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**EVIDENCE BY WITNESS IN INTERNATIONAL
COMMERCIAL ARBITRATION**

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ABSTRACT

Present research is analyzing the witness evidence and witness evidentiary privileges in international commercial arbitration as compared to litigation and urges for the vital necessity to achieve the balance between the need to obtain evidence for the purpose of proper dispute resolution and fact-finding and the reasonably acknowledged privilege dealing with non-disclosure of sensitive business information. The importance of the topic is confirmed by the contemporary business practice.

The author comes to the conclusion that business privilege can, by extension of general doctrine of privilege for the purpose of application to international commercial arbitration, protect the lawful business achievements (including also those not covered by trade secrets privilege notion) to promote the development of business activities and preserve their reliable character, especially when the adverse party's abuse will destroy or misappropriate the commercial value of such information before any efficient judicial remedy will reach it. The methodological basis of the research encompasses the comparative legal method, legal analysis and legal modeling methods.

DEDICATED to

**Andrey Alexandrov (CCL) and Elena Kotlyarova (IBL),
Russian Alumni of CEU Legal Department (2004/2005 Academic Year)
for their help, guidance and moral support in my preparation and application to CEU,
to my former chief – attorney Gregor Muller – for wise advises, unvaluable experience with
international business law and for acquaintance with arbitration
and to my parents for their confidence in me and understanding**

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LIST OF ABBREVIATIONS

AAA	American Arbitration Association
Bar	Barrister association
CEO	Chief Executive Officer
CIETAC	China International Economic and trade Arbitration Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
ex ante	forthcoming
FDI	Foreign Direct Investment
IBA	International Barrister Association
Id.	Idem, the same source
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
IP	Intellectual Property
IT	Information Technology
LCIA	London Court of International Arbitration
M&A	Mergers and Acquisitions
R&D	Research and Development
UNCITRAL	United Nations Commission for the International Trade Law
v.	versus
WIPO	World Intellectual Property Organization

Introduction

Truth, like all other good things, may be loved unwisely;
may be pursued too keenly [and] may cost too much
(*Pearse v Pearse* (1846) 1 DeG & Sm 12)¹

The notions and problematic aspects of taking, presenting, evaluating and analyzing evidence in any court proceeding in any country are the issues of undoubtful importance constantly increasing under the influence of technological opportunities and the appearance of new types of evidence and means of its presentation, correspondingly.

The above mentioned phenomenon can be considered even more important in such type of economic dispute resolution as international commercial arbitration (transnational proceedings), the essence and specificity of that produce the need for a special consideration by research and deep analysis of the topic of evidence presentation.

Although due to the nature of international commercial arbitration written evidence are usually considered to be the main source of evidence it has to be recognized that not everything can be proved solely by the means of documents at particular instances. Witness testimony are also important, however, simultaneously with the decision to present evidence in their form, many procedural legal problems arise. They can sufficiently reduce the efficiency of this source of evidence for a party as well as for a tribunal. The problems can even lead to failure of the whole process (e.g. setting aside of an award), and this issue cannot be ignored².

The scope of the present thesis embraces evidence by witness in international commercial arbitration in the contexts of its contemporary problematic issues and in the light of an extension of legal privilege doctrine.

The author's research question selection was partially based on the Young International Arbitration Group topics for discussion (precisely, raised at the Symposia in Geneva on 17 March

¹ Cited in M.Sindler; T.Wüstemann, Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup? Vol. 23 No. 4 ASA Bulletin 629 (2005).

² See George Burn, Zara Skelton, "The problem of legal privilege in international arbitration", 72(2) Arbitration 128 (2006).

2005)³. Mainly the questions posed by P. Pinsolle, R. Mohtashami, N. Ghubril, M. Scherer and N. Tse, related to witness evidence and privilege that refer to contemporary unresolved problematical issues on the topics, served for the primary orientation in the field⁴.

In its turn, legal privilege is generally defined as "a legally recognized right to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information"⁵.

The issue of legal privilege in international commercial arbitration still have lots of grey areas, and although the problem is more important in litigation (public open process, no confidentiality concept as in arbitration), contemporary researchers claim it to be important in arbitration at least due to attorney-client privilege multi-jurisdictional problems⁶.

In case of international arbitration the parties as well as arbitrators are coming potentially from different legal systems and, thus, have totally different approaches to the issues of what amounts to pieces of information permitted to be protected by privilege. Thus, the issues are how to find an appropriate balance between the need to win the dispute and the maintenance of commercial tactics to

³ The Young International Arbitration Group (YIAG) (URL:<<http://www.lcia-arbitration.com/>>) is an association of arbitration lawyers, sponsored by the LCIA to exchange views on, and to debate, topical issues in international commercial arbitration. The group holds three symposia a year at venues throughout the world, providing opportunities for debate, discussion and networking. The list of topics, comprised by Domitille Baizeau and Bernd Ehle, is available at URL: <http://www.lcia.org/CONF_folder/documents/Topics-YIAG-Final.pdf>

⁴ Those questions were posed as follows: "Privilege as a bar to discovery. If there are professional/deontological rules governing discovery and counsel's conduct and obligation to disclose do these apply in international arbitration? Which system of law should be the reference point for determining legal privilege, where the parties / their lawyers come from different jurisdictions and are accustomed to working under different sets of rules? Should conflict of laws rules be applied to determine which jurisdiction's privilege rules apply? Which jurisdiction's conflict of laws rules should be applied? If the conflict of laws rules of the procedural seat of the arbitration are to be applied, is this appropriate where the parties have not selected that seat and/or where there are no other connections with that jurisdiction? Use of information (confidentiality and strategic issues). Is the content of the parties' negotiations protected by either "without prejudice" privilege or litigation privilege? If so, which privilege rules apply? Production of commercially sensitive information: How to define commercially sensitive documents? Which practical measures can be ordered by Arbitral Tribunals to ensure confidentiality and enable disclosure? Is 'witness conferencing' helpful?" etc. See URL: <http://www.lcia.org/CONF_folder/documents/Topics-YIAG-Final.pdf>

⁵ Mosk and Ginsburg, Evidentiary privileges in international arbitration Vol 50(2) ICLQ 345 (April 2001).

⁶ For example, see BURN George / SKELTON Zara, The problem with legal privilege in international arbitration 72(2)Arbitration 124-129 (2006).; SINDLER, Michelle / WUSTEMANN, Tina, Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup? ASA Bulletin, December 2005;

gain as much benefit from commercial secrets as possible and what should be the appropriate conduct of the counsel and arbitrators in this case.

The absence of mandatory procedural rules in international arbitration produces for the parties and arbitrators a large degree of freedom and also creates uncertainty. Different legal backgrounds of the participants lead to different expectations, and thus, procedure can only be met by laying down specifically case-related procedural rules to compromise between common law and civil law evidentiary rules⁷.

Authoritative researches were carried out on the topics related to evidence in international commercial arbitration⁸, as well as on the problems arising in connection to the evidentiary privileges in international commercial arbitration⁹ (especially – attorney-client privilege), but the direct connection, impact and the possibility of misuses arising out of interaction of witness testimony and evidentiary privileges in international commercial arbitration has not been subject to substantial scrutiny in the context of modern trends and developments. The reason for it is the fact that the problem of privilege in arbitration still creates uncertainties in practice.

In the present thesis the topic of evidence in international commercial arbitration is mainly addressed in the light of litigation and more flexible established rules and practices of civil and common law approaches to evidence, primary derived from their application for local national purposes. The synergetic interaction of these approaches strives towards shaping a proceeding into flexible, smooth process serving parties intent to settle a dispute by alternative-to-court mechanism.

⁷ Van Houtte Vera / Young Michael, Producing evidence in international arbitration: A comparative view of the use and abuse of disclosure and witness testimony// 1 Computer law review international 13 (2005).

⁸ E.g. PIETROWSKI, Robert, Evidence in international arbitration// Vol.22, Num.3 LCIA Arbitration International (2006); LEVY, Laurent / VEEDER, V.V. Arbitration and oral evidence, Paris, ICC Publishing (2004); BÜHLER, Michael / DORGAN, Carroll, Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration // Vol 17 (1) Journal of International Arbitration 02/01/2000, STRONG S.I / DRIES James J., Witness Statements under the IBA Rules of Evidence// Vol. 21 Num.3 LCIA Arbitration International (2005); VAN HOUTTE Vera / YOUNG Michael, Producing evidence in international arbitration: A comparative view of the use and abuse of disclosure and witness testimony// 1 Computer law review international (2005);

⁹ MOSK M. Richard / GINSBURG Tom, Evidentiary privileges in international arbitration// 50 International and Comparative Law Quarterly (2001); BURN and SKELTON, SINDLER and WUSTEMANN, supra note 5;

The topic of evidentiary privileges in international commercial arbitration, subject to specialist's analysis, gives rise to more questions than answers as itself. But the nature of privilege makes it applicable and relevant precisely to arbitration as a process involving business sensitive information and lacking efficient enforcement mechanism for such sensitive confidentiality commitments on international level. That is due to the fact that such information can be misappropriated and/or its profitable effect for its lawful owner distracted much easier and faster, than it will take time and money for the owner even to commence legal proceedings with the international partner.

The aim of the present research is to analyze the harmonization efforts and national regulation towards witness evidence and privileges and to prove the vital necessity to achieve the balance between the need to obtain evidence for the purpose of proper dispute resolution and fact-finding and the reasonably acknowledged privilege not to disclose certain facts.

The importance of the topic is confirmed by the contemporary business practice, where during the recent years there have appeared lots of professional occupations, the essence of business of which for development and maintenance of business is not only to achieve the results, but also to make them inaccessible to public, or at least exclusively accessible to a limited group of people, although the arbitration process is consensual and flexible, there are (and should be) interest balancing ways not to force those involved in such business to disclose such information in their witness testimony.

The author findings are that business privilege can, by extension of general doctrine of privilege for the purpose of application to international commercial arbitration, protect the lawful business achievements (including also those not covered by trade secrets privilege notion) to promote the development of business activities and preserve their reliable character, especially when the adverse party's abuse will destroy or misappropriate the commercial value of such information before any efficient judicial remedy will reach it.

In the present thesis the following issues will be addressed: the specificity of evidence by witness in international commercial arbitration and results of the influence of the commercial arbitration international proceedings features; their importance and the appropriate role of Counsel and Tribunal in acting towards witness testimony in international commercial arbitration (examination, cross-examination and witness conferencing); the doctrine of legal privilege, as well as its impact on international commercial arbitration and the need of reassessment of this doctrine in light of contemporary economic needs (e.g. business & professional rules).

Furthermore, the sub-doctrine of attorney-client privilege in international commercial arbitration will be focused on in the research, based on the grounds that: a) it is still a one of actual concern; b) it is very elaborated¹⁰; c) the elaborations already done on it can be applied to the research on seeking the opportunities to satisfy contemporary need for the extension of doctrine of privilege.

