CROSS EXAMINATION AS A GROUND FOR ICSID ANNULMENT

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I. INTRODUCTION

This paper deals with the issue of non-appearance for cross examination of a Party-Appointed Expert by a tribunal as a ground for an annulment under Article 52(1) (d) of the ICSID Convention. The function of the annulment 'is not to correct errors of fact or of law, but to police the integrity of the award and of the process leading to the award.'[118]

According to Article 52(1) (d) of the ICSID Convention, a request for Annulment of the Award can be made, if a serious departure from a fundamental rule of procedure occurs. It makes applicable to ICSID arbitrations the "minimal standards of procedure to be respected as a matter of international law." [119] Thus, its aim is to ensure that due process of law is maintained throughout the proceedings. This ground has been invoked under every annulment case under the Convention.[120]

A violation of a fundamental procedural rule has to be serious to lead to an annulment.[121] This was established in *CDC Group*[122] and other annulment cases,[123] when the ad hoc committee concluded that

"...the departure must be serious and it must be from a fundamental rule of procedure. It is a dual requirement."[124]

The committees of various annulment proceedings have considered whether due process violations are serious, substantial, and outcome-determinative. The committee in *MINE* clarified this by stating that a departure is serious where it is '*substantial and [is] such as to deprive the party of the benefit or protection which the rule was intended to provide.*'[125] The violation of a procedural rule is serious when it causes a tribunal to reach a result that would have been different if the proper rule was observed.[126] Rules of procedure are fundamental if they relate to the 'essential fairness of the proceeding.'[127]

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[118] A. K. Bjorklund, 'The Continuing Appeal of Annulment: Lessons from Amco Asia and CME' as cited in T. Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London 2005).

[119] *Wena Hotels Limited v Egypt* (2004) 6 ICSID Rep 129, (2002) 41 ILM 933, (2003) 130 Clunet 167.

[120] Albena P Petrova, 'The ICSID Grounds for Annulment in a Comparative Perspective: Analysis and Recommendations for the Future' [2006] 10 VJ 287, 289.

[121] Christoph Schreuer, 'The ICSID Convention: A Commentary: a Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (Cambridge University Press, 2001) 227.

[122] *CDC Group Plc v Seychelles*[2005] ICSID Case No ARB/02/14, IIC 48, [48].

[123] *Maritime International Nominees Establishment v Republic of Guinea, Decision on Annulment* [1989] ICSID Case No ARB/84/4.

[124] *CDC Group Plc v Seychelles* [2005] ICSID Case No ARB/02/14, IIC 48, [48].

[125] *Azurix Corp v Argentina* [2009] ICSID Case No ARB/01/12 ,IIC 388 [50]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* [2007]ICSID Case No. ARB/01/3 [70]; *MINE v Guinea.*

[126] *Wena Hotels Limited v Egypt* (2004) 6 ICSID Rep 129, (2002) 41 ILM 933, (2003) 130 Clunet 167 48.

[127] ibid.

The 'serious departure from a fundamental rule of procedure' ground has been invoked in every annulment case decided under the Washington Convention but only one annulment request has successfully demonstrated an ICSID tribunal's serious departure from a fundamental rule of procedure.[128]

For this ground of annulment to be established, it has been repeatedly held that the rule of procedure in question must be "fundamental".[129] This concept is "intended to denote procedural rules which may properly be said to constitute 'general principles of law', insofar as such rules concern international arbitral procedure".[130]

Furthermore, the departure from that rule of procedure must have been "serious" in the sense that it "must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed",[131] or in the sense that it was "such as to deprive a party of the benefit or protection which the rule was intended to provide".[132]

As stated previously, there are two sides to the limited grounds for annulment. This paper too, shall approach it such with Part II, explaining the side that is in favour of annulment and Part III building the case for those against. Thus the split is clear on the lines of accuracy versus finality. The authors will do this by relying on the IBA Rules on the Taking of Evidence in International Arbitration, 2010.

II. THOSE IN FAVOUR OF ANNULMENT

1. RIGHT TO BE HEARD IS A FUNDAMENTAL RULE OF PROCEDURE

Right to be heard was successfully raised for annulment in *Fraport AG Frankfurt Airport Services Worldwide v Philippines,* wherein it was recognised as a fundamental rule of procedure applicable to international arbitral proceedings generally. The Committee concluded that a party's right to be heard consisted of the opportunity to adduce evidence and argument on its claim and in rebuttal of those of its opponents and it constituted a fundamental rule of procedure, as recalled in Article 35(c) of the Model Rules on Arbitral Procedure adopted by the International Law Commission in 1952, on which the drafters of the ICSID Convention relied.

