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Legitimacy of the Arbitral Process

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As a think-tank dedicated to the development of international business law, the ICC Institute of World Business Law ('ICC Institute') organises, inter alia, 'Innovation Meet-Ups' for discussion and debate among its members. In the edition held on 29 April 2024, the author presented the concept of 'legitimacy', its philosophical definition and its role in the arbitration process, exploring what constitutes a truly deliberative and informative process. The author emphasised that the proactive conduct of the arbitrators and the use of available procedural and methodological tools are key to ensuring legitimacy of the arbitral process in the eyes of the parties.

Introduction

All of us have been confronted with users' discomfort (to say the least) with their arbitration experience. While they are working hard to set up their case through submissions, witness and expert depositions and the like, and incurring a heavy financial burden to that end, they are kept in the dark as to what the arbitral tribunal does (or does not), thinks (or thinks not), and this often continues for one or two years or more.

The curtain is finally lifted when they receive the award.

However, whether they are the winner or the loser, or both (as it is generally the case), they often remain at a loss to understand the methodology adopted by the arbitral tribunal, let alone the reasons for adopting the upheld solutions.

And when coming to the possibility of appeal, they are told that there is little, if not no possible remedy against such opacity and confusion. In other words, they are faced with an outcome that is said to be perfectly legal[1] even though they resent it as obscure, or worse, not acceptable.

Legitimacy

According to *Collins English Thesaurus*, 'legitimate' is tantamount to 'reasonable, just, correct, logical, justifiable, well-founded, admissible'. The *Cambridge Dictionary* defines 'legitimacy' as 'the quality of being reasonable and acceptable'. More specifically, the *Encyclopedia Princetoniensis* defines legitimacy as 'a belief, held by individuals, about the rightfulness of a rule or ruler', adding that 'it has collective effects when it is widely shared in a society'.[2]

Immanuel Kant (Germany, 1724-1804) was the first thinker to apply to philosophy the idea of the astronomer Nicolas Copernic (Poland, 1473-1543) that the Earth was not the centre of the universe (as believed in those times), but rather that the centre was the Sun, around which the Earth revolved. These new applications – known as the 'Copernican Revolution' – triggered profound changes in science, philosophy, religion and entirely changed the way of thinking.[3] The centre of the human world was no longer the egocentric 'I' but rather my relation to 'You' so as 'to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only'.[4] For Kant, we treat people as an end whenever our actions toward them reflect their inherent value.[5] As a corollary – for

1 See further 'Explaining Why You Lost - Reasoning in Arbitration' (ICC Institute of World Business Law, Dossier XVIII, 2020), incl. Th. Giovannini Chapter 6 'Reasoning in Arbitral Awards: Why? How? Control and Sanction under Swiss Law'.

2 https://pesd.princeton.edu/node/516.

3 *13 Encyclopaedia Universalis*, 260.

4 Id. at 265; Internet Encyclopedia of Philosophy, Immanuel Kant, Section 5.b, *Moral Theory, The Categorical Imperative*; Essential Quotation (4 ed.), S. Ratcliffe (ed.), Immanuel Kant 1724-1804, no. 7 (Oxford University Press, 2016).

5 Internet Encyclopedia of Philosophy, Ethics.

Kant – society comes to hold the view that the faculty of sound judgment requires the agreement of all as a sort of duty.[6]

Jürgen Habermas (Germany, 1929-), one of the most influential contemporary philosophers,[7] echoes Kant's way of thinking by putting forward the principle of publicity – namely the requirement for a critical and public use of reasoning (or motivation). This principle comes within the broader framework of deliberative democracy. For the German philosopher, a decision is legitimate insofar as it results from a legitimate process, the 'deliberative process', which consists in making public the way in which the problems have been formulated and solutions have been evaluated. This principle, according to Kant is a source of legitimacy against despotism. It stands against the decision-maker model put forward by Jean-Jacques Rousseau, according to which the source of the decision is sufficient to guarantee its legitimacy.[8]

Following this analysis, the legitimacy of the arbitration process[9] can therefore be defined both as a *truly informative process* resulting in a *truly deliberative process*.