This paper will compare regulation and usages applied to evidence by witness in international commercial arbitration to the application of the same in litigation in common and civil law systems (Chapter 1), with further separate focusing on the witness testimony in arbitration and evidentiary privileges – an unresolved conflict of current importance (Chapter 2).

The methodological basis of the present thesis encompasses the comparative legal method, legal analysis and legal modeling methods.

¹⁰ LOUGHREY, Joan Legal advice privilege and the corporate client// 9 International journal of evidence & proof, (2005); DOSTART, Zach, Comment, Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine, 33 PEPAT L. REV. 723 (2006); LEWINBUK, Katerina AT, Transformation of the Ethical Boundaries of the Attorney-Client Privilege in Response to the Growing Complexity of the Modern Business World, 42 WILLAMETTE L. REV. 79 (2006); RICHMOND, Douglas R., The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era, 55 DEF. L.J. 1 (2006); VON SCHLABRENDORFF F. / SHEPPARD A., Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution”, ICC Publishing S. A. Whitesell Anne Marie (ed.) / ICC Publishing S. A. Global Reflections on International Law, Commerce and Dispute Resolution : Liber Amicorum in Honour of Robert Briner (ICC Publishing S. A., 2005)

Chapter 1 - Presentation of witness evidence in international commercial arbitration: techniques and boundaries

1.1 Examination of witnesses: preparing and controlling a written statement, an oral testimony or a 'witness conferencing'

It can be alleged, that witness evidence are less important in arbitration, because of the need of speedy and less costly process, than especially transnational litigation will be in international transaction. Generally, from the modern practice of international commercial arbitration, as A. Dimolitsa urges, it can be inferred that witness testimony are an addition to documentary evidence when the latter are insufficient, however, witnesses are often useful for additional information or making of certain clarifications¹¹. As Paul-A. Gelinas states, clear and precise oral testimony, besides complementing documentary ones, make an important contribution to arbitrators in the chasing of the truth¹².

In international arbitration, the use of witness statements, and the associated preparation of witnesses, enables both parties and arbitral tribunal to identify and concentrate on the critical issues in dispute which usually results in much more efficient hearings¹³. Although witnesses are sometimes given a secondary role, as explained, for instance by Dimolitsa, there are cases in international practice where, due to great volume of documents, the arbitral tribunal in making an attempt to find the main points in a extensive case file will refer to witness for clarifications and accurate details and, thus making witnesses participation indispensable. Dimolitsa also refers to taking of oral evidence as the second phase of fact finding of the case that is practically essential to find the supporting facts for the reasoning of the award. In practice both types of evidence – documentary and oral – are used in most

¹¹ Antonias Dimolitsa “Giving evidence: Some reflections on oral evidence vs documentary evidence and on the obligations and rights of the witnesses” in “Arbitration and oral evidence”, ed. By Laurent Levy and V.V. Veeder, Paris, ICC Publishing, 2004, at 12

¹² Paul-A. Gelinas “Evidence through witnesses” in “Arbitration and oral evidence”, see supra note, at 30; Redfern and Hunter name witness testimony “the second method of presenting factual evidence”, Alan Redfern, Martin Hunter, Law and Practice of International Commercial Arbitration, London 2004, at 361; Schneider states that notwithstanding the value that is given by different arbitrators to witness testimony in general, tribunals generally hear witness evidence, See Donald F. Donovan “Introduction to the fifteenth Annual International Commercial Arbitration workshop: Arbitral advocacy: Act III Advocacy with witness testimony”, Vol. 21, Num.4 LCIA Arbitration International 605 (2005)

¹³ Georg Von Segesser, “Witness Preparation in International Commercial Arbitration” Vol. 20 - N° 2 ASA Bulletin, at 227

international arbitration cases, that represents the real will of the parties and the arbitrators, sometimes for practical reasons related to the insufficiency of one type of evidence the other type may have more weight.

The question about on what type of evidence to rely as on the leading one can only be raised in internal preparatory communications of a party and its counsel. And it is highly probable that the answer will depend on the legal culture of the party and its counsel¹⁴. Dimolitsa explains noticeable difference between common law and civil law trained counsels in this case: the former will, as they were trained to do, produce all documentary evidence that they possess, even those against them, focusing on careful witness preparation instead, while the latter, not being used to pre-trial procedure, will examine carefully all the documents they have available and holding back those not providing effective support for the position and nearly not concentrating on the preparation of witnesses. Moreover, if the case can be argued on the basis documents only, the representative of civil law system will neglect work with oral evidence¹⁵.

Nevertheless, one who has absolute control over the taking of evidence is the arbitral tribunal that can refuse further evidence should a fact be already established with sufficient degree of certainty,

¹⁴ Dimolitsa, see supra note 11, at 13 -15

¹⁵ Dimolitsa, supra note 11, at 15; As Newman describes one of the characteristics of international arbitration is that continental european arbitrators emphasize actual words used by witnesses in answering questions less than american (or even English) lawyers do and they frequently simply prepare written summaries of the testimony signed after that by witness and, thus, not even actual words, but also inconsistencies exposed on cross-questioning are not preserved. But now the practice of tape-recording is also actively used, but it is not used efficiently by lawyers. See Lawrence W. Newman, Cross-examination in international commercial arbitration in "Take the witness: the expert speaks on cross-examination" L.W. Newman, Rikki Klieman (eds.), Juris Publishing, 2006, at 57

or refuse to admit evidence on the ground of it being irrelevant or immaterial¹⁶. But anyway the right of the parties to present the case using oral evidence cannot be neglected¹⁷.

The legal culture of an arbitrator may influence the rules on evidence that will be applied, non-admittance of certain witnesses, examination procedure and, very important, assessment of evidence by weighing it differently. But in most cases this psychological factor can be overcome and, thus, the arbitral tribunal, taking into consideration the arguments and facts presented, will uphold its internal cultural balance in assessment of evidence¹⁸. In most international arbitration proceedings, the parties may prefer an international standard which may combine aspects of U.S. civil procedure rules with those stemming from a civil law jurisdiction. With the aim of accommodating the expectations of the parties, the arbitral tribunal should take the initiative and seek to convince the parties to agree upon the most efficient procedure¹⁹.

One of the very interesting descriptions of the procedural problems based on transnational character of the proceedings was presented by William W. Park²⁰, who urges that the absence of settled standards leads to inequality, because procedural rights available in one system might be unknown or rejected elsewhere (e.g. witness interviews²¹ and oral depositions²²).

¹⁶ Conversely, it can ask a party to produce additional evidence of any kind anytime (e.g. Art. 20 (5) ICC Rules of Arbitration, Art. 24 (3) UNCITRAL Arbitration Rules, Art. 8 (4) IBA Rules), as well the tribunal may anytime order the appearance of a witness identified by the parties, but also of any other person to testify (Art. 20 (5) of ICC Rules of Arbitration, Art. 4 (11) of IBA Rules). If an affidavit is submitted, but the witness does not appear without a valid reason to testify, arbitral tribunal may decide to disregard such affidavit or infer that such evidence will be adverse to the interests of the party, but it is difficult to entail any consequences unless the witness is a party or its representative. If arbitrators consider it extremely important they, can refer to national court for assistance in providing appearance of the witness, if court assistance is generally accepted see Gelinis, supra note 12, at 15, 18.

¹⁷ Difficult balancing between the efficiency, time, cost of the proceedings and the principle of due process is illustrated by the case *Iron Ore Company of Canada v. Argonaut Shipping, Inc.* (US District Court, Southern District of New York, 9 September 1985, commented in *Yearbook Commercial Arbitration*, Vol. Xii-1987, Kluwer, at par 173-176) where the arbitrators after making the decision not to hear certain testimonies/witnesses will sometimes “go to great lengths in award, by instinct of self-protection, to prevent losing party from invoking Art. V. 1 (b) of the New York Convention or another applicable law¹⁷”. Gelinis, supra note 12, at 30, 41, 52.

¹⁸ *Id.*, at 12 -13

¹⁹ Segesser, supra note 13, at 223

²⁰ William W. Park, *Arbitration of international business disputes: studies in Law and Practice*, Oxford University Press, 2006, at 61

²¹ In this context, as, probably, the most powerful examples W.W. Park points to Germany in contrast to USA, because of an established prohibition to interview witnesses out of court in Germany (see John H. Langbein, *The German Advantage in Civil Procedure*, 52 *Chicago Law Rev.* 834 (1985) and American consideration of lacking of diligence by lawyers that fail to train their witnesses about the questions to be asked, that is in theory a

Different customs have also evolved with respect to appointment of experts, manner of their testimony hearing, the admissibility of such evidence²³, the scope of cross-examination²⁴. As the result of such allegations W.W. Park states that although there can often be reasonable arguments made for the choice of alternative rules, it is essential to preserve a fair treatment and expectations of both parties also before a hearing. The same opinion was expressed by other scholars, e.g. Dimolitsa - thus, the procedural rules applied to taking of evidence are to be determined in each case in advance to avoid surprises²⁵.

Analyzing the issue of tension between fairness and efficiency, W.W. Park states that there are various disputes and, thus, different applicable approaches to the issue of “surprise” element in evidence presentation. Some admit unpredictability in presentation of evidence as a positive element and base it on the assumption that a “caught” witness is likely to answer more accurately and sincerely, others think that the advance mutual arrangement over evidence presentation gives time that permits to understand its significance. To elaborate presentation more can help arbitrators to understand the facts properly. Also Park points to the debate about whether one fact witness may be present when another is testifying²⁶. Under s.615 of the US Federal Rules of Evidence it is possible for litigant to exclude witness from hearing when he is not presenting evidence (sequestration) to reduce the possibility of one testimony influence on that of another. But W.W. Park also mentions an opposite argument – the one against sequestration, the essence of which is in that the presence of such witness

possibility to prevent witnesses from being misled or surprised (see, e.g., Wigmore on Evidence (3rd edn) § 788.), Id., at 475.

²² By this W.W. Park meant that the IBA Rules of Evidence make no provision for oral depositions analogous to USA Federal Rules of Civil Procedure, Rule 26 (b) (1), Id., at 474.

²³ As an example, W.W.Park provides the USA “Daubert” motion, that may be made to disqualify an expert because of his method is not sufficiently reliable; when scientific or technical knowledge will assist in understanding evidence, an expert witness may testify in the form of an opinion if “the testimony is the product of reliable principles and methods” See *Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993), Federal Rules of Evidence § 702, Id., at 474.

²⁴ Another interesting example W.W.Park gives is the example of the tendency of British practice to allow cross-examination of any matter relevant to the arbitration’s claims, while American lawyers try to limit to the scope of direct examination (as oral or statement), Id., at 475.

²⁵ Dimolitsa, see supra note 11, at 12

²⁶ Park, see supra note 20, at 475

with relatively similar knowledge will indirectly force telling more truth a witness that otherwise will tell less²⁷.