Thus, reading into the travaux of the ICSID Convention and considering the view taken by the ad hoc committee in *MINE v. Guinea*, a consensus can be reached that not all rules of procedure would fall within the ambit of fundamental rule of procedure. They have to relate to essential fairness of the proceeding. It was therefore established in the *Fraport* case, that a "fundamental rule of procedure" is intended to denote procedural rules which may properly be said to constitute "general principles of

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[128] *Fraport AG Frankfurt Airport Services Worldwide v Philippines, Decision on the Application for Annulment* [2010] ICSID Case No ARB/03/25, IIC 478 [286(1)].

[129] *Azurix Corp v Argentina, Decision on Application for Annulment* [2009] ICSID Case No ARB/01/12 ,IIC 388 [50]; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic* [2007]ICSID Case No. ARB/01/3 [70]; *MINE v Guinea.*

[130] *Fraport AG Frankfurt Airport Services Worldwide v Philippines, Decision on the Application for Annulment* [2010] ICSID Case No ARB/03/25, IIC 478 [286(1)] 186, 187.

[131] *WENA Hotels, (* n 129)58; *Azurix v Argentina* (n 132)51.

[132] *MINE v Guinea, (* n 126).

law", which can be construed in the sense of Art. 38(1) (c) Statute of the International Court of Justice, insofar as such rules concern international arbitral procedure. Thus, the concept is restricted to the principles of natural justice, including the principles that both parties must be heard and that there must be adequate opportunity for rebuttal. The right to be heard includes due opportunity to present proofs and arguments. The opposing party has the right to respond to the other party's arguments and evidence.

International practice has created consensus on arbitral norms on matters such as witness statements and the right to cross examination, having settled more towards the common law than the civil law end of the spectrum. It is widely accepted that cross-examination is now the norm in international arbitration. In New York, for instance, the right to cross-examine has been deemed a fundamental element of due process.

Under Rule 35(1) of ICSID Arbitration Rules and the Art 8.1 of the IBA Rules, the witnesses and experts can be examined. The IBA's Rules are "designed to fill the void intentionally left in most institutional and ad hoc rules between the submission of initial pleadings and the issuance of the award," and are considered to be a fusion of civil law and common law traditions, particularly adapted to the context of international dispute resolution proceedings.

The IBA Rules require that an expert has to give testimony upon the request of a party. Moreover, the Expert's Report has to be disregarded, if it is not accompanied with oral testimony; the only leeway to this rule is when there are 'exceptional circumstances' as to the absence of the expert. A refusal to testify on the other hand clearly breaches the duty of good faith mentioned in IBA Rules.

1.1 NON-APPEARANCE FOR TESTIMONY CONTRAVENES ARTICLE 8.1 OF THE IBA RULES.

Article 8.1, IBA Rules makes it compulsory for witnesses of fact and experts to appear for testimony at the Evidentiary Hearing, if such person's appearance has been requested by any Party or by the Arbitral Tribunal.[133]

Article 8.1 of the revised IBA Rules of Evidence foresees the mechanism for determining whether experts or fact witnesses must appear for testimony at an evidentiary hearing, namely on the request of any party or the arbitral tribunal. This revision from the 1999 IBA Rules of Evidence clearly suggests the importance being attributed to the cross examination and oral testimony of both witnesses and experts.[134] Written testimony may be preferred for sake of expediency, but would remain less convincing than direct examination.[135]

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[133] IBA Rules on the Taking of Evidence in International Arbitration 2010, article 8.1.

[134] 'Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration', (2011) 5 No. 1 Disp Resol Int'l 45 27.

[135] Irene Welser and Giovanni Berti De, 'The Arbitrator and the Arbitration Procedure - Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices', [2010] Austrian Yearbook on International Arbitration 89.

