* at [24-25].

outcome under Italian and German law -- that it is the buyer's responsibility to prove the existence of a lack of conformity and the damages that arise from it. Since such proof has not been offered, nor could it be because the items sold are no longer available due to the [buyer's assignee]'s actions ([buyer's assignee] disposed of all shoes whose soles were said to be defective because of the vulcanized rubber furnished by [seller], without retaining even a sample of the goods), the Court is unable to determine whether the goods were defective, and consequently it cannot establish whether the [seller] was in breach or whether the [buyer's assignee] suffered any damage (or the amount of any such damage). Thus the Court cannot require the buyer to pay compensation."

Some international arbitration rules provide for the burden of proof adopting the *ei incumbit probatio, qui dicit, non qui negat* principle.⁷⁰ They follow a similar form, and it is contended, reflect an international legal norm.

Model Law

The Model Law by Article 27(1) provides specifically in relation to evidence:

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.

DIAC Rules

The DIAC Rules directly follow the Model Law provision as to the burden of proof.

HKIAC Arbitration Rules

The HKIAC Rules also directly follow the Model Law provision as to the burden of proof.

NZIAC 2018 Rules

As to evidence and admissibility, the Rules provide in Clause 26.1:

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

However, given that a number of international arbitration rules do not specifically address the question of the burden of proof, how then is this to be determined by an arbitral tribunal?

⁷⁰ *ei incumbit probatio qui dicit, non qui negat*: The burden of proof rests upon the one who affirms, not the one who denies.

In the absence of agreement from the parties, a valuable default position for the arbitral tribunal is to adopt something close to the Model Law and the DIAC, HKIAC and NZIAC Rules. This approach also has the advantage of being generally consistent with a well-accepted norm of international commercial adjudication, as evidenced by the current case law on the CISG.

It is suggested that this principled and widely accepted approach in international jurisprudence points to the desirability of the following evidentiary ruling being made in advance of the substantive hearing as a default position:

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

Relevance

In his paper 'Evidence in Arbitration',⁷¹ the Hon K M Hayne AC QC exhorts his audience of arbitration practitioners to adopt the following central tenet, namely: "when we are considering what evidence is to be given in an arbitration, we can, and we must, always be able to answer that one question: *'How will this help the panel decide the dispute?'*"

This he describes as 'the critical question which any party or lawyer preparing for an arbitration needs to confront and keep confronting at every stage of the preparation of the matter for hearing and at every stage of the hearing. *"It is the central question to ask and answer in deciding what evidence will be adduced in the arbitration."*

The wisdom and force of this observation in expressing the need to focus on the relevance of evidentiary material in arbitration is beyond question. It was earlier echoed by Professor Carbonneau in his essay.⁷² It provides the basis for a suggested default direction on the issue of relevance which can be made at an arbitration Pre-hearing Conference.⁷³

Some provisions in the Sample descend to define specific grounds of exclusion of evidence, although this level of prescription is relatively rare. An example is provided by the *IBA Rules*:

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

⁷¹ *Ibid* RESOLUTION INSTITUTE Baker & McKenzie – Melbourne – 5 October 2016 'Evidence in Arbitration', The Hon K M Hayne AC QC, available at www.resolution.institute/documents/item/2282 [last observed 15 July 2018].

⁷² 'Carbonneau On International Arbitration Collected Essays', Thomas E. Carbonneau, 2011 Chap. 5 *"Darkness and Light in the Shadows of International Arbitration"* at p. 162.

⁷³ As to which, see below.

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

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

- (a) lack of sufficient relevance to the case or materiality to its outcome;
- (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
- (c) unreasonable burden to produce the requested evidence;
- (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred; and
- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
- (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”

However, with this exception noted, international arbitration rules generally leave the question open for the arbitrator to determine.

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

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

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

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

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

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

Standard of Proof

Most international arbitration rules do not address the question of how the arbitral tribunal is to go about assessing the evidence. The standard of proof is left open to the arbitrator.

Typical of this approach is the *IBA Rules*. Article 9(1), which deals with 'Admissibility and Assessment of Evidence', provides as follows:

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

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

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

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

The Default Directions

It is suggested that, where there is a gap in the applicable rules as to what laws of evidence should apply, default directions dealing with the burden of proof, standard of proof and relevance may be coined at an early stage of an arbitral proceeding. Pre-hearing conferences can provide an ideal facility for evidence to be effectively managed from the outset of the arbitration, and to the advantage of the parties by providing an opportunity to achieve an early consensus as to these critical matters.

The directions suggested are intended to provide a guide as to the basic or 'tap root' rules of evidence that could apply. They may be varied or supplemented, for example by the addition of appropriate exclusionary evidence rules by agreement of the parties to suit the demands of a particular arbitration. Flexibility is thus maintained.

However, the default directions may usefully serve as a backstop to be adopted by the arbitral tribunal and the parties in the absence of agreement.

The framework may also be used to further the Core Process Principles of Efficiency and Fairness. It can promote fairness of the proceedings and maximise efficiency for the parties by enabling them in advance of the hearing to be appraised of the approach to evidence that is to be adopted by the tribunal. They are then able to prepare their cases accordingly.

In the interests of efficiency, the framework may also be used to guide the arbitrator to maintain consistency in the task of reception and assessment of evidence throughout the arbitration and to provide a structure for the making findings of fact which rationally accord with logic and common sense. Confidence in arbitration, to which the parties have contractually committed as their adjudication process of choice, will not be fostered by fact-finding which is devoid of logical explanation and smacks of alchemy, sorcery or a flip of the coin.

Conclusion and Executive Summary

The fact-finding process in arbitration conducted in the arena of construction adjudication is of central importance. It is also a major contributor to cost. "Cost" continues to be seen as arbitration's worst feature, followed by a number of factors including "lack of speed". These findings point to the need for a greater level of cost consciousness in the arbitral process, combined with a greater level of efficiency, proportionality and expedition in the procedural management of an arbitral proceeding and its ultimate disposition.

A selection of eleven bodies of rules which govern international commercial arbitration are examined. They reflect 'Core Process Principles' of Flexibility; Efficiency; and Fairness. These principles lie at the heart of the conduct of an arbitration, and ultimately provide the rationale for its existence as an accepted system of international adjudication. The process principles which apply are considered. However, a gap is revealed. To the Core Process Principles may be added a framework of evidentiary 'ground rules', called Core Evidence Principles, to govern the Burden of Proof, Standard of Proof and Relevance in the reception and assessment of evidence.

Procedural and evidentiary issues are important to resolve at an early stage of a factually driven arbitration. Where these principles conflict with one another on a particular issue, careful judgment needs to be exercised by the arbitral tribunal to achieve an appropriate balance tailor made to the case. This judgment needs to be made and communicated as early as possible in the arbitral process. Subject to the agreement of the parties, any applicable rules or law, and the needs of an individual arbitration, and consistently with the Core Process Principles, it is suggested that the Core Evidence Principles should most conveniently be set in place at an early stage in advance of the substantive hearing.

The evidentiary innovations discussed in this paper are presented for discussion in aid of advancing and supplementing the Core Process Principles of arbitration, being Flexibility, Efficiency and Fairness.

Other formulations may be preferred or considered more appropriate to an individual arbitration, however, the basic or 'tap root' rules of evidence may be in the following form:

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

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

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

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

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

Management tools such as Pre-hearing Conferences, Lists of Issues (or Terms of Reference), and Bifurcation, can be deployed in support of these evidence principles where appropriate.

By way of conclusion, I quote the theme of a recent lecture delivered by Professor Doug Jones AO at a public lecture conducted at The University of Melbourne on 23 August 2018 entitled 'Innovations in International Infrastructure Arbitrations': ⁷⁴

"Infrastructure disputes are undeniably complex, often characterised by detailed factual matrices involving multiple parties, contracts and areas of technical complexity. These complexities pose significant challenges for dispute resolution and have contributed to infrastructure disputes developing a reputation as involving lengthy and expensive processes in courts and arbitration. Ongoing consideration has been given to the formula for efficient infrastructure arbitration. No magic bullet has emerged despite the growth of adjudication in common law jurisdictions. It is clear however that the continued success of arbitration as a method of dispute resolution is dependent upon its ability to adapt and innovate in the search for improvement."

The lecture provided insights into the growth of innovation in international construction arbitration. By embracing private and public institutional innovation

⁷⁴ See: <https://events.unimelb.edu.au/events/10837-innovations-in-international-infrastructure-arbitrations> [Last observed 25 August 2018].

and active case management techniques, Professor Jones concludes that stakeholders have the chance to maintain arbitration as a preferred dispute resolution option.

The innovations discussed in this paper seek to contribute to this process. They are presented for discussion in aid of advancing and supplementing the Core Process Principles of arbitration, being Flexibility, Efficiency and Fairness.