1. The decision-making process

The problem

The award generally represents the first – and unique – information of the arbitral tribunal's approach to the dispute after one, two or more years of submissions, procedural orders, hearings, etc. As a matter of fact, the rules of the game are that the entire process is secret and that arbitrators are to keep a poker-face at their (almost) only meeting with the parties and their counsel, i.e. the hearing. Consequently, awards may come as a surprise when parties and their counsel discover that:

- what they considered as key arguments have been ignored or brushed aside; and/or
- what they held as minor issues have determined the outcome of the dispute.

As put by Dr Bernhard Berger during the ASA conference entitled 'Inside the Black Box: How Arbitral Tribunals operate and Reach their Decisions':

> from the parties' perspective, you know the arguments and motions put forward in the proceedings, that is the input; you can see the result in the form of the dispositive section of the award, that is the output; and you can try to understand the reasons given for the decision in the award, that will be the transfer element. All the rest that may have happened in the deliberations remains undisclosed and undiscovered'.[10]

Adding thereupon:

> For example, is there a relatively mild decision on the quantum of damages as a bargaining chip for unanimous affirmation of liability?[11]

6 *13 Encyclopaedia Universalis*, 267.

7 E.g. In 2007, Habermas was listed as the seventh most-cited author in humanities (including the social sciences) by *The Times Higher Education Guide*. Bibliometrics studies demonstrate his continuing influence and increasing relevance.

8 Wikipedia, Jurgen Habermas with reference to various publications on this topic, e.g. e.g. *The Structural Transformation of the Public Sphere* 1962) ISBN 0-262-58108-6; *The Theory of Communicative Action* (1981).

9 This topic has been developed by the author on the occasions of various conferences, including the CPR European Conference on Business Dispute Management, keynote address, 'Integrity and Efficiency in the Decision-Making Process: Hurdles and Suggested Solutions' (London, May 2019); The Harvard International Arbitration Conference, Harvard Law School, keynote address, 'Lifting the Curtain on Arbitral Tribunals' Decision-Making: Practical Tools to Enhance the Reliability of the Process' (Harvard, 23 Feb. 2019); Sixth Annual GAR Live Dubai, keynote address; *Reasoning as Evidence of Legitimacy of the Award* (Dubai, 21 Nov. 2019) and publications, such as 'Philosophy can help Tribunal draft Awards that Parties will accept as Legitimate', in *Dispute Resolution Journal*, Vol. 66, no 2 (May/July 2011).

10 B. Berger, 'The Legal Framework: Rights and Obligations of the Arbitrators in the Deliberations', in Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions, B. Berger, M.E. Schneider (eds.) ASA Special Series No. 42, 7 (2014) (2013 Swiss Arbitration Association Annual Conference).

11 Ibid.

Deliberations as a fundamental principle

Statistically, a vast majority of international arbitration tribunals are composed of three members – a setting that constitutes the fallback rule (Art. 10.2) in the UNCITRAL Model Law that has been adopted by many arbitration-friendly countries. As such, it is a fact that, as put by Richard M. Mosk in his remarkable study on 'Deliberations of Arbitrators':

> An important component of any dispute resolution mechanism involving more than one decision-maker is the deliberation.[12]

Deliberations – in person or otherwise – are indeed considered mandatory in most national laws on international arbitration, and inadequate deliberations can trigger the annulment of the award as shown, for instance, in the 1991 11th Circuit decision in the *SZUTS* case,[13] and in a 2003 Paris Court of Appeal decision as follows (free translation):

> The requirement of deliberations is a fundamental principle of the procedure which guarantees the judicial character of the decision reached by the arbitral tribunal; the principle of collegiality assumes that each arbitrator will have the possibility of discussing each decision with his/her colleagues.[14]

Publicity of the decision-making process

Deliberations are customary in state courts that are composed of more than one judge and generally do not raise any particular concern. Often, either deliberation is public by law,[15] or the parties and the court communicate during the entire process in such a way that users can grasp the steps followed by the court in reaching the decision. So why does the arbitration community pay so much attention to the arbitral tribunal's deliberations with a particular focus on bias and bargaining?