1.2 NON-APPEARANCE FOR TESTIFYING MAKES A REPORT UNACCEPTABLE AS PER ARTICLE 5.5 OF THE IBA RULES

Article 5.5 of IBA Rules states that the Arbitral Tribunal will disregard any Expert Report by a Party-Appointed Expert, who fails to appear for testimony at an Evidentiary Hearing without a valid reason, except in cases of exceptional circumstances.[136]

Opinions of party-appointed experts in their reports are treated in the same manner as witness statements, and they can be relied upon only if the expert arrives at the hearing and is available for cross-examination.[137] Therefore in light of this interpretation, the arbitral tribunal has every right to question the expert in the same manner a witness is cross-examined to confer a fair trial. When an expert whose presence for cross examination has been requested by a party refuses to come for the hearing, then his report should be excluded from evidence. Such a refusal should be seen as a serious departure from fundamental rule of procedure and not in the interest of arbitral proceedings.

1.3 THE PROBLEM WITH EXCEPTIONAL CIRCUMSTANCES

As with fact witnesses, the expert report of a non-appearing party-appointed expert may nevertheless be accepted "in exceptional circumstances", if the arbitral tribunal so determines. Some instances of 'exceptional circumstances' as used in the context of general principles of law in arbitration and common law are given below.

In *Fakes v. Turkey*, an Expert could not be cross examined via video conferencing due to poor health and unscheduled hospital admittance on the day of the Evidentiary Hearing, the tribunal agreed to consider the report without oral hearing because the parties agreed that any delay in rescheduling will be detrimental to their interests. The point to be noted here is that the parties consent was there. This was held to be an exceptional circumstance.[138]

Another point of view in this regard is the Desert Line award,[139] which makes the granting of moral damages dependent on the existence of "exceptional circumstances". Sometimes, physical duress is cited as an 'exceptional circumstance'. The damage to the physical integrity of the natural persons is just one example of "exceptional circumstances".

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[136] IBA Rules 2010, article 5.5.

[137] Michael E Schneider, 'Technical Experts in International Arbitration, Introductory Comments to the Materials From Arbitration Practice' (1993) 11(3) ASA Bull 448.

[138] *Fakes v Turkey, Award,* [2010] ICSID Case No ARB/07/20, IIC 439 [17].

[139] *Desert Line Projects LLC v Yemen, Award,* [2008] ICSID Case No ARB05/17, IIC 319 [289].

The common law principle on this point, has been stated in *Egan v Motor Services (Bath) Ltd.* where Smith L.J. thought that exceptional circumstances might include on a point, which was not properly argued or has relied on an authority which was not considered.[140]

1.4 DEGREE OF SERIOUSNESS OF DEPARTURE FOR ANNULMENT

A departure from fundamental rule of procedure has to be 'serious' enough to annul the award. The violation of a procedural rule is serious, when it causes a tribunal to reach a result that would have been different if the proper rule was observed.[141] This can be determined by the evidentiary weight given to the Report of the Expert. If the importance given to the Report is high and it turns out to be the most persuasive evidence the tribunal used to decide against a party, then it definitely is serious enough to be concerned for annulment. This is because when the Report is the most important evidence for the decision, it should not suffer from any procedural irregularity.

1.5 DEPRIVATION OF THE 'BENEFIT OR PROTECTION' WHICH THE RULE WAS INTENDED TO PROVIDE

Article 5.5, which compels a party-appointed expert to appear at an evidentiary hearing, was adopted on consensus among the members of the Working Party who recognised that they would generally order witnesses who had submitted a written statement, especially an expert report, to appear live. Live testimony of an expert at the evidentiary hearing is crucial and "can conceivably decide a dispute".[142] Art. 5.5 was added because the testimony of an Expert Report is more likely to have a determinative effect in the case, as compared to those witnesses of fact who can testify only as to peripheral details.

The need to create a "fair process for the taking of evidence in international arbitrations" is now emphasised in the Preamble of the IBA Rules as one of the central pillars on which they are based.[143]

2. DISCRETIONARY POWER OF THE TRIBUNAL

It is up to the tribunal to decide, whether or not to accord the status of evidence to the report of an expert, as it is clear from the general principle, also found in many institutional and ad hoc arbitration rules, that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of

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[140] *Egan v Motor Services (Bath) Ltd* [2007] EWCA Civ 1002 [51].
[141] *CDC Group*, (n 125)49.
[142] Richard Kreindler, 'Benefiting from Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques' [2005] ICC-Arbitration and Oral Evidence 87.
[143] Klaus Peter Berger, 'Evidentiary Privileges of the Revised IBA Rules on the Taking of Evidence in International Commercial Arbitration' [2010] 13(5) International Arbitration Law Review 173.

evidence.[144] Obviously, the arbitral tribunal shall exercise its discretion in making such determinations, which are central to its role. But the tribunal cannot abuse its discretionary power to compromise the accuracy of the award. The preamble of the 2010 IBA Rules also states that the IBA Rules are intended to govern the taking of evidence "in an efficient, economical and fair" manner.