The author of thesis supposes, that although this latter point may be practically lawful, it can seem idealistic, because if this possibility refers to two rival or two own witnesses they may be deeply interested in the outcome and be prepared to defend nearly any attack. In arbitration witnesses are often those interested in the outcome, because they are involved with one of the parties in the transaction and the outcome of the dispute can affect them, or affect their other legal relationship

1.1.1 Affidavits and oral testimony

Examination usually takes place in one, both or even all three procedural forms (if to consider “direct” and “cross” as types) – written witness statement (hereinafter referred to as “affidavits” not to be confused with general notion of witness statement), oral evidence and witness conferencing. Probably, these forms cannot be pure in nature, but the distinction and various combinations thereof due to the specific features are present.

In an average arbitration, each party will have one representative and will call two-three fact-witnesses, may be one expert-witness²⁸. The manner and the order of taking oral evidence, need for verbatim record²⁹, interpretation and other important issues can be decided upon as well as parties can agree on the introduction of witness statements³⁰. Affidavits will normally serve as a direct testimony.

²⁷ Id., at 475

²⁸ Gelinas, see supra note 12, at 36-37.

²⁹ Generally, in international arbitration proceedings, witness depositions will be recorded verbatim (both civil and common law lawyers are anxious to have stenographic records of the hearing, according to G. Born, note 139 below, at 93), as well as translation and interpretation will be required in lots of instances; parties may agree to have live note recording, but in general its absence does not violate due process by itself (the absence of the full transcript of oral evidence given does not violate due process– *Societe Sopip c/ Societe El Banco Arabe Espanol et autre*, Court of Appeal of Paris (1st Ch.C.), 14 Decemb. 1999, commented in *Rev.del Arbitrage* 2000, No. 3, at 471 -492, 481), see Id., at 42 and 52.

³⁰ Id., at 40; Chave claims that affidavits help the arbitrator and the parties to prepare for the hearing and save a considerable amount of time by dispensing with some direct examinations. See Carol Chave, *Starting an international commercial arbitration: using a preliminary hearing letter* 60-APR *Disat Resol. J.* 88 (2005); Fellas confirms that affidavits as now well-accepted in international arbitration when used, often brief the direct examination of witnesses, and the main focus of the hearings is on cross-examination of witnesses, which with other factors of its use saves a considerable amount of time. See John Fellas, *A fair and efficient international arbitration process*, 59-APR *Disat Resol. J.* 78 (2004); Due to Redfern and Hunter, for international commercial arbitration it is not always necessary for witness to give oral testimony if he has submitted the affidavits to make the oral phase shorter, See Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration*, London (4th ed. 2004), at 361-362; see also Louis L. C. Chang, *Keeping arbitration easy, efficient, economical and user friendly*, 61-JUL *Disat Resol. J.* 15 (2006); The view about the arbitrators requiring the

For Newman, affidavits are essential, particularly in situations where there is no or very little discovery (many of the continental European arbitrations)³¹.

Due to the flexibility of the process, there can be a little guidance found in arbitration rules about the way for the evidence to be presented to tribunal, but it should be managed to ensure the “maximum efficiency of the fact-finding phase”³². According to W.W. Park, international arbitrators have developed a general practice of requiring affidavits to be the limits for oral direct testimony³³. Yet, he mentions, significant opposite opinions exist on whether direct oral testimony should be entirely replaced, or just limited in scope, by affidavits. So some arbitrators preserve an approach of elimination of all direct oral evidence as to reduce time for hearing, but the other contrasting opinion suggests that it is an extreme approach and it unacceptably decreases a tribunal’s ability to comprehend facts and evaluate credibility of witness. Park states that the appropriate approach, due to the fact that most people better understand by a combination of both hearing and reading, is to combine, which many arbitrators in fact prefer³⁴.

Arbitration rules often provide for testimony contained in an affidavit³⁵, it has even become a common practice in international commercial arbitration.

witness direct testimony to be provided in the form of affidavits, which is precisely advisable for expert witness testimony in complex cases, is also upheld by Newman and motivated by the same objective. See Newman, *supra* note 15, at 59

³¹ Lawrence W. Newman, *Efficient organization of international arbitrations*, 8 *World Arb. & Mediation* Reat 82 (1997)

³² In merging two approaches of dealing with evidence the IBA Rules on Taking of Evidence (hereinafter - IBA Rules) “are the modern example of harmonization”, they can be followed by counsel and arbitrators alike “without hunting their inner sense of justice”, notwithstanding different cultural background. See Gelinas, *supra* note 12, at 43

³³ Pre-filed direct testimony can allow to a counsel a sufficient time to consider the other side’s arguments and evidence, and, thus, acts as discovery, because each side has opportunity to consider in advance what evidence the other has. But if oral testimony goes beyond the scope of the statement, there might be motions to exclude otherwise useful evidence, file supplemental affidavits, or recall witnesses for rebuttal. A party that ignored the requirement of advance written testimony would gain an advantage, since the other party would have unequal time to consider its adversary’s evidence and thus, probably, better inform the arbitrators on the merits, see W.W.Park, *supra* note 20, at 476

³⁴ *Id.*, at 476

³⁵ Art. 4.5 if the IBA Rules states that “each Witness Statement shall contain:

(a) the full name and address of the witness, his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant and material to the dispute or to the contents of the statement;

(b) a full and detailed description of the facts, and the source of the witness’s information as to those facts, sufficient to serve as that witness’s evidence in the matter in dispute;

Schlaepfer describes the usually procedure as follows: parties submit the affidavits with the memorandums and then at the hearing the witnesses confirm it orally and may be cross-examined (and re-examined if party who presented witness wants it); the scholar names the following advantages of the procedure:

- enables the party to narrow the scope of the issues to be addressed;
- assists the parties and the tribunal to prepare for the evidentiary hearing;
- assists tribunal to determine if specific witness testimony is relevant to the case or whether just the other evidence will suffice.

According to Schlaepfer, even though affidavits are generally accepted, practice and experience shows that parties, counsel and arbitrators do not always easily agree on their content, purpose and use in arbitration proceedings³⁶.

Affidavits do not act as additional opportunity for the parties to submit new factual allegations or to modify prayers for relief, even if signed by representative of the party - they are the means of adducing evidence, that are to be confirmed orally at the hearing, unless otherwise decided by the parties or tribunal³⁷. Arbitral tribunal can decide that all or some of affidavits will not be confirmed orally, like it, for example, was made in the decision by the Swiss Federal Tribunal (Jan. 7, 2004). Arbitrators may consider under the circumstances of the case not to be justified to summon witnesses at the evidentiary hearings if they have submitted affidavits, which do not imply that they

(c) an affirmation of the truth of the statement; and

(d) the signature of the witness and its date and place". Many institutional rules allow the use of direct written statements if the witness is available for cross-examination or for examination by the arbitral panel at a hearing, but it can be avoided also (AAA International Rules in Arts. 20.2, 20.3. 33 a.; UNCITRAL Rules in Art. 25.1, 25.4, 25.5; ICC Rules in Art. 20.6). Direct testimony in affidavits is considered an 'important strategical tool'. See T. Tallerica, A. Behrendt, *The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings*, 20 (3) *Int.Arb.J.* 300-302, 305 (2003).

³⁶ Anne Veronique Schlaepfer, *Witness statements in "Arbitration and oral evidence"*, see supra note 11, at 65

³⁷ *Id.*, at 67; in some instances, the arbitral tribunal will require affidavits to substitute the direct testimony completely, with oral examination commencing with cross-examination, in other cases, the arbitral tribunal will require that the affidavit provide only a general overview of the witness's testimony, with the witness able to supplement their testimony with direct examination at the hearing. In any event, the excessive use of written evidence in international arbitration reflects the influence of the civil law tradition. See Javier H. Rubinstein, *International commercial arbitration: reflections at the crossroads of the common law and civil law traditions*, 5 *Chi. J. Int'l L.* 303 (2004)

will not be taken into account as evidence³⁸. But this decision will not be made very often and the general tendency in international arbitration is not to take into account affidavits which have not been confirmed orally or are not upheld by other evidence³⁹ (e.g. Art. 4.8 of the IBA Rules), that is also reflected in IBA Rules Art. 4.7 – “Each witness who has submitted a Witness Statement shall appear for testimony at an Evidentiary Hearing, unless the Parties agree otherwise”.

Schlaepfer describes some important problematic situations that may arise⁴⁰:

a) When there is an agreement between parties that there is no need to hear witnesses (that “shall not be considered to reflect an agreement as to the correctness of the content of Witness Statement”, Art. 4.9 of the IBA Rules), the arbitral tribunal shall take the statements into account and has to evaluate it even without hearing its oral confirmation.

b) If the opposing party does not wish to cross-examine the witness, may the tribunal or the other party require that the witness appear and testify? Arbitral tribunal, of course, can order it, but in practice affidavits are mostly meant to replace direct examination (Art. 8.3 of IBA Rules – “The Parties may agree or the Arbitral Tribunal may order that the Witness Statement (...) shall serve as that witness’s direct testimony.”)⁴¹.

c) Nothing prevents attachment of the documents to the affidavit as long as they are related to its content; being attached considered to be a part of an affidavit and is viewed as such, for parties not

³⁸ Id., at 69,75. The scholar also points at the American decision rendered by the United States District Court (Southern District of N.Y.) on 12 January 1993 in case *Intercarbon Bermuda Ltd. v. Caltex trading and transport Corat*, publ. in XIX Y.B. COM.ARB.802 (1994), where the Court stated that it is “mindful of the factors weighing against the arbitrator’s decision to render judgement on the documentary evidence alone (...) despite this (...) arbitrator’s decision is reasonable ...[H]earing will not be required just to see whether real issues surface (...)”, see also *Griffin Indus. Inc. v. Petrojam*, 58 F. Supat 2d 212, 219 (S.D.N.Y. 1999) (“[w]hile hearings are advisable in most arbitration proceedings, arbitrators are not compelled to conduct oral hearings in every case.”); *Cragwood Managers, L.L.C. v. Reliance Ins. Co.*, 132 F. Supat 2d 285, 289 (S.D.N.Y. 2001) (upholding interim order issued without hearings or oral argument); *British Ins. Co. of Cayman v. Water Street Ins. Co.*, 93 F. Supat 2d 506, 512 (S.D.N.Y.2000), cited in Fellas, see supra note 30, at 75

³⁹ Schlaepfer, see supra note 36, at 69

⁴⁰ Id., at 68-72

⁴¹ Id., at 71, 75, see also: Michael Buhler, Carrol Dorgan, Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration, 17 (1) *Journal of International Arbitration* 3-30 (2000)

to produce in such way any additional documents; if any specific documents are cited in the statement without being attached to it – the opposing counsel should be entitled to obtain and examine them⁴².