The answer lies essentially with the parties' right to 'agree upon any procedure for appointing arbitrators' (see e.g. Art. 12, ICDR International Arbitration Rules) and more specifically to choose their arbitrator – a fundamental arbitration feature embedded in Art. 11(3)(a) of the UNCITRAL Model Law and in almost all modern arbitration laws[16] and arbitration rules[17]. This right has recently been criticised by some of the most distinguished minds in arbitration who argue, in essence, that this right is supposedly incompatible with the concept of impartial dispute resolution[18] as, for example, set out in Section 33(1) of the 1996 UK Arbitration Act.[19] As noted by Richard M. Mosk, cited previously, it is true that in such a setting:

> The deliberations become a negotiation or an adversary proceeding with the party-appointed arbitrators seeking to persuade a passive presiding arbitrator.[20]

At this juncture, it is worth looking more closely at the notion of bias and its practical consequences.[21] Bias can be defined as the situation where:

> a party-appointed arbitrator (for whatever reason) closely identifies with the appointing party;[22]

12 R.M. Mosk, Deliberations of Arbitrators, in D.D. Caron, et al., *Practising Virtue: Inside international Arbitration,* 486 (Oxford University Press, 2015).

13 G.B. Born, *International Commercial Arbitration,* Second ed., Vol. III, 25.04 (B) (4), 3247, with reference e.g. to *Szuts v. Dean Witter Reynolds, Inc.,* 931 F.2d 830, 832 (11th Cir. 1991) (vacating award issued by two arbitrators, after the third arbitrator was disqualified but not replaced); *Int'l Bhd of Elec, Workers, Local Union 1823 v. WGN of Colorado, Inc.,* 615 F supp. 64, 67-68 (D.Colo.1985) (vacating the award because an arbitrator rendered a decision without obtaining signatures from the co-arbitrators, indicating absence of 'any significant decision-making process by the majority of the board').

14 Paris Court of Appeal, 16 Jan. 2003, pp. 371, 379-380 *Rev. Arb* (2004) : 'Considérant que l'exigence du délibéré représente une règle fondamentale de la procédure qui garantit la nature juridictionnelle de la décision à laquelle parvient le tribunal arbitral ; que le principe de collégialité suppose (...) que chaque arbitre ait la faculté de débattre de toute décision avec ses collègues'. In that case, the Court held that this requirement was met when the dissenting arbitrator, who claimed that the presiding arbitrator had breached this rule of collegiality by allegedly deciding issues with one of the wings only, had actually been informed in advance and invited to join the discussions.

15 E.g. Swiss Supreme Court, Act on the Federal Court of 17 June 2005, Art. 59 (1 July 2022).

16 E.g. Section 1035(iii) of the German Code of Civil Procedure; Section 16(4) of the 1996 Arbitration Act; Art. 1452(2) of the French Code of Civil Procedure.

17 E.g. Art. 12(4), ICC Arbitration Rules; Art. 7, LCIA Arbitration Rules.

18 S.H. Elsing, A. Shchavelev, 'The Role of Party-Appointed Arbitrators', in *The Powers and Duties of an Arbitrator, Liber Amicorum Pierre A. Karrer*, 65 (2017) (with reference to J. Paulsson, 'Moral Hazard in International Dispute Resolution', 25 *ICSID Review*, 339 (2010).

19 'The Tribunal shall ... (a) act fairly and impartially as between the parties ...'.

20 R.M. Mosk, supra note 12, at p. 489.

21 For this part, see T. Giovannini, 'Integrity and Efficiency in the Decision-Making Process: Suggested Solutions for Addressing Significant Hurdles', *Alternatives to the High Cost of Litigation,* 38(10), pp. 152-156 (Nov. 2020).

22 M. Black, 'A Short Note on the Decision-Making Process', in Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions, at p. 121.

or put differently, where:

> one of the co-arbitrators … adopt[s] the position of an additional advocate of the views of his appointing party.[23]

Bias has been said to be either conscious or unconscious, tantamount to self-serving or egocentric interests,[24] equivalent to misconduct.[25] But little has been said about what has been characterised by learned authorities[26] as the most serious – albeit often unrecognised – bias, namely the cultural bias that stems from the differences in nationalities, cultures, education and background (conversely, judges share a common legal background).

In this context, the practice of partisan party-nominated co-arbitrators was historically common in the United States. For example, until 2003, the AAA Commercial Rules[27] provided for presumptively different standards of independence and impartiality for co-arbitrators and presiding arbitrators, tellingly, referred as 'neutrals'. Cultural background can also play a key role. For example, it is the understanding in some European countries (but not only) that party-appointed arbitrator's role is precisely to advocate the position of the party that appointed him or her. Other bias can stem from different, if not opposite, legal approaches to procedure (e.g. adversarial vs inquisitorial, admissible vs inadmissible evidence).