But certain notions of due process and fairness are fundamental to arbitration and must always be promoted. These include the right to equal or at least fair treatment and an appropriate opportunity to present a case and the right to have a tribunal that is unbiased or does not lead to reasonable apprehensions of bias, at any stage through the process. Lew, Mistelis and Kröll in fact describe these norms as the Magna Carta of arbitration.[145]

There have been concerns about the promulgation of inaccurate decisions, pointing to SGS v. Pakistan in ICSID,[146] Loewen v. United States in NAFTA,[147] and the Czech cases as examples of tribunals that have arrived at inaccurate decisions.

3. THE DUTY OF 'GOOD FAITH' UNDER ICSID AND IBA RULES

The inclusion of an express duty of good faith in the IBA Rules[148] is noteworthy. Also see, Rule 34(3) ICSID Arbitration Rules, providing that "[t]he parties shall cooperate with the Tribunal in the production of the evidence..." ' Article 15.7 of the Swiss Rules 2012 provides that '(a)All participants in the proceedings shall act in good faith…'. Apart from this, the duty to arbitrate in good faith is generally derived from the contractual obligation to arbitrate, as an implied element of the agreement to arbitrate.[149] Art.5.4 of IBA Rules extends the experts' duties to co-operate in preparation of their reports.[150] Checks are hence placed, like Art. 8.1 IBA Rules, foreseeing cross-examination during the hearing to ensure good-faith in dealing with party-appointed experts with the various provisions.

III. THOSE AGAINST ANNULMENT

1. RIGHT TO CROSS-EXAMINATION IS NOT A FUNDAMENTAL RIGHT

The Claimant's right to due process has not been violated. Art. 8.1 of the IBA Rules necessitates that a party appointed expert has to appear for testimony at the evidentiary hearing. And upon failure to do

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[144]IBA Rules2010, article 9.1.
[145]Julian D.M. Lew, Loukas A Mistelis, Stefan M. Kröll, *Comparative International Commercial Arbitration,* (The Hague: Kluwer Law International, 2003) 95.
[146]Matthew Wendtlandt, '*SGS v Phillipines* and the Role of ICSID Tribunals in Investor- State Contract Disputes' <http://www.tilj.org/content/journal/43/num3/Wendlandt523.pdf> accessed 12 November 2013.
[147]Noah Rubins, 'Loewen v United States: The Burial of an Investor-State Arbitration Claim' [2005] 21(1) Arb. Int'l 1, 32,36.
[148]Revised IBA Rules, Preamble 3.
[149]Gary B Born, *International Commercial Arbitration* (Wolters Kluwer Law and Business 2009) 1009.
[150]Klaus Sachs, Nils Schmidt Ahrendts, 'Expert evidence under the 2010 IBA Rules'[2010] 13(5) Int ALR 219.

so, his Report is disregarded as decided by the tribunal by way of Art. 5.5. However if the tribunal decides that 'exceptional circumstances' exist for the non-appearance of the party appointed expert, then the Report can be considered as evidence. Thus, as held in *Azurix*, because the power is discretionary, a decision by a tribunal not to accede to a party's request to exercise that power can never, in and of itself, be a departure from a fundamental rule of procedure. A decision by a tribunal whether or not to exercise a discretionary power that it has under a rule of procedure, is an *exercise* of that rule of procedure, and not a *departure from* that rule of procedure. It is only where the exercise of that discretion, in all of the circumstances of the case, amounts to a serious departure from another rule of procedure of a fundamental nature.[151] The language of Art. 5.5 of the IBA Rules indicates the discretionary power of the Tribunal to admit evidence .