One feature essential for witness testimony in arbitration – the possibility to contact witness before hearing is harmonized irrespective of national approaches to it in litigation. It is widely accepted in international arbitration that counsel may have contact with the witness prior to the evidentiary hearings⁴³, as well as that witnesses usually do not write their affidavits themselves – practically, their contribution is often only the date and the signature on the last page of the affidavit (in comparison to the other pages of the document); counsel helps the witness to focus on the relevant issues, then reviews the affidavit or drafts thereof on the basis of the story told, and witness is to approve the text: counsel is advised to use witness own words and expressions if they are understandable⁴⁴, and this practice usually even facilitates the submission and understanding of the affidavit⁴⁵.

The time and effort that counsel and the witness should devote to witness preparation, according to the Rooney's practical guide for counsel, depends on two main factors: the importance of

⁴² Schlaepfer, see supra note 36, at 68

⁴³ Redfern and Hunter, see supra note 30, at 364; A bar against a party (or a party's legal representative) appearing as a witness does exist in some legal systems – for example, in France and Germany– and this rule is still applied, on occasion, in international arbitration. For example, in ICC Case No. 7319, the Sole Arbitrator decided that a party, including its legal representatives (in this case its Directors), could not be heard as a witness in the arbitration. The Sole Arbitrator referred in this context to Article 14 of the then-applicable 1988 ICC Rules, which distinguished between hearing the “parties” and hearing “any other person”. Statements made by the Directors would be treated merely as declarations of the party that they represent. In contrast, an officer of the party – an employee, not its legal representative–could be heard as a witness. It appears that this case reflects the different practices found within the common law and civil law systems: the party that wished to present the Directors as witnesses was represented by Irish counsel; the party opposing this was represented by French counsel; and the Sole Arbitrator who decided the issue was German. See ICC Case No. 7319, 30 October 1992, 5 The ICC ICA Bulletin (1994, no. 2) at 56-59. In another award, the evidence of party representatives was admitted but given no weight by the arbitral tribunal, See Award of 15 October 1979 (1981) VI Yearbook Comm. Arb. 119. Cited in Bühler and Dorgan, supra note 41, at 30

⁴⁴ But it is considered important for the witness to feel comfortably in relation to his affidavit, because it will act as a direct testimony at a hearing. See Donovan, supra note 12, at 583

⁴⁵ Id., at 68-69; Wagoner confirms the tribunal expects affidavits to be those of the witness and not counsel and if not so - will be given it little or even no weight. See David E. Wagoner, Managing international arbitration: A Shared Responsibility of the Parties, the Tribunal, and the Arbitral Institution, 54-MAY Disat Resol. J. 15 (1999)

the specific witness to the client's case; and the overall importance of the arbitration to the client, usually measured by reference either to the amount in dispute or the principles at stake⁴⁶.

The scholar proposes the following scheme for preparing a significant witness in an important arbitration case to face the indispensable uncertainties of every international commercial arbitration hearing:

Step 1: request the witness to review the case independently⁴⁷

Step 2: review the strategies of the parties⁴⁸

Step 3: review the evidence in detail (most time-consuming)

Step 4: prepare for examination (principal)

Step 5: prepare for cross-examination and tribunal questions⁴⁹

Step 6: final preparation (review of the critical issues).

According to Gelinas, unless the parties have agreed otherwise, hearing shall be held in camera. And arbitrator may require leaving of any witness during the time when others are testifying, although experts will, as a rule, stay in the room throughout the hearings and generally testify last to have their conclusions and observations related more closely to events as well as to clarify or highlight some aspects.

Gelinas address several important problematic issues arising in course of arbitral proceedings⁵⁰:

⁴⁶ David P. Roney, *Effective Witness Preparation for International Commercial Arbitration: A Practical Guide for Counsel*, Vol. 21 No. 4 *Arb. Int.* 562-564 (2005).

⁴⁷ Before the first preparatory meeting, counsel should therefore provide the witness with a brief of documents for independent review containing: all other affidavits relevant to the evidence of the witness; all expert reports which are based upon the factual evidence of the witness; a point form outline of any contradictions between their affidavit and other affidavits. Counsel should emphasize to witness the importance of reviewing these documents in detail and encourage the witness to mark up the brief of documents and make a list of comments and questions for counsel, *Id.*, at 562

⁴⁸ To demonstrate to the witness that they are an important part of the team and help them to understand why it is necessary to focus on certain facts or documents in such great detail during preparation. For this purpose, counsel should provide the witness with a few-page strategic overview of the arbitration, the one part of which should deal with your client's case while the other should address your opponent's case. *Id.*, at 562 -563

⁴⁹ Is an essential phase, where the counsel must review with the witness all possible issues, which may be raised in cross-examination or by the arbitral tribunal. *Id.*, at 563

⁵⁰ *Id.*, see supra note 12, at 45-48, also their importance and significance is mentioned by Schlaepfer, supra note 36.

1. *Can witness be assisted by counsel during his testimony* (e.g. engineer)? – it may be possible, provided the testimony is not influenced or interfered with. But the question about the bearing the costs of such lawyer is made open by the scholar.

2. *Is the reading from the documents that are not admitted as exhibits permitted?* – witnesses are usually given relevant exhibits when they are testifying, however, the witness can use his notes, being prepared, however, that tribunal, addressed by the relevant request, will inquire as to the nature of notes to decide upon their production, but in most instances will find them not to be produced. If it finds the opposite – it should be filled in record and presented for the examination to the other party. If the circumstances will cause doubts about the need to produce these notes/document(s), that tribunal should inspect them and provide opportunity to do the same to the opposing party⁵¹.

3. *Can unequal time be allowed?* – if the parties present disproportionate lists of witnesses, equal time division will be unfair. Tribunal can also manage this aspect according to circumstances, but remember possible consequences of due process and equal treatment violation jeopardy.

4. *Can a testimony by a party's counsel be accepted?* – there is no rule in international arbitration to prohibit it, in contrast to most rules of judicial procedure before courts; counsel may present some facts that he has been made aware of in the course of preparatory work on the case and adjustment of exhibits, tribunal can ask him just to summarize or relate facts for the record, opposite party can question him directly. Counsel can help the witness, if the latter does not understand the point or have difficulties with the language of arbitration; in this case it makes nearly no difference, because the affidavits are carefully prepared by counsel.

5. *Does taking of pictures and filming serve for the benefit of justice?* – unconsciously, arbitrator may suspect witness of telling lies, but the perception will vanish over time after witness presentation; it is not possible to record gestures on paper, and thus, it could be helpful for the panel to exchange the attitudes to witnesses testimony and a solution can be found by having an assistant,

⁵¹ See Rivkin D.W., *Procedural Issues to Consider*, Ch.1, in *Practitioner's Handbook on International Arbitration and Mediation*, R.V. Rhoades et al., Juris Publishing, 2003 at para.6.06 and Gelinas, *supra* note 12, at 45-46

secretary or even professional to take some pictures of witness testifying (may be of the setting generally), even some short videos, but the issue should be raised during the first organizational meeting and should not to cause any harm or substantial inconvenience.

There can be some problematic situations out of the hearing, but required for it to be efficient. It concerns the taking of distant of not easily accessible testimony.

In case of international commercial arbitration there can be an assistance of courts of law needed for taking of evidence, also from witnesses. Courts, definitely, can assist the Tribunal for the needs of proper examination that due to the international features of the arbitration can be helpful.

Gelinas draws the applicable scheme for court assistance to examination as follows. Sometimes for the need of examination there can be rogatory commissions formed with, generally, the assistance of court of the place of arbitration and those at the place of witness residence. “Commission” is issued by local court to a foreign court that then summons an individual to testify within his jurisdiction. Once the witness knows that he will testify before his court, he is likely to consent to give evidence before court reporter and local counsel (if not the counsels involved in the case themselves) and the procedure will be guided by instructions issued by arbitrators for such examination abroad (sometimes it will just take form of questions-answers). Also arbitrator itself without all the tribunal being present can sometimes take evidence from witness, that can be useful in limited number of cases provided that the basic parties’ guarantees are present, but there is no unanimous view on the problem⁵². But there is a risk that arbitrator will pose questions or present the evidence received in a way that will prejudice one of the parties (probably, not the one that nominated him).

1.1.2 Witness conferencing technique

Examination can also be conducted through electronic means of video-conferencing, the quality of which has considerably improved, and, in the view of Gelinas, arbitrators should resort to it without hesitation, or at least propose its use to the parties for the purpose of collecting of evidence

⁵² Gelinas, see supra note 12, at 36-37

from witnesses hardly otherwise accessible. The scholar stresses its difference from online arbitration (that still has, if ever succeed to, to prove its position), because the high quality of the video-conferencing can practically be as effective as part of the life hearing⁵³.

Online arbitration and witness conferencing have common features, the most obvious of that is the extensive use of IT facilities in communication.

Witness conferencing can serve successfully as well for the limited purpose of assessing facts by confronting two versions of truth⁵⁴.

Although Schneider⁵⁵ expresses an opinion that the word ‘conferencing’ may not be the best choice, because it “implies everybody talking rather than having questioning”, in the author’s opinion is that the practitioner is not correct. “Conference” is a method of discussion with the aim to find the right approaches to the truth, that is also to some extent limited to certain problem in a context and involves questioning as an essential factor of fact finding (in respect to business or academic sense the essence can be regarded as nearly identical).

Different practitioners mention such advantages of witness conferencing techniques as:

- everybody is “brought into the same room” and questioned simultaneously (Schneider);
- it saves time, because the problem will be described once and not separately (Schneider);
- that is also a big advantage to have one telling his point of view in front of the others who experienced the events with him, “or who are his peers” and the degree of truth is increasing; it also contributes very much to clarification, especially in case of linguistic problems (Schneider);
- that creates the more comfortable atmosphere, reducing the adverse effects of tough cross-examination, and is more useful to getting experts to find common ground, which the tribunal finds desirable (Moser);

⁵³ Id., at 37

⁵⁴ Redfern and Hunter, see supra note 30, at 383

⁵⁵ Donovan, see supra note 12, at 606

- tribunal has an opportunity to manage witness confidence in more favorable environment, better then while the counsel is cross-examining the witness (Schneider)⁵⁶;

- the technique helps in avoiding some abuses in witness statements preparation - if everybody knows from the beginning that there will be witness conferencing held, the kind of witness statements that are prepared by the experts is different than otherwise, probably, because the experts allow less influence of on their testimony by lawyers being aware of further competing with same area professional, than in case of cross-examination (Moser);

- switching from “questioning versus technical knowledge to one of technical knowledge versus technical knowledge”, sometimes makes the process more efficient and the atmosphere - more cooperative (important where issues of proof of foreign law are involved) (Aksen)⁵⁷.

From the other hand, the problems that are advised to be kept in mind are the following:

- there is an essential need to determine clearly who does the questioning, otherwise the confusion arises; it doesn't make crucial difference, whether it is the Chairman or one of the arbitrators, but somebody must have control;

- once the discussion of an issue is over, there is an essential need to summarize what conclusion was drawn, which gives to the participants (witnesses/experts) a possibility to say that something is wrong, or it gives counsel a chance to clarify; and, thus, the contradictions are to be identified as well⁵⁸.