The practical consequences of bias on the decision-making process are numerous. Reference can be made to:

- The refusal to discuss any further if the majority tends to support the position of the party adverse to the one that appointed him or her.
- The bargaining process, which, as put by Michele Patocchi are situations where 'one arbitrator is amenable to concurring with another provided that a point is conceded and this is a kind of 'quid pro quo' that takes place in deliberations'.[28]

In such a complex setting, the question arises – if one were to follow Kant and Habermas – of how to apply the deliberative process, namely, how to communicate the way in which the problems are being formulated and in which the solutions are being evaluated. Several answers have been put forward, both to limit as much as possible the consequences of bias and to have the parties involved as early as possible in the decision-making process. Some of them deserve particular attention. To begin with, Prof. Pierre Mayer, a learned authority in the field, considers that:

> the best way to arrive at a unanimous award or at least to diminish the inconveniences of bias … is to start discussing the various aspects of the case rather early on.[29]

With the same concern to avoid bias in mind, it has been suggested that, as early as possible in the proceedings[30] – some recommend at the outset – the arbitral tribunal plans, and paves the way for, approaching the issues that will have to be resolved and the methodology by which the decisions may be reached.[31] Others go further and advise that the issues to be proven be discussed and identified at the first procedural meeting.[32]

It is important to note that the suggested route to identify the precise and detailed issues to be decided upon as early as possible is not tantamount to early determination. The question is not to decide on the merits of the dispute as such, but rather:

> to identify the issues, to identify the real questions, to reduce the issues to be decided.[33]

Identification does not imply decision, and the more detailed the issues, the more difficult it will be to argue alternative solutions, either by the parties or by the members of the arbitral tribunal. This system is efficient in many respects, and avoids possible bias and bargaining.

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23 N.G. Bunni, 'Personal Views on How Arbitral Tribunals Operate and Reach their Decisions', in *Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions*, at p. 124.

24 Sh. Seidman Diamond, 'The Psychology of the Decision-Making Process', 17(4) *Asian Dispute Review*, p. 197 (2015).

25 M.J. Goldstein, 'Living (or not) with the partisan arbitrator: are there limits to deliberations secrecy?' 32 *Arbitration International*, p. 589 (2016).

26 E.g. Ph. Capper, 'Dealing with Bias and Obstruction' in *Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions*, at p. 46.

27 https://www.adr.org/sites/default/files/CommericalDisputeResolutionProcedures.pdf

28 M. Patocchi, 'How Arbitral Tribunals Operate and Reach their Decisions', in *Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions*, at p. 66.

29 P. Mayer, 'Dealing with Dissenting Opinions', in *Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions*, at p. 67.

30 Ph. Capper, 'Dealing with Bias and Obstruction', in *Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions*, at p. 43.

31 N.G. Bunni, supra note 23, at pp. 123, 125.

32 N. Ulmer, 'Six Modest Proposals before You Get to the Award', in *Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions,* at p. 115. See also A. Sabater, 'Optional Provisions for the Terms of Reference and Procedural Order No. 1', *ICC Dispute Resolution Bulletin*, issue 3-2023.

33 Id. at p. 60.

A truly deliberative process requires that such identification is shared with the parties with a view to reaching an agreement on how the problems are formulated and how the solution will be evaluated. This requires that:

- What some experienced arbitrators call a 'very detailed decision tree'[34] be developed at a time where the dispute in all its aspects has been put on the table – a time that this author would identify as upon the completion of the written phase before the hearing.[35]
- The decision tree be put to the parties for determination.

2. The tools to legitimacy – The proactive role of the arbitral tribunal

As mentioned above,[36] a truly deliberative and informative process, as a fundamental condition of legitimacy, requires the arbitral tribunal to play an active role throughout the arbitral procedure, in particular by identifying with the parties the issues and the supporting evidence required as early as possible.[37]

Such proactive conduct of the arbitrators is generally encouraged by arbitration rules or guidelines to enhance the arbitrators' understanding of the case and the predictability of the outcome. Reference is made in that regard, inter alia, to:

Para. 28, ICC Techniques for Controlling Time and Costs in Arbitration (2018):

> [A] tribunal that has made itself familiar with the details of the case from the outset can be proactive and give appropriate, tailor-made suggestions on the issues to be addressed in documentary and witness evidence, the areas in which it will be assisted by expert evidence, and the extent to which disclosure of documents by the parties is needed to address the issues in dispute.[38]

Art. 22.1(iii), LCIA Arbitration Rules (2020):

> The Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute.