In *MINE*, it was held that even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is "fundamental". The Committee considered that a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: *"The parties shall be treated with equality and each party shall be given full opportunity of presenting his case."* The term "fundamental rule of procedure" is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.[152]

Drawing an analogy from *WENA,* wherein one of the grounds raised was that a key witness was not called to present the evidence, it was held that the Applicant failed to demonstrate the existence of a fundamental rule of procedure which would have put the Tribunal under an obligation to call for further evidence. Request for further evidence by way of calling a witness was part of the discretionary power of the tribunal, and not obligatory hence it could was held to not to be a fundamental rule of procedure.

Another case on this point is the U.S. case of *Generica v. Pharmaceutical Basics*, where the losing side claimed that the arbitrator's denial of the opportunity to cross-examine a particularly damaging witness violated fundamental due process.[153] The court dismissed the motion illustrating the limits of the procedural defect ground for annulment. It confirmed the arbitral tribunal's broad freedom to organize and conduct the arbitration. The arbitrators' mode of evidence gathering was "not such a fundamental procedural defect that it violated our (U.S.) due process jurisprudence." The Court further determined that in any case the outcome of the arbitration was unlikely to have been affected by the limitation on cross-examination.[154]

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[151] *Azurix v Argentina (Annulment)* (n 132) 210.
[152] *MINE v. Guinea*(n 126).
[153] *Generica v Pharmaceutical Basics*, 1996 U.S. Dist. LEXIS 13716.
[154] Christopher Dugan, *Investor-State Arbitration* (Oxford University Press, New York 2008) 643.

Investment arbitration tribunals have rarely provided ammunition to losing states that seek to set aside Awards on grounds of procedural defect.[155]

As the Rules contain so many discretionary elements, it will always remain the case that arbitrators even bound by the rules can take differing views about the trade-offs between truth, liberty and efficiency on a case-by-case basis.[156] While the party's right to comment and counter such expert opinions must always be respected, this right need not be necessarily exercised by way of cross-examination at the hearing. If a party's expert, despite a request for cross-examination from the other party, does not appear at the hearing, his report can be taken into account by the arbitral tribunal as part of the party's written statement.[157]

The essential question is what obligations the tribunal has to consider, in regard to a duty to afford a reasonable opportunity to present each party's case. Because of differences in legal families, it is not necessarily the case that the principle of *audi alteram partem* comes with a right to be heard orally. Written submissions and evidence may suffice.[158] Thus, an English Court of Appeal concluded that a Swiss arbitrator who refused to hear oral testimony did not lead to a breach of natural justice.[159] In this case, there wasn't even a refusal to hear the case; rather it was an unavoidable circumstance.

Oral hearings can be for cross-examination and redirect examination, primarily in testing and bringing the witnesses to face conflicting evidence. Ideally, oral hearings should be less concerned with expanding on what was already said, as this would not be necessary if well said.[160] A tribunal may indicate that certain forms of cross-examination will be less helpful. An example would be in relation to cross-examination of legal experts, who have already provided detailed written submissions on points of law.[161]

When it is obvious that a case turns on which of the two conflicting witnesses is more credible, it makes a lot of sense to conduct a quick hearing, allowing each side to cross-examine the other's key witness.[162]

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[155] ibid.
[156] Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International2012) 759.
[157] Schneider (n 140)..
[158] Gerold Herrmann, 'Power of Arbitrators to Determine Procedures under the UNCITRAL Model Laws', as cited in Albert Jan van den Berg, *Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration, ICCA Congress Series No. 7* [1996] (Kluwer Law International, The Hague) 45.
[159] *Dalmia Dairy Industries Ltd v National Bank of Pakistan, [1978] 2 Lloyd's Rep 223.*
[160] Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 398.
[161] Karl-Heinz Böckstiegel, 'Case Management by Arbitrators: Experiences and Suggestions', as cited in Gerald Aksen and others *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing, Paris 2005) 124.
[162] David W Rivkin, 'Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited, Arbitration International' [2008] 24(3) Arbitration International 383.

1.1 ADMISSIBILTY OF REPORT DUE TO EXCEPTIONAL CIRCUMSTANCES

Art. 8.1 of the IBA Rules necessitates that a party appointed expert has to appear for testimony at the evidentiary hearing. And upon failure to do so, his Report is disregarded as decided by the tribunal by way of Art. 5.5. However if the tribunal decides that 'exceptional circumstances' exist for the non-appearance of the party appointed expert, then the Report can be considered as evidence.