W. Peter⁵⁹ offers the approach of wider use of witness conferencing and presents his conclusions concerning this technique, based on his experience (11 arbitration in the recent 6 years) and research.

⁵⁶ Is also confirmed by Peter W., the authoritative scholar on witness conferencing, who states that this technique changes the way of interaction between counsel and the witness, reducing the impact of counsel's question on the witness response, being more the debate of “informed and specialized” witnesses than of witness and counsel, like in case of cross-examination. See Peter W., note 59 below, at 50

⁵⁷ For more detailed opinions see Donovan, *supra* note 12, at 605- 609

⁵⁸ Schneider in Donovan, see *supra* note 12, at 606 -607

⁵⁹ W.Peter, Witness ‘Conferencing’ Vol.18-N°1 Arb. Int. 47-58 (2002).

The author will summarize below the scholar's undoubtedly important findings and conclusions according to organization of procedure, advantages, disadvantages and perspectives of the witness conferencing.

Organization of procedure includes:

- it is necessary to get parties consent prior to the hearing to the use of witness conferencing;
- the principles expressed in IBA Rules in Art. 8.2 (witnesses questioned at the same time and in confrontation with each other) and 5.3 (party-appointed experts to meet and confer) should help to convince the parties of the interest in agreeing to witness conferencing⁶⁰;
- for the effective use the technique arbitrators should be as well informed on the key issues, as the carefully selected file submitted to them permits;
- it is important that a witness can make the point with reasonable speed and brevity, then it is time to turn to the opposing team and so forth;
- the technique requires from each witness a prior affidavit for the preparation of the arbitral tribunal;
- the use of IT is better to be prepared for the organization and presentation of documents and exhibits (permits switching quickly between all documents and exhibits referred to in the flow of the debate).

Advantages are the following:

- in the course of traditionally conducted hearing "the second witness will often explain why technically the first witness was entirely wrong, and nobody can effectively check or challenge"⁶¹ and, thus, simultaneous, joint hearing of all fact witnesses, expert witnesses, and other experts involved in the arbitration throughout the entire team against team interaction, and not a 'witness-by-witness';

⁶⁰ Terry F. Peppard, New International Evidence Rules Advance Arbitration Process in 73 Wisconsin Lawyer 3 (March 2000)

⁶¹ Thus, this traditional method of one-after-one hearing is of rather little usefulness in a technical fields and the method of witnesses confrontation is logical. Due to the experience of W.Peter, "nobody can be a better check and counterbalance to a witness with advanced expertise than the witness who was their counterpart during the contractual relationship", see supra note 59, at 48

- each relevant question is generally put only once and the most qualified witness will address it, while in the usual hearing the same question will be put to several witnesses;

- the difference with the traditional witness hearing is that counsel cannot easily build up in the direct questioning of their own witnesses a complete impression or description of an issue without being challenged and corrected by the opposing team; and where counsel is conducting cross-examination, they must accept that other witnesses from the opposing team may assist the cross-examined witness; this can help to evaluate the issues clarified by such witness evidence in light of the most probable position and facts presented;

- the duration of the hearing can be shortened to a part of the time that a traditional hearing would require, but it is not achieved at the expense of quality in of results;

- it generally gives one answer to the same question, because through a confrontation of witnesses issues became obvious even for the witnesses themselves, and thus, the answer becomes clear for tribunal and that contributes to the outcome of the case;

- if properly conducted the process should clarify the technical points at issue and permit the arbitral tribunal to apply the results to the specific dispute.

On summarizing his experience in applying the technique W. Peter comes to the conclusions that:

- the witnesses adapt far more easily to the technique than the lawyers involved⁶²;
- it requires from the members of the arbitral tribunal a fair knowledge and understanding of the technical issues concerning the dispute subject-matter;
- even apparently simple questions by questioning participants often bring out facts on which the parties have a very different understanding, although both sides have used the same technical notions;

⁶² Where the question is posed before team of witnesses and experts, the most knowledgeable witness will start to answer fast, obviously assisted by other witnesses of their team, and if jointly participating in the hearing, “no witness will miss any question that they are personally most qualified to answer” - thus, the system brings out the best level of knowledge. Id., at 49

- witness conferencing is very favorable for a settlement⁶³.

Disadvantages, analyzed by W.Peter, are often argued by other practitioners to be in:

- its putting a higher burden on the members of the arbitral tribunal with respect to preparation and conduct of the hearings⁶⁴;
- lawyers feeling disoriented and also fearing to loose the control of the witnesses⁶⁵;
- raising concern among practitioners that a witness may be influenced by listening to other witnesses⁶⁶;
- conferencing puts the burden of simultaneous presence on all witnesses, since most have to attend the full hearing (however, such a burden is largely compensated by the much shorter overall hearing time).

W. Peter outline the perspective of the technique as being quite appealing – as, definitely, successful at least in M&A, construction, R&D, IP etc. areas of disputes (“characterized by most witnesses being far more knowledgeable in the particular field than the members of the panel or well-prepared counsel”) that are based on a complicated contractual process, involving sophisticated technical issues, where most or all potential witnesses are not only factual but also quasi-experts. Consequently, witness conferencing would appear to be ideally applied in such circumstances⁶⁷.

It is important to mention several issues, with which the author of the thesis likes to come up with, as the result of analysis of the facts:

⁶³ Parties can settle during or at the end of the hearings (in the recent practice of W.Peter there were just 2 exceptions), because the parties realize clearly the strong and weak points of their positions and, thus, the result of several days of hearing will be reviewed in each party's internal discussions and lead therefore in most cases to a settlement, *Id.*, at 55

⁶⁴ However, if counsel for all parties both propose witness conferencing, it is likely that the arbitral tribunal would have to accept the proposal and the possitive features and result can overweight such a burden; *Id.*, at 56

⁶⁵ Especially that from common law jurisdictions, that are often taught not to ask a question on cross-examination without knowing the answer, but usually after a few hours, it is capable of being overcame by the counsel if he adapts to the method of the conferencing interrogations, different from usual cross-examination in court; also the process itself does not eliminate cross-examination, *Id.*, at 55-56

⁶⁶ But the scholar recommends the technique mostly when dealing with technical witnesses who have already filed the affidavits and studied those of their counterparts, thus, such concern is unfounded; if it is to appear necessary from the circumstances, fact witnesses whose recollection may be challenged by another fact witness may be sequestered when credibility is at issue, but W. Peter himself has never seen a procedural application to that effect or a situation in which the panel on its own initiative considered this necessary, *Id.*, at 55,58

⁶⁷ *Id.*, at 58

- the technique is understood by practitioners as the one applied – mainly – to two issues – either for examination of distance witness by tribunal (e.g. Gelinas) or for technical knowledge interactive confrontation for the sake of quick and efficient fact-finding (W. Peter);

- in contrast to online arbitration, this is an example of a more realistic, wise and promising use of IT opportunities, but for not putting in jeopardy the enforcement and related issues (by the mean of V I (b) ground of the New York Convention invocation) it should be better agreed by parties in writing (may be even with the prior explanation of technique precautions); and also it presumes the advanced IT availability and experience of the use thereof by arbitrators and witnesses;

- if this is a realistic and working way to reduce the adverse effects of presenting witness testimony (e.g. statements written by the counsel) it can and should be permitted to contribute to the overall efficiency to uphold the advantage of procedural flexibility attributed to arbitration, but as for now it still can be used successfully for a limited number of cases and even applied to the limited number of issues, that can require additional efforts and risk undertaken by tribunal by proposing it;

- due to the fact that arbitrators as well as counsels have an implied obligation of making the best efforts for the achievement of the most favorable result in respect of the case they will have to accept and apply the technique and adapt to it, but, probably, counsels will be interested in it only for particular cases with no better alternative to make a process efficient.

In the present chapter of the research the author paid more attention to witness conferencing because of the several factors: a). it is relatively new and its practical impact position in international commercial arbitration is still rather contradictory; b). it is, definitely, something which features can be fruitfully used and what can lay claim into future; c). it can be seen as applicable to international commercial arbitration more, than to ordinary litigation because of the costs and practical necessity attributed to the difference of the categories of the disputes handled by this two types of proceedings (to be more precise – due to the transfer of a large quantity of commercial disputes to arbitration from litigation).

1.2. Cross-examination: the importance and the appropriate role of Counsel and Tribunal

1.2.1 The essence of cross-examination

Needless to say that cross-examination is important for any dealing with witness testimony in course of any proceedings⁶⁸. It can be considered as the best test for the procedural weight of evidence. Witness has not only appeared and confirmed his affidavit or gave oral evidence, but also was unsuccessfully cross-examined by the adverse party.

Dimolitsa urges that: “As a result of cross-examination any testimony – even those prepared with all due professional integrity –may be reformed and let emerge or permit the approach of the “whole truth”⁶⁹.

Due to Newman, the aim of cross-examination is the alteration by various means the use of the witness direct testimony, by reducing its credibility or persuading the witness to alter testimony given on direct examination in favor of the cross-examiner, but the scope and traditional features of the technique in international arbitration are not so wide and oppressive as, e.g. in dealing with criminal cases in USA⁷⁰. But the scholar accentuates that although the time allowed for the cross can be short, its careful and skillful use can give beneficial results.

Some scholars have stressed the impact of the difference of the cultural background on cross-examination of witness in international arbitration⁷¹:

Cross-examination is an additional potential source of conflict, stemming from different views of

⁶⁸ Notwithstanding the obvious character of such claim, sometimes the situations of claiming the contrary arise, e.g. in the *Paklito Investment Ltd. v. Klockner East Asia Ltd.* case in arbitration under CIETAC rules the party was denied the right to cross-examine expert about his report and the party in which favor the award was rendered provided the ground against the invocation of absence of opportunity to present its case that there is no right to cross-examination either in Chinese law or under CIETAC's Arbitration Rules. Professor An Chen involved after in the court proceedings argued that this was the misreading and the right to cross-examination is a fundamental legal principle. His view was generally confirmed in the same proceedings by Mr. Anthony Neoh Q.C. who stated that “The underlying principle in Law is that each party will have the opportunity to challenge evidence collected by the Tribunal (including expert evidence) before the judgement is rendered”. Although the case does not refer precisely to witnesses, present case involving the ground of equal treatment in arbitration, shows the fundamental character of the cross-questioning of witness stage. *Paklito Investment Ltd. v. Klockner East Asia Ltd.* UK, High Court of Hong Kong, 1993 (Vol.2) Hong Kong Law Report 40, See e.g. Varady, Tibor / Barcelo, John J. III / Von Mehren, Arthur, *International Commercial Arbitration: a transnational perspective*, 2 ed., Thomson West 2003, at 511-519

⁶⁹ Dimolitsa, see supra note 11, at 17

⁷⁰ Newman, see supra note 15, at 59

⁷¹ Tallerica T., Behrendt A., see supra note 35, at 304;

oral testimony. Under the American system, cross-examination is the core of a trial, the true testing ground for oral evidence. How a witness deals with cross-examination determines the value of his or her testimony. On the other hand, Continental Europeans view oral testimony with Skepticism and cross-examination with animosity. They perceive American and English cross-examination as a process of trickery designed to confuse witnesses rather than to elicit vital information or impeach credibility. In addition, they believe that witnesses generally lie and present only the facts most favorable to their position⁷².