Art. 2(3), IBA Rules on the Taking of Evidence in International Arbitration (2020) ('IBA Rules'):

> The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome (…).

Identification of the issues to be decided: How and when?

As suggested above, the earlier the issues, and the evidence required in support them, are identified, the better. In this regard, three procedural steps are generally considered to be appropriate for a real and informative collaboration between the arbitral tribunal and the parties:

1. Establishment of the Terms of Reference or Procedural Order No. 1.
2. Completion of the first round of written submissions and witness statements 'well before the main hearing'[39] and before the document production process.
3. Completion of the written phase before the hearing.

34 B.F. Meyer, 'Structuring a Bargaining Process", in *Inside the Black Box: How Arbitral Tribunals Operate and Reach their Decisions*, at p. 60.

35 P. Capper, supra note 30.

36 E.g. D.W. Rivkin, 'Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited', 24 *Arbitration International*, Vol.24, 375 *et seq.* (2008).

37 On the issue of the arbitral tribunal's interactive role, see M.E. Schneider, 'The uncertain future of the Interactive Arbitrator: Proposals, Good Intentions, and the Effect of Conflicting views on the Role of the Arbitrator', in *The Evolution and Future of International Arbitration*, S. Brekoulakis, J.D.M. Lew, L. Mistelis (eds.) (Wolters Kluwer, 2016), p. 379 *et seq.* On the parties proactive conduct towards effective conflict management, see the ICC Guide to Effective Conflict Management (2023), at I.3 'Proactive conflict management – Using awareness and training', II.B.4 '(i) Party engagement before commencement of arbitration' and '(ii) Party engagement during arbitration proceedings'.

38 ICC Commission on Arbitration and ADR, 'Techniques for Controlling Time and Costs in Arbitration' (2018 ed.), para. 28 'Providing information in advance of the conference'.

39 N. Kaplan, 'If It Ain't Broke, Don't Change It', (2014) 80 *Arbitration*, Issue 2, 172, 174, also cited by M.E. Schneider, supra note 37, at para. 25.13.

The Terms of Reference or Procedural Order No. 1

The first opportunity for the arbitral tribunal to identify the issues to be decided and share its comprehension in that regard with the parties is the drafting of the first procedural order or Terms of Reference. For instance, Art. 23(1) of the ICC Arbitration Rules provides that it is the responsibility of the arbitral tribunal itself to:

> draw up on the basis of documents or in the presence of the parties and in the light of their most recent submissions a document defining its Terms of reference. This document shall include the following particulars: … (c) a summary of the respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims; (d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined (…).

The above provision constitutes the first substantial step towards the informative and deliberative process constitutive of the legitimacy at stake, notably for the arbitral tribunal to share with the parties its own understanding of the case at hand and the issues to be determined. It has even been suggested that the drafting itself be made into a form of a preliminary hearing at which the parties briefly present their case and discuss it with the arbitral tribunal which, within a couple of weeks:

> issues written recommendations as to topics to be discussed in the submissions and the format of evidence presented.[40]

Quite regrettably however, practice shows that the users (arbitral tribunal members and parties alike) favor the system of the parties directly inserting their respective positions and avoiding the listing of the issues to be determined, and this, despite the clear discomfort frequently mentioned by users *vis-à-vis* the passive arbitral tribunal.

The case review conference ('CRC') and the document production process

As proposed by Constantine Partasides, a CRC should be held after the first exchange of written submissions that would be:

> focused by a tribunal-led discussion on the issues and evidence necessary to determine the parties' requests for relief. [41]

On this occasion, a truly deliberative and informative process would require the arbitral tribunal to submit to the parties for discussion:

- A first decision tree, as mentioned by Prof. Pierre Mayer and David W. Rivkin[42] or as provided in Art. 2(3) of the IBA Rules recalled above those issues that it 'may regard as relevant to the case and material to its outcome'.
- An indication as the case may be, as proposed by Prof. Katherine Kessedjian,[43] as to where their argument is weak and their evidence insufficient.