In practice, the courts appear to be reluctant to pin down this notion of "exceptional circumstances". This is perhaps understandable: courts are always very reluctant to define what is exceptional, partly because it is more or less impossible to foresee what is exceptional, partly because "exceptional" may mean either very unusual or unusually compelling, and partly because defining "exceptional" limits the court's discretion for future cases. Thus, in *Robinson v Fernsby and Scott-Kilvert*[163] May L.J. stated that these issues could only be determined on a case-by-case basis.

An ICSID case on this point is Saluka Investments BV v Czech Republic, wherein the Claimant's request for a second round of written submissions was rejected, it being held that according to the applicable law, a second round of written submissions may only be granted under exceptional circumstances. Examples of Exceptional circumstances given were that new facts were brought by the Respondent party.[164]

The real challenge in maintaining consistency especially in the IBA Rules of Evidence 2010 is to articulate matters with such precision that parties can know what is expected in advance, tribunals can shape the process and follow their own mandate. Conversely, such rules and guides should not be so detailed as to constrain adjudicators from dealing appropriately with the special circumstances of individual cases.[165] The IBA Rules have provided for this use of discretion.

If the Report fulfils all the requirements of an Expert's Report as given in Art. 5.2, including the methodology used, it could be used in the written proceedings. It is indeed an exceptional circumstance when there is a refusal to give testimony. Also, in the light of above cases, we see that it is very difficult to pin down what is exceptional or not and hence it is left to the discretion of the tribunal to decide so.

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[163] *Robinson v Fernsby and Scott-Kilvert* [2003] EWCA Civ 1820, 96.
[164] *Saluka Investments BV v Czech Republic* 4P114/2006, IIC 211 (2006).
[165] ibid.

2. THE TRIBUNAL HAD AUTHORITY TO USE ITS DISCRETIONARY POWER

Some rules confer broad discretions on arbitral tribunals, subject to the contrary agreement of the parties. Article 19(2) of the UNCITRAL Model Law provides that *'(t)he power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.'* Art. 27(4) of the UNCITRAL Rules 2010 is to similar effect, as is Art. 9.1 of the IBA Rules on the Taking of Evidence in International Arbitration 2010. Article 34(1) of the ICSID Arbitration Rules indicates that '(t) *he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.*' The IBA Rules of Evidence 2010 also provide for a residual broad discretion, where the rules are silent and the parties have not agreed otherwise.[166]

The International Court of Justice has considered that a tribunal generally has a broad discretion as to the way to approach the evaluation of evidence. It has stated that *'(t)he appraisal of the probative value of documents and evidence appertained to the discretionary power of the arbitrator and is not open to question.'*[167]

Where evidentiary issues are concerned, the right to an opportunity to present a case and the right to equal treatment can be argued to conflict, when the two parties believe that there should be fundamentally different ways in which to provide a reasonable opportunity.[168]

If we consider how evidence must be offered or taken in the proceeding, the principle of flexibility is expressly provided. There is not a single best way to conduct all international arbitrations, and that the flexibility inherent in international arbitration procedures is an advantage. In paragraph 2 of the Preamble of the IBA Rules, it has been stated clearly that the Rules are not intended to limit this flexibility. Indeed, as noted in that paragraph, the IBA Rules of Evidence should be used by parties and arbitral tribunals in the manner that best suits them.

It is important to consider how standardised rules and guidelines may be interpreted. To some 'such attempts at procedural standardisation may be counter-productive, as they are often interpreted and applied in a formalistic and rigorous way rather than encouraging initiative.'[169] Most adjudicators would wish to have maximum predictability at the same time as maximum flexibility, aims which inevitably conflict.

Upon deliberation, the arbitrators can decide to consider an Experts Report as it is well within their discretionary powers under Rule 34(1) of ICSID Arbitration Rules to admit evidence as they deem. Rule 35 and 36 also emphasise the discretionary authority of the Tribunal on these procedural issues

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[166] IBA Rules 2010, art 1.5.
[167] *Honduras v. Nicaragua,* [1960] ICJ Reports 215,216.
[168] Waincymer (n 163)751.
[169] Arthur Marriott, 'Arbitrators and Settlement' in Albert Jan Van Den Berg (ed), *New Horizons in International Commercial Arbitration and Beyond* (ICCA Congress Series, Beijing 2005).

of admissibility of evidence. This discretionary power is also enshrined in Arts. 1.4 and 1.5 of the IBA Rules.