As Newman outlines in one of his recent articles, the trend in international arbitration witness evidence presentation is towards “Americanization” of the process, although cultural differences will always exist and result in risks and danger for the participants⁷³.

According to Redfern and Hunter, in many civil law countries, party’s cross-examination of witness is not permitted, but it does not concern international arbitral tribunals and the option is given if the party so requests, but they make important inference that then to subject witness to lengthy cross-examination before the tribunal composed mainly of the civil law countries can turn to be a sort of a detrimental strategy⁷⁴.

1.2.2 Preparation for cross-examination

Next to the last step 5 of the Rooney’s model of witness preparation is the prepare for cross-examination and tribunal questions, in relation to that he advises to:

1. Review the Issues for Cross-Examination and Tribunal Questions
2. Discuss Guidelines for Responding to Cross-Examination and Tribunal Questions

Counsel should then give to the witness the following general guidelines for responding to cross-examination and tribunal questions: listen to the question; always tell the truth; if you do not hear the question, ask for it to be repeated; if you do not understand the question, ask for an explanation; do not answer complex questions; pause and think before answering; correct any factual errors in the question; answer only the question asked; do not guess or argue; admit what you have to etc. The best possible preparation for the rigours of cross-examination is to subject the witness to several rounds of

⁷² Lawrence Newman, Evidence in Arbitration, N.Y.L.J. 3 (1999), cited in Tallerica T., Behrendt A.; see also Lawrence W. Newman, International arbitration hearings: showdown or dénouement? 5 Tul. J. Int'l & Comat L. Spring 1997, at 394

⁷³ Newman, see supra note 15, at 68

⁷⁴ Redfern and Hunter, see supra note 30, at 382

very aggressive cross-examination. With each round, the witness will become more comfortable with the process and, ultimately, more confident and credible⁷⁵.

Newman states that such cultural factor as the common feature that business people are not accustomed to appearing as witnesses in litigation, tend not to take the process sufficiently serious, and consequently, are not taking enough time to prepare for giving testimony can help the cross-examiner. This trend exists also because they assume that confidential documents (intra-company) are not available to cross-examiner or/and in the companies with strong cultures of corporate loyalty there is an “institutional bias” to lie for the sake of company, regardless of the consequences. And, according to Newman, when lies are told, effective cross-examination can be very useful⁷⁶.

In principle, the scope of direct examination should be limited to the content of witness statement – confirming or explaining in more details, without repeating the content (sometimes witness merely confirms that the content is accurate), but, definitely, the scope of cross-examination should not be limited in the same way, not to prevent the opposing party from questioning by submitting an affidavit that deals only with unimportant issues⁷⁷.

Keeping records of the proceedings enables a cross-examiner to confront witness with what was said on direct, and it certainly helps in summarizing later to point out exactly how the witness' words on direct were contradicted by him in his cross⁷⁸.

According to Hamilton, when witnesses are testifying not in their own language (it is not uncommon for international arbitration) it can spoil the effect of cross-examination simply because of repetition, and the loss of the track. Another aspect, mentioned by the practitioner, is that if someone is trying to testify in non-native English, which is often, the cross-examiner, has to take great precautions

⁷⁵ Roney, see supra note 46, at 567-568

⁷⁶ Id., at 59-61

⁷⁷ Schlaepfer, see supra note 36, at 72

⁷⁸ Newman, supra note 31.

not turn the witness into a victim, in case of what the cross-examiner can lose the advantage of the testimony that he has received⁷⁹.

The evidence of adverse witnesses, cross-examination, and questioning by the arbitral tribunal are all filters which, when properly and diligently applied, has the effect of reducing all of the evidence to the essential truth of the matter⁸⁰.

In the case *Maiocoo v. Greenway Capital Corp.*⁸¹, one of the Greenway's arguments raised for the vacation of the award was that it was denied its right to confront and cross-examine the testimony of a witness, who testified telephonically. The court asserted that "[i]n light of the fact that there is no evidence that the arbitrators could not assess the credibility of [the witness], and in light of the fact that many arbitration hearings take telephonic testimony, the Court concluded that Greenway [was] not entitled to relief based on its purported inability to confront and cross-examine [the witness]" and the arguments was dismissed.

1.3 Managing analysis and evaluation of witness statement: witness of fact and expert witness

1.3.1 Witness identity, due process and the role of the counsel

For the evaluation of witness testimony, the question of who is testifying is highly relevant.

As a general rule, any person can testify⁸², without being of some special capacities or qualifications. The variety of roles includes party's representative, former or present employee, consultant or expert remunerated by a party or appointed by arbitral tribunal, spouses or other related persons, "sachants" (an outside person being independently familiar with facts and circumstances or

⁷⁹ Donovan, see supra note 12, at 608

⁸⁰ Segesser, see supra note 13, at 226

⁸¹ See Arbitrator "misconduct" insufficient to vacate award, in 9 World Arb. & Mediation Reat 182 (July 1998)

⁸² e.g. "Any individual intending to testify to the arbitral tribunal on any issue of fact or expertise" (LCIA Rules, Art. 20-7); Europeans and American arbitrations differ in relation to distinguishing between parties and witnesses. Americans don't make such a distinction, but a party's representative is only allowed to give a presentation, but it's just as though he were a kind of assistant to the lawyer rather than a witness whose word can be relied on. See Newman, supra note. Due to Segesser, although parties and their employees are not capable of giving evidence as witnesses in state court proceedings in certain civil law jurisdictions, it is generally accepted that they should be heard as witnesses in the context of international arbitration. See Segesser, supra note 13, at 226; All of the major sets of arbitration rules contain provisions on the testimony of witnesses. While some rules provide for witness statements (UNCITRAL Arbitration Rules, Article 25, para. 5; LCIA Arbitration Rules, Article 20.3; AAA International Arbitration Rules, Article 20 para. 5.) and Article 20.6 of the LCIA Rules even explicitly permits the interviewing of witnesses, others do not address such issues at all (e.g. ICC Rules of Arbitration). Segesser, at 222

arbitrated issues) and “amicus curiae”. About the latter there should be kept into mind that if it is a party who requests the hearing of a certain person as amicus curiae, it could be a disguised application for an appointment of expert⁸³.

In his article on witness evidence Gelinas also discusses the important obstacle for the treatment of witnesses – if the internal procedural rules recognize the witness status of certain persons only (those sworn or who does not represent a party), then its non-observance will amount to a ground for annulment. But generally, hearing of parties’ representatives and any other persons who can give relevant evidence are normal practice, no matter under what rules arbitration is conducted⁸⁴.

As Gaillard points out this distinctions are of little significance; witnesses are not generally under oath while testifying and arbitrators always are empowered to evaluate the weight of testimony⁸⁵.

A party may not always be in a position to know who will be better suited to testify on a given aspect of issue until all the briefs are produced, it may be sufficient to provide in briefs which allegations will be proven by oral evidence and disclose the names of the witnesses at a later time. Because premature provision may be dangerous, it should not influence the tribunal’s attitude to evidence beforehand, even if procedural and agreed terms are respected by the party and also can act as tactical move for other party not to influence potential witnesses and not to obtain better understanding of party’s strategy⁸⁶. Other party may have planned certain aspects of evidence presentation according to which witnesses have been called by the other side, as well as tribunal itself may look forward to hearing testimony and question particular witness, so that will be unfair for the party to cancel at the last minute the presence of the announced witness; should other party desire to question the witness whose presence was announced by the other party, that one should be present notwithstanding party’s wish not to question him, unless valid reasons for his not being present are

⁸³ Gelinas, see supra note 12, at 32

⁸⁴ Id., at 32

⁸⁵ E.Gaillard and J. Savage (eds), *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer law international, 1999, at 699

⁸⁶ Gelinas, see supra note 12, at 35

provided. Otherwise, according to Gelinas, the arbitral tribunal can draw unfavorable inferences from such party's behavior. But it should be subjected to the equal treatment that poses the question of the role of due process principle in the evaluation of testimony.

The role of due process principle in the assessment of witness evidence is enormous. Evidence can only be fairly assessed if the due process and equal treatment principles are not violated⁸⁷.

No party can be clearly favored by the tribunal, *inter alia* by providing it with the opportunity to present "eleventh hour witness", which can amount to violation of due process⁸⁸. Admissibility of evidence in arbitration is not as strict as before domestic courts and in his assessment of the probative value of evidence arbitrator will take account of all circumstances, and not allow evidence compelling ethical standards to influence a decision on some procedural issue that arose in connection to evidence⁸⁹.

According to Schlaepfer, if the arbitral tribunals come to the conclusion that affidavits replace direct examination, they should also consider them as such when deciding the case, even if there was no cross-examination. The tendency in international arbitration is to give little credit to affidavits, especially when the witnesses not heard in the course of an evidentiary hearing. The scholar thinks that the best solution is to authorize both parties to request the appearance of witness, even if the affidavits will any way serve in the proceedings as direct testimony, because according to efficiency principle, direct examination can be limited to a confirmation by the witness of the accuracy of statement or may serve as well as some additional explanations related to major issues. Each arbitrator has a different approach to taking evaluation of the role of oral evidence or affidavits, but if the witness

⁸⁷ Id., at 44, See also Redfern and Hunter, *supra* note 30, at 383

⁸⁸ Gelinas, *supra* note 12, at 36; In the case *Maiocoo v. Greenway Capital Corat*(No. 97-MC-0053, 1998 U.S. Dist. LEXIS 836 (E.D. Pa. Jan. 29, 1998) the court addressing Greenway's allegations that the arbitrators were guilty of misconduct stating that "[a]rbitrators are to be accorded a degree of discretion in exercising their judgment with respect to a requested postponement," the court concluded that the arbitrators had a reasonable basis for denying Greenway's request for a postponement and added that it "was poor judgment on the part of Greenway's counsel to wait until the last day of the hearing to inform the arbitrators that it planned to call a witness who simply was not available that day." Id.

⁸⁹ Id., at 46, also see J.-L. Delvolve, J. Rouche and G.H. Pointon, *French Arbitration law and Practice*, kluwer Law International, 2003, para. 240, at 129; Gelinas also refers to Art. 9.2 (b) of IBA Rules in this respect

performance is not convincing and the facts are not supported by other evidence, it will not be, generally, taken into account.

This is, due to Schlaepfer, because it is widely accepted that it is the lawyers who write such statement, but anyway there is no doubt that affidavits are widely used in international commercial arbitration –to increase the efficiency of the arbitral proceedings but can act as rather ineffective to convince arbitral tribunals⁹⁰.