This proactive approach paves the way for a consensual, streamlined, and efficient approach ensuring a truly deliberative and informative process in the context of the evidence to be provided, in particular through the document production process and the hearing, along clear and unambiguous directions aimed at promoting predictability and equality between the parties. This requires clarification and transparency in particular on sensitive issues such as:

- The rules applicable to the burden of proof;
- The rules applicable to the interpretation of the contract in dispute; and
- A pre-hearing discussion to identify, with the active participation of the parties, the issues that the arbitral tribunal considers require further information and clarification from the witnesses (the 'decision tree').

40 J. Risse, 'Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings', 29 *Arbitration International* 3, 453, 457 (2013) with reference – on this topic – to the idea of Constantine Partasides presented in a speech in 2010, cited by M.E. Schneider, supra note 37.

41 C. Partasides, 'A Case Review Conference, or Arbitration in Two Acts', (2015) 81 *Arbitration*, Issue 2, 167, cited by M.E. Schneider, supra note 37, at para 25.15. The ICC Report on 'Facilitating Settlement in International Arbitration' and Guide to 'Effective Conflict Management' also refer to 'mid-stream conferences' or 'further CMCs [case management conferences]'.

42 D.W. Rivkin, supra note 36, cited by M.E. Schneider, supra note 37, at para. 25.15.

43 C. Kessedjian, Keynote Speech: 'International Arbitration – More efficiency for greater credibility – the Collaborative Arbitrator', *Fordham Papers* (2014), cited by M.E. Schneider, supra note 37, at para. 25.17.

Burden of proof

As observed by commentators at the 2014 ICCA Miami Conference, issues of proof are frequently determinative of the outcome of arbitration.[44] Yves Derains recalls the importance of the principle at the document production phase:

> When assessing requests, arbitrators must carefully check that the burden of proof actually lies on the requesting party.[45]

Indeed, a strict application of the principle of '*actori incumbit probatio*' or '*affirmant incumbit probatio*' is embodied (explicitly or implicitly) in the UNCITRAL Model Law and in major arbitration laws[46] and arbitration rules (e.g. UNCITRAL Arbitration Rules, Statute of the Iran-United States Tribunal).[47] The principle is largely recognised and even applied in the absence of an express provision to that effect, as in the ICSID case of *Asian Agricultural Products Ltd v. Sri Lanka*, where the arbitral tribunal considered that 'there exists a general principle of law placing the burden of proof upon the claimant'[48] or in the ICSID annulment proceedings of *Azurix v. Argentina*, where the *ad hoc* committee considered:

> the general principle in ICSID proceedings, and in international adjudication generally, to be that 'who asserts must prove' and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts.[49]

In sum, and as a general rule:

> the party who affirms is expected to come to arbitration with sufficient evidence to sustain it.[50]

As a consequence:

- If a party alleges that the counterparty failed to prove an allegation, it will not be up to that party to discharge the burden either by attempting to obtain documents (*in lieu* of its opponent) to prove such an allegation to be corresponding to actual facts or showing – as the case may be – that the allegation is false. In fact, the accepted consequence of non-proven allegations should simply be the dismissal of the argument.[51]
- If evidence has been produced in support of the allegation, the other party is entitled by law to rebut it, either on its own motion or by requesting the production of documents.
- The party against whom a presumption is made has the burden of producing evidence to rebut the presumption, but the rule does not shift the burden of persuasion which remains with the party who initially had it.[52]

As a corollary,

- As implicitly set forth in Art. 3(1) of the IBA Rules: '[A] party is per se not required to submit documents that are averse to its case'.[53]
- The analysis of the 'relevance and materiality' requirements as per Art. 3(3)(b) would have to be seen in the strict and limited context of the burden of proof.[54]

44 M. Aimoré Carreteiro, 'Burden and Standard of Proof in International Arbitration: Proposed Guidelines for Promoting Predictability', XIII (49) *Revista Brasileira de Arbitragem* 82, 83 (2016).

45 Y. Derains, 'Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint', *ICC Bulletin Special Supplement* (2006), para. 14.

46 France, Code on Civil Procedure, Art. 9: 'Each party must prove, in accordance with law, the facts on which its claim is grounded.'; Switzerland, Swiss Civil Code, Art. 8: 'Unless provided otherwise by law, the burden of proving the existence of an alleged fact rests on the person who derives rights from that fact'; Italy, Civil Code, Art. 2697; Netherlands, Code of Civil Procedure, Art. 150; and in different terms, China, Civil Procedure Law, Art. 64.