3. THE DEPARTURE IS NOT 'SERIOUS' ENOUGH TO ANNUL THE AWARD

Vivendi concluded that even where a ground for annulment existed, the ad hoc committee had the discretion not to annul if the error was not significant to the rights of the parties.[170] Article 52 (3) of ICSID provides that a committee "shall have the authority to annul the award or any part thereof", and this has been interpreted as giving committees some flexibility in determining whether annulment is appropriate in the circumstances.[171]

An arbitral tribunal that refuses to hear the testimony of a particular witness, even if sitting in some common law countries, is unlikely to have its award set aside solely on that ground[172]

The seriousness of a departure from a fundamental rule of procedure is determined if it is significant to the rights of the parties and is outcome determinative i.e. whether the tribunal would've reached a different conclusion if the irregularity was not there. The right to cross-examination violated is in no way a significant right, in the sense that questions of evidence are within the discretionary power of the Tribunal. An award is based on a lot of considerations, it is never decided on the basis of a single piece of evidence.

4. EXCESSIVE INTERPRETATIONS OF THE ANNULMENT GROUNDS UNDERMINES THE ICSID SYSTEM

One of the primary benefits of arbitration is that it provides an official termination to a conflict.[173] The *MINE* Committee found that annulment need not be granted, *"Where an annulment is clearly not required to remedy procedural injustice and it would unjustifiably erode the binding force and finality of ICSID awards."*[174] The *Wena* and *Vivendi* annulment decisions "contain further confirmation of this cautious attitude."[175] In Vivendi, for example, the ad hoc Committee concluded that it "must guard against the annulment of awards for trivial cause."[176] The decisions of the ad hoc Committees in *Eduardo Vieira v Chile* and *Fraport AG v the Philippines* are also along this line. Viewed in context, they do justify the commonly-expressed fear that excessive interpretations of the annulment grounds undermine the ICSID system.

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[170] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*(2002)ICSID Case No ARB/97/3, 66.
[171] Schreuer (n 124) 357; *MINE v. Guinea* (n 126).
[172] *Soubaigne v Lintmareds Skogar* (1985) Rev Arb 285; *Dalmia Dairy Industries v National Bank of Pakistan*(1978) 2 LLR 223.
[173] Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, Chicago [USA] 1981) 49.
[174] ibid 46; *MINE v Guinea,* (n 126).
[175] Schreuer (n 124) as cited in Emmanuel Gaillard and Yas Banifetami(eds), *Annulment of ICSID Awards* (JurisNet 2004).
[176] *Vivendi* (n 173) 63.

Article 52(1) (d), "serious departure from a fundamental rule of procedure," has been defined narrowly.[177] The narrow interpretation of the grounds for annulment helps to maintain the finality of ICSID arbitral awards. Many consider the finality of awards to be one of the primary advantages of arbitration.[178]

IV.CONCLUSION

Common and civil law approaches, to the use of experts in international commercial arbitration, vary from country to country. For example, the use of experts in the United States is widely different from that of France. Though, the IBA Rules have made an attempt to blend the common law and a civil law distinction of evidence collection, their job is still made out for them.

The arguments for both sides have been dealt with generously. In the authors opinion, it has been the trend that the ground of fundamental departure from rule of procedure is very difficult to prove and thereby difficult to get an award annulled. A serious violation is more than minimal and has a material effect on a party.[179] Ad hoc committees have consistently moved towards a narrower interpretation of the fundamental rule of procedure ground. The committees have consistently concluded that a violation of essential due process rights violate this annulment ground. The committees have considered, whether due process violations are serious, substantial, and outcome-determinative. Later decisions have relied upon the reasoning of previous committees, and that has contributed to consistency and uniformity in the interpretation of the fundamental rule of procedure ground.[180] But the issue is not a buried one, as the requests for annulment have been climbing.

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[177]David D Caron, Matti Pellonpää, Lee M Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, New York 2006) 42.

[178]Samuel A Haubold, 'Opting out of the US Legal System: The Case for International Arbitration' [1997] 10 Int'l L Practicum 44.

[179]Christoph Schreuer, *The ICSID Convention: A Commentary: a Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (Cambridge [England], University of Cambridge, art 52, 2001) 227.

[180]Albena P Petrova 'The ICSID Grounds for Annulment in a Comparative Perspective: Analysis and Recommendations for the Future' [2006] 10 VJ 287.