Arbitrators will naturally rely on their own experience in assessment of each testimony in light of persons direct or indirect relation with the party, his financial or other interest in the case, and the statements of one witness will be balanced against that of the other witness(es), even the witness attitude (including psychological signs and effects) will be taken into consideration⁹¹. “Credibility is paramount in assessing the weight of evidence (...) not only from what the witness says but also through his whole conduct”⁹².

Credibility is, probably, the main aspect the counsel should be prepared to manage while preparing and controlling the performance of witness testimony, especially for the purpose of not making the use of witness evidence just a spending of preparatory time, because somebody had something to tell.

For starting to predict and manage evaluation of witness statement the counsel shall begin to judge the utility opportunity of the individuals before him. The main questions that are to arise will be “Who knows the key facts?”, “Who can testify to them with the greatest clarity and persuasive effect?”, “Who becomes inarticulate or stutters under stress?”, “Who is untrustworthy or comes across as untrustworthy?” as to the essence of evidence and practical –on availability in time of trial etc.

⁹⁰ Schlaepfer, see supra note 36, at 71-73

⁹¹ Gelinas, see supra note 12, at 32

⁹² Id., at 47; Redfern and Hunter as well confirm the necessity of witness presence and giving oral evidence on cross-examination at least for the evaluation of witness evidence and stress the little, if any weight of “untested” witness with “clear interest” in the case testimony, see supra note 30, at 365

Rifkind also states that “witness should be prepared in detail, so far as humanly possible”⁹³. Although it is a purely American approach, in my opinion, it is justified in general in the work with witness testimony. At least because of rival’s aim to discredit its evidence and because of human attitude factor that individual will not take the issue as serious as life to prepare to defend it.

As a part of the strategy, if it does not already exist, the lawyer can establish an attorney-client relationship with the witness which permits the latter to pure out all the truth, and the former – to give privileged advise⁹⁴. Also witness must be told about arrangements of the forum in which he will testify, environment, about the other party and mechanics of giving testimony, he should also have an idea of the impact of his evidence on the outcome of the case, often he needs to see a copy of pleadings. Due to Rifkind, it is highly inadvisable to give the witness a very one-sided view, either orally or in writing, of the controversy, because the witness needs to understand what both sides are claiming and, thus, what is in dispute. Witness has to be shown every document with which his testimony may be challenged. Also, Rifkind stresses, the witness can be cross-examined about whatever documents he/she was made aware of and, if all the witness saw was a definitely biased account, it will not enhance its credibility⁹⁵. The scholar states that the lawyer may advise the witness on the order, style, and choice of words to make points of his testimony clear and unambiguous. Preparation is also done because the leading questions are usually impermissible, and so “[b]efore he takes the stand, the witness should know what each of your questions is aimed at”⁹⁶.

Also due attention, according to Rifkind, must be paid to preparation of witness for cross-examination, because its principle object is to damage the credibility of witness, to show defects of memory, presence of bias, exaggerating, ignorant or knows facts inconsistent with his direct testimony; damage to credibility can be very serious and is not rare; credibility may be even more

⁹³ Robert S. Rifkind, Practice of horseshed: the preparation of witness by consel in America in “Arbitration and oral evidence”, at 57

⁹⁴ Id., at 57

⁹⁵ Id., at 58, 62

⁹⁶ Watler Barthold, Direct and Cross-examination, in Federal and Civil Practice (G.M. Vario, ed.) (N.Y.S. Bar Assocoaiton, 1989), 644-645, cited in Rifkind, supra note 93, at 59

important than the substance of his testimony, so his answers are not to be based on guesses, speculations or even assumptions. And unless he is an expert witness he/she must not offer its own opinion or answer hypothetical questions, and not volunteer⁹⁷. And, thus, not to produce unintentionally false or inconsistent evidence.

1.3.2 False testimony

Definitely, the issue of false testimony should be examined and analyzed in relation to its impact on credibility of witness and other possible consequences. The question also worth mentioning because of its specificity (in comparison to litigation) in arbitration.

There are some certain to reasonable extend rights and obligations of the witnesses, about what Dimolitsa emphasizes an interesting feature, that can clarify some differences between the same in litigation - he points out that it is not necessary to make difference between parties and third parties, as well as appearing - testifying and telling the truth. Parties and their representatives have an obligation and the right to appear and testify and there is also parties' obligation arising out of contractual relationship to act fairly and to inform could operate even during the arbitration proceedings towards the other party⁹⁸.

Because of the right to silence in litigation it is accepted that the testimony does not always disclose the whole knowledge the witness has and, thus it is accepted that honest testimony are not always the "whole truth"⁹⁹. Then Dimolitsa raise the lawful and logical question of that who that one is to draw the line between testifying and telling the truth, and how, and answers it that that are, probably, representing counsel and the witness himself at the time of preparation of the affidavit, including or not the appearance to testify in person. For the scholar that means to be the "cultural background and integrity of the counsel and witness [that] dictate the substance of the testimony",

⁹⁷ Rifkind, see supra note 93, at 61; See above the sub-chapter on cross-examination.

⁹⁸ Dimolitsa, see supra note 11, at 15

⁹⁹ Id., at 16; Surprisingly, due to Newman, in european continental arbitration the inconsistency close to lie has less crucial effect on arbitrators and any serious consequences, than in american cases, most probably due to the fact that witness testimony in Europe means less due to the presumption that the witness is lying with the help of the party's representative. But this can be cured by presenting the document which the witness wrote or was aware of (better –that date from before the dispute arose) that directly contradicts his testimony, the effect will be striking. See Newman, supra note 15.

which is given for the sake of the particular party to win the case¹⁰⁰. The interesting clarification should be made that by this argument the scholar refers to any witness, that can be representative or an employee, but as well - just a third party.

The issue of the oath giving also arises in connection with false evidence treatment. Generally, arbitrators as being “private individuals” feel not qualified to use the oath giving device¹⁰¹ and in practice arbitrators prefer to ask witness in an informal manner that they will tell the truth¹⁰². For any case there is a valid ethical obligation upon the counsel (that is confirmed for the European counsel by CCBE¹⁰³ and moral – on witness to “refrain from knowingly giving false or misleading information”. False testimony undiscovered during arbitral proceedings (i.e. cross-examination) can then constitute the basis for challenge of an award, that will, thus, be prejudicial to one of the parties and it will seek remedy¹⁰⁴.

Such award in general is not subject to any remedy, but in exceptional cases (when false testimony amounts to fraud) there are four types of solutions¹⁰⁵ to this problem: set aside on the ground of public policy¹⁰⁶; award is reconsidered by judicial authority¹⁰⁷ or by arbitrators¹⁰⁸,

¹⁰⁰ Id., at 17

¹⁰¹ This is also position adopted by national laws of some countries (France, Germany, Sweden, Italy, Greece), but in some other arbitrators are expressly authorised (UK, Belgium, Netherlands). In any event, witnesses on testifying orally are required by the arbitral tribunal to tell the truth and are informed of possible consequences out of false testimony under the law of the place of arbitration. The most enforceable “lato sensu sanction” for false testimony – it may be disregarded by the arbitral tribunal and produce undesired consequences for party in the award. See Dimolitsa, supra note 11, at 17 -18, 20

¹⁰² Id., at 17

¹⁰³ see the Code of Conduct for Lawyer in te European Community (CCBE) Art. 4 (4) and Art.4 (5) (on lawyers-arbitrators relations)

¹⁰⁴ Dimolitsa, see supra note 11, at 17, 21

¹⁰⁵ For more detailed description and analysis Dimolista refers to see Yves Derains, “La reviiion des sentences dans l’arbitrage international” in Law of International Business and Dispute Settlement in the 21st Century, 2001, at 165, especially at 169

¹⁰⁶ UNCITRAL Model Law (preparatory work), French law (Art. 1507 NCPC), that expressly provides for possibility to revise an international arbitration award (to this solution the case SA Thompson CSF v. Societe Brunner Sociedade Civil de Administacao Limitada and Societe Frontier AG Bern, Paris Court of Appeal, 10.09.1998, in Rev.arb.2001, at583, serves as an illustration). This french approach has been critisized by Derains, Fadlallah, according to Dimolitsa. Also other national laws state fraud as a ground for annulment – Austrian Code of Civil Procedure Art. 595; Greek Code of Civil Procedure Art. 857 (8) and 544 (6); Japanese Code of Civil Procedure Art. 801; US FAA Sect. 10 (a). See Dimolitsa, supra note 11, at 25

¹⁰⁷ Art. 1068 of Netherlands Code of Civil Procedure (NCPC); Art. 43 of Spanish law 60/2003 on arbitration of 23 December 2003, Id., at 25

¹⁰⁸ Art. 51 (3) of the ICSID Convention; Fougierolle v. Procofrance, 25 May 1992, Rev. arb. 1993, at91 (“results from general principles of law on fraud, notwithstanding Art. 1507 of NCPC (...) an internaional arbitration award made in France may, exceptionally (...) be retracted if the arbitral tribunal is still constituted (...) (or can

reconsidered by arbitrators if leave is given by judicial authority (England, Wales, Switzerland). According to Dimolitsa, for an award to be set aside or reconsidered, like in the several existing examples, there must be established a “genuine procedural fraud on which the award was based”¹⁰⁹.

The author of the thesis thinks that the impact of false witness testimony sufficiently justifies such an approach, as well, in essence, by the fact that arbitration is not a state, but contractual justice and is done for the sake of enjoying its benefits by the parties to the agreement and, thus, they (in this circumstances, mainly, bona fide party) are entitled to proper dispute resolution. A fraud itself is at minimum a harsh procedural violation and for the false testimony intentionally produced the party should bear the consequences. It can justify inclusion of the genuine procedural fraud into the grounds for setting aside or reconsideration. The fact if such testimony was laid in the basis of the award can, definitely, matter.

In the case *In re Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd.*, to the INL's argument according to which the testimony of Waterside's owner and chief executive in the arbitration proceedings contradicted previous testimony he had given in judicial proceedings, assertion that the confirmation of the awards would be contrary “to this nation's public policy against granting relief on the basis of sworn testimony directly contradictory to prior sworn testimony, and in favor of the sanctity of the oath and maintenance of the integrity of the judicial system” and claim on violation of the public policy against fraud Chief Judge Feinberg recalled that the defense set out in Article V (2) (b) of the New York Convention had to be construed “in light of the overriding purpose of the Convention” court has unequivocally stated that the public policy defense should be construed narrowly, and, thus, “(...) the assertion that the policy against inconsistent testimony is one of our nation's “most basic notions of morality and justice” goes much too far.” Also it was considered by the Court that arbitrators were presented with the allegedly inconsistent testimony, but still the Court by

meet again”); *Antoine Biloune (Syria) and Marine Drive Complex Ltd. (Ghana) v. Ghana Investments Centre and the Government of Ghana*, Y.B. Com. Arb. XIX (1994), at 11 (“Tribunal has an inherent power to take cognisance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony...”), See Dimolitsa, *supra* note 11, at 25-26

¹⁰⁹ *Id.*, at 21

no means suggested that in any event, whatever remedies the parties injured by the prior, allegedly inconsistent testimony may have in the judicial proceedings in which that testimony was given, we do not believe that confirmation of the arbitration awards should be denied¹¹⁰. The issue of inconsistent testimony is correctly distinguished from the false testimony, because the former can be unintentional, and in many instances can appear due to the ordinary human subjective factor, that anyway is to be taken in consideration in the assessment of evidence.