47 E.g. and in addition to the IBA Rules, Art. 3(1): Iran-United States Claims Tribunal, Rules of Procedure, Art. 24(1); UNCITRAL Arbitration Rules, Art. 27(1); Hong Kong International Arbitration Rules, Art. 22(1); The principle is largely recognised and applied even in the absence of express provision to that effect, as shown e.g. in the ICSID Case *Asian Agricultural Products Ltd v. Sri Lanka* of 27 June 1990, where the Arbitral Tribunal considered that 'there exists a general principle of law placing the burden of proof upon the claimant' (para 56) or still in the ICSID annulment proceedings of *Azurix v. Argentina* of 1 Sep. 2009, where the *ad hoc* committee referred to 'the general principle in ICSID proceedings, and in international adjudication generally, to be that 'who asserts must prove' and that in order to do so, the party which asserts must itself obtain and present the necessary evidence in order to prove what it asserts', para. 215.

48 M. Aimoré Carreteiro, supra note 44, at 82, 92 with reference to ICSID Case n° ARB/87/3, Award of 27 June 1990.

49 Azurix v. Argentina (I), Decision on the Application for Annulment of the Argentine Republic, 1 sept. 2009, at para. 215.

50 M. Aimoré Carreteiro, supra note 44, with reference to ICSID Case *Azurix v. Argentina*.

51 B. Hanotiau, Document Production in International Arbitration: A Tentative Definition of 'Best Practice', *ICC Bulletin Special Supplement* (2006), para. 15.

52 USA, Federal Rules of Evidence, Rule 301.

53 T. Zuberbühler, D. Hofmann, Ch. Oetiker, Th. Rohner, *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (Schulthess Verlag, 2012), para. 73; 2022, para. 66.

54 Id., para. 138; 2022, para. 131 (more nuanced though: Ibid, para. 132).

The adoption of such strict rules would make that the deliberations and the decisions of the arbitral tribunal would be limited to a mathematical and logical analysis: Has the evidence of the claim been submitted? If not, there is no room for compelled document production. If the evidence has been presented, the production sought and granted must be limited to the rebuttal.

Interpretation of disputed contractual provisions

Depending on the applicable legal system (civil or common law), the principles of interpretation of disputed contractual clauses must be clear and accepted by both the parties and the arbitral tribunal alike, before proceeding to the document production phase.

In **civil law**, generally, the principle which applies is '*in claris non fit interpretatio*', i.e. when the wording of the contract is clear, there is no room for interpretation on the negotiations that led to the signature of the contract at issue, with the consequence that any and all requests for documents *related to the negotiations* will be irrelevant and therefore have to be dismissed.

In addition, according to such principle, where the wording of the contract is not clear, the decisive element for the interpretation of the contract is the parties' common understanding and not a party's unilateral true intentions and thoughts with the consequence that all requests for documents production *related to unilateral intentions or thoughts* will be dismissed.

In **common law** generally, negotiations are not relevant to the interpretation of the contract the contract, with the consequences that any and all documents production requests *related to unilateral intentions or thoughts* will be dismissed.

Pre-hearing planning and management

Legitimacy requires the arbitral tribunal to engage with the parties in order to:

- Update the 'decision tree' discussed at the CRC considering the now completed second round of written submissions, with the parties' respective positions and evidence in response to their opponent's arguments and evidence.
- Identify the issues that require clarification from witnesses and experts as opposed to unnecessary testimonies – bearing in mind that, in various jurisdictions, the arbitral tribunal is legally empowered to determine in advance the relevance and materiality of the evidence presented and/or required.

Conclusion

The various steps suggested above are not only aimed at increasing the efficiency of the process (costs, delays, as often mentioned), but are, in the author's view, the actual and genuine response to the complaints of users, revealed in particular by the Queen Mary 2010 Survey,[55] according to which the arbitrators should be more active.

Users are entitled to be informed and involved in the decision-making process, and only to that extent, as Kant and others have pointed out, can its outcome be seen as understandable and likely to be accepted by the majority, that is: legitimate.

55 2010 Queen Mary University, White & Case, '2010 Choices in International Arbitration'.