ELBML
English Language Based Master of Law Program
R.U.L.E

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SEMINAR SUMMARY REPORT

EVIDENCE TAKING IN INTERNATIONAL ARBITRATION : A COMPARATIVE ASSESSMENT

INTRODUCTION

The English Language Based Master of Law (ELBML) Program, the Nagoya University's Research Unit on "Decolonizing Arbitration", and the National Commercial Arbitration Centre of Cambodia (NCAC) organized a hybrid seminar on **"Taking of Evidence in International Arbitration: A Comparative Assessment"** on November 4, 2023 at the Royal University of Law and Economics (RULE). **The seminar** aimed to provide a rich discussion about the different principles and practices regarding **the admissibility of evidence in international arbitration in different legal systems, i.e., Japan, the USA, Italy, and Cambodia.**

GUEST SPEAKERS AND MODERATOR

Francesca Benatti
Associate Professor, Università Cattolica del Sacro Cuore-Milan

Giorgio F. Colombo
Professor of Law, Nagoya University

Kiri San
President of National Commercial Arbitration Centre of Cambodia

Tony Andriotis
Arbitrator, DLA Piper, Japan

Savada Prom
Partner, R&T Sok & Heng Law Office, the moderator

I. Theories on Taking Evidence in International Commercial Arbitration

By Professor Giorgio F. Colombo

“Lawyers tend to replicate what they do in litigation into arbitration, which should not work that way.”

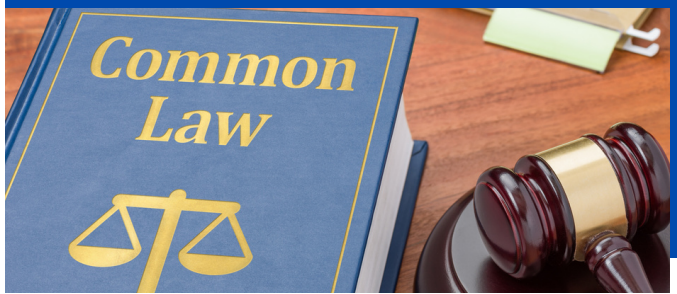
The **IBA Rules** were created under the influence of the common law system. Then, civil law lawyers created the **Prague Rules** with a civil law background in response to the IBA Rules and **the Creeping Americanization of International Arbitration**. On the taking of evidence, Article 4 of the Prague Rules specifically states that there shall be no form of e-discovery, unlike the **Americanization Style** which turns evidence into **e-discovery**.

Noticeably, there is a clash of cultures in the IBA Rules or the Prague Rules as evidence rules. The IBA Rules are more ‘common’ in the common law system, while the Prague Rules are more appealing to lawyers trained in civil law systems. Overall, the parties should consult with each other and with the arbitral tribunal and decide on the rule of evidence to be implemented.

II. AMERICAN STYLE OF EVIDENCE EXCHANGES

By Mr Tony Andriotis

The approach in different legal systems affects the finding of evidence. While it is said that the civil law approach to evidence is propelled by the need to find out who is right and who is wrong, the common law approach, in its transparent and compulsory nature, seeks to find the truth. Where a party to a dispute destroys data which they believe will hurt their case, courts and arbitrators in the common law tradition often impose a “negative inference” on the corresponding submissions made by said party as they have acted in bad faith. Only good faith document exchanges are admissible in the tribunal which addresses the factual questions and evidence.



As practiced in US courts, the exchange of documents related to the case is called the ‘discovery’, which is divided into three essential forms: the interrogatory phase; deposition phase; and document production. Parties to a dispute should be aware of the differences in legal tradition so that they can proactively advise their lawyers to approach the evidence gathering phase through either a closed civil law set-up, or via an open compulsory common law scenario. The outcome of the case may be dependent on the types of evidentiary exchanges agreed upon. The Redfern Schedule is commonly used in arbitration in relation to the exchange of documents/evidence. The Prague Rules were created to allot for more civil law “friendly” evidence exchanges, as the frequently used IBA Rules on Evidence have been accused of being slanted towards the common law tradition. All these options make international arbitration flexible.

III. Civil Law Perspective

By Professor Francesca Benatti

It is difficult to identify a "civil law model". However, there are three main differences between the common law and the civil law approaches, that concern: discovery, cross-examination, and experts.

In **Italy**, there are rules on the evaluation of legal evidence and rules about how to evaluate oral evidence that the parties cannot break. They cannot be changed based on whether the case is in a regular court or an arbitral tribunal. Unmatched witness evidence during trials can be removed from the case. Document discovery is usually quite limited, so there might not be a lot of written evidence to keep the cross-examination in check. It is typical for common law countries to have expert witnesses, but in civil law countries, the arbitral tribunal typically selects the experts.

The process for a judge/arbitrator to hire an expert to write a report is very complicated and takes a lot of time. It is faster and easier to use experts chosen by the parties, even if some of them may be biased. However, this could generate difficulties in disputes involving complex technical and scientific issues.

IV. Taking Evidence in Commercial Arbitration in Cambodia

By Mr Kiri Sani

Under Cambodia's laws and the NCAC's Arbitration Rules, the tribunal has full power and duty to hear all admissible evidence and then decide whether they are relevant and material to the issues in dispute. Types of evidence admissible in commercial arbitration in Cambodia comprise of, e.g., documents, witness testimonies, expert evidence of opinion, and physical evidence (the subject matter of dispute or site inspection).

The parties may submit written statements of witness on whose evidence they intend to rely. The tribunal may require the witness to testify under oath or affirmation. The tribunal has the discretion to limit or refuse the appearance of witnesses. The parties and the tribunal can question the witnesses who give oral evidence in the hearing. The tribunal cannot delegate the decision making to the tribunal appointed expert.

NCAC
NATIONAL COMMERCIAL ARBITRATION CENTRE

DecolonizingArbitration.org

KEY TAKEAWAYS

- Rules on evidence in arbitration procedures are diverged in different legal systems based on inquisitorial and adversarial styles in different tribunals.
- Different arbitration rules have different procedures and rules on the taking of evidence.
- Parties must understand how arbitration works in different jurisdictions to decide which procedure to include in the arbitration clause that will favor them best, e.g., the pros and cons of common and civil law systems on how to handle evidence.
- Parties shall take caution on which legal system lawyers to hire and what instruction to give them.
- Arbitration is different from litigation, thus the rules on taking evidence used in courts cannot be used in arbitration hearings.