1.3.3 Evaluating an expert witness

Managing the evaluation of an expert-witness is also a very important task that cannot be disregarded. The general features are nearly the same as for the witness of fact, but preparation and management of evaluation should be paid attention to in several special aspects of expert evidence. Mainly, organizing presentation for proper mutual understanding, emphasizing the qualities of a professional, including suitability for a particular dispute.

In respect to preparation, the not legal expert-witness needs more care for him not to address arbitrators like students on a lecture. First, counsel should ask such witness to teach him what counsel needs to know about, and then, the counsel will help him to present the matter to be quickly and clearly understood by non-experts. No memorization of the prepared text is advisable, because the latter never appears to be as planned¹¹¹.

The importance of the expert witness testimony is emphasized by scholars¹¹². Potential importance of live testimony by an expert at a witness hearing is definite in the cases where the in-

¹¹⁰ In re Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd., 18 June 1984, 737 F. 2d 150 (2d Cir. 1984), Journal of International Arbitration, Vol. 2 No. 1 (1985), at 82 – 85

¹¹¹ Rifkind, see supra note 93, at 59

¹¹² See e.g. Cato, D. Mark The Law of Expert Witnesses in the United States: Past, Present and Future, *In The Expert in Litigation and Arbitration* 215-50 (London: LLP Professional Publishing, ed. 1999); Seidemann, Ryan M. et al. Closing the Gate on Questionable Expert Witness Testimony: A Proposal to Institute Expert Review Panels, 33 S.U. L. REV. 29 (2005), available at URL: <<http://www.swlaw.edu/cocurricular/lawreview.htm>>; Harrison, Jeffrey L. Reconceptualizing the expert witness: social costs, current controls and proposed responses // Yale Journal on Regulation, Summer, 2001

person response to questions is to simplify complex factual, technical and even legal disputable matters, even “the appearance of an expert in live proceedings can conceivably decide the dispute”¹¹³.

Kreindler also warns to keep in mind that the ultimate contribution of the expert may be more of synthesis, than of providing a reliable opinion, so it can latter turn out in the course of arbitration that “the opinion per se is less useful” and serves more for organizing the main issues to render opinion.

Qualifications of the expert, according to Kreindler, are usually based on one or more of: knowledge, skill, experience, and training/education, and the ability to ensure his successful qualification as expert by tribunals estimation should not depend only on whether he is subject to oral examination, because this opportunity, depending on the circumstances, may be provided only to make a conclusion if he/she is qualified or not.

The opposing party might wish to disqualify the expert witness that is usually achieved by the means of cross-examination by counsel. In international arbitration it is done usually without the participation of that party’s expert witness. Kreindler also stresses that it will be frequently done in a good faith manner as to admitting the qualifications of expert witness, but showing the tribunal, that it has nothing to do with the opinion the expert is to present in the case and to discredit the basis for the opinion¹¹⁴.

Kreindler further presents an interesting observation, that should be taken into account – skill or knowledge for expert to be qualified as such need not be academic or even formal – and draws two inferences from it – the absence of experience does not necessarily disqualify and the qualifications present and shown must match the subject-matter of the testimony. In any way – it is for tribunal ultimately to decide upon it¹¹⁵.

¹¹³ Richard H. Kreindler, Benefiting from oral testimony of expert witnesses: Traditional and emerging techniques, in “Arbitration and oral evidence”, supra note 11, at 87

¹¹⁴ Id., at 100

¹¹⁵ Id., at 95

Expert witness testimony to have positive effect on the outcome of the case should be strategically elaborated in respect of oral evidence presentation for it not to be useless, or even detrimental, in the chaos of non-agreement on the rules of examination between the parties¹¹⁶.

To examine and analyze the specific feature of the expert evidence presentation, Kreindler outlines the goals of expert-witness oral examination, some of that, which influence the process of management and analysis of witness testimony, will be discussed in present research.

According to the scholar, few basic objectives are of essential character for the offering party:

1 – an aim to qualify such a witness as expert in the opinion of the arbitral tribunal, as a minimum, but also to present him as such for the opposing party and his expert, if any (in international arbitration it can be “much more free-flowing and fluid”, than, e.g. for the sake of formalistic civil litigation approach in USA);

2 – to understand that expert qualification does not need to assure that such expert is the right professional to give opinion on the issues to rely on or benefit from; it is essential to demonstrate the testimony subject-matter to be directly linked to the qualifications and the relevance of such testimony to the issues in dispute (goal is to be necessarily achieved during cross-examination (when witness statement is to substitute direct examination), tribunal questioning, witness conferencing with opposing expert);

3 – to establish reasonable grounds and to show logically interconnected/admissible sources for the formation of such an opinion (depends on area of expertise, may include, but can not be limited to: personally realized data, admissible hearsay, information of which an expert became aware of only at the hearing;

4 – to be attentive and pay as much attention as possible to what the arbitral tribunal needs and wants to clarify as the result of expert witness testimony, especially if the tribunal itself offers clues and hints for it;

¹¹⁶ Id., at 98

5 – to take into account that in some cases the prior written report will suffice and “even superior” and in case the oral examination will be deemed useful it can mainly concern a) the basis for the result reached; and b) the comparison of two rival experts testimony to find out whether the grounds for the disagreement are in the sphere of objective information or rather based on different grounds for conclusions made¹¹⁷.

The important existing problem is that it is not rare that experts have only a second-level knowledge about the contractual relationship; therefore, although arbitral tribunals are sometimes inclined to confront them, without the interactive participation of the contractors the testimony is often limited in value¹¹⁸.

W.Peter characterizes the interaction between litigation and arbitration in respect of witness testimony and comes to conclusion that arbitration cannot to become more efficient than procedures before courts if counsel or arbitrators (lawyers) mostly copy court procedures and as the hearing of witnesses is still heavily influenced by that procedures, in his opinion, that is the “one field where there is much room for improvement”, e.g. because the traditional court-way hearing, one after another, is totally unsuitable for some types of arbitration¹¹⁹.

Making the conclusion on the specificity of witness testimony presentation in arbitration, the author wants, primary, to stress that difference lies in the less strict and settled more flexible procedure in arbitration that can combine different approaches to uphold the balance of cultural backgrounds of parties. Simultaneously, the global problem and additional burden on seeking balance alongside with preserving due process arises in respect of the role of tribunal.

Precisely, an attitude to witness testimony in general, to false testimony, to oath taken by witness, to cross-examination, types of witnesses (party counsel) and to application of useful techniques and compromise (including the value of its compromise itself) is different in arbitration, but underlying justice considerations generally remains the same.

¹¹⁷ Id., at 98-102

¹¹⁸ W.Peter, see supra note 59, at 58

¹¹⁹ Id., at 47

Chapter 2 - The issue of legal privilege in international commercial arbitration: benefit or detriment?

2.1 *Witness testimony and the issue of confidentiality*

The confidentiality in arbitration is multi-sided even in relation to witness evidence. What is important in relation to witness evidence and confidentiality? What legal notions of confidentiality are relevant to witness evidence in international commercial arbitration?

Three related instances of confidentiality, that is important to distinguish between, include:

- confidentiality of affidavits and other arbitration-related information, imposed on the parties;
- confidentiality obligations of witnesses towards the parties;
- confidentiality obligation of parties towards witnesses of what he testifies about.

To the present research the most relevant are the first and the second one.

Although confidentiality itself is not the subject of the present research, there will be some general approaches and rules described and analyzed, that are necessary for the argumentation on the thesis author's claim.

As it was described above, witnesses become aware not only of the event of arbitration between the parties, but also of the essence of the dispute and related documentary evidence in course of their preparation and giving of evidence.

The first issue to mention is that parties could, if they so desire, include a confidentiality provision in the arbitration agreement by express language, but even if they do so, this would bind only the parties and not third parties including witnesses¹²⁰. This approach can be described by the

¹²⁰ Patrick Neill QC "Confidentiality in Arbitration", Vol. 12 No. 3 *Arbitration International* 308 (1996); Sarles emphasize that an agreement or protective order may not in itself bind everyone gaining access to the proceeding, such as non-party fact and expert witnesses. Requiring all witnesses to agree to confidentiality terms similar to those governing the parties should be effective in most instances, such confidentiality agreements and protective orders at least reduce the risk of undue disclosure See, Jeffrey W. Sarles, *Solving the arbitral confidentiality conundrum in international arbitration, ADR & the Law* (18th Edition 2002); But it may be necessary at least to have participants who are not parties to an arbitration to sign confidentiality agreements for the purpose of particular cases. Different categories of participants may be required to sign comparable or different confidentiality agreements. Agreements may specify, among other provisions, the nature and extent of the required confidentiality of applicable parties, including time limits governing confidentiality See, Leon E. Trakman, *Confidentiality in International Commercial Arbitration* Vol. 18 - N°1 *Arbitration International* 11 (2002); Buys approves that, generally, third parties, such as lay or expert witnesses, are not bound by any duty of

*Esso Austl. Resources Ltd. v. Plowman*¹²¹ significant case dealing with confidentiality in arbitration, which provides for the existence of duty of each party to cause party's servants and agent to keep information confidential, but if he will anyway do, he "will presumably commit no wrong as against the opposite party, and presumably he would not even commit wrong towards his employer unless (...) he had received and accepted an instruction from the employer prohibiting disclosure".

According to Collins, British law implies a duty of confidentiality¹²². Under the laws of the United Kingdom, for example, parties to arbitration are forced to rely on confidential rules that are implied into their agreements by operation of the common law, and these implied rules are grounded in conceptions of privilege and privacy, not confidentiality; as a result, common law courts evaluate confidentiality according to whether particular information is privileged as a matter of substantive law, or protected procedurally under rules of disclosure and the admissibility of evidence¹²³. However, the position in the United States and Australia is different¹²⁴.

According to Collins, the need for exceptions to the rule of privacy with regard to documents and information produced during the arbitration can be seen in the following situations¹²⁵. First, a

confidentiality without any special contractual obligations. See Cindy G. Buys, The tensions between confidentiality and transparency in international arbitration, 14 *Am. Rev. Int'l Arb.* 121 (2003)

¹²¹ *Esso Austl. Resources Ltd. v. Plowman*, Supreme Court of Victoria, Mealey's Int'l Arb'n Reat, June 1993 (Vol.8, Issue 6), at D1-D36, cited in Varady/Barcelo/Von Mehren, supra note 68, at 546

¹²² Michael Collins Q.C., Privacy and confidentiality in arbitration proceedings, 30 *Tex. Int'l L.J.* 121 (1995); Due to Redfern and Hunter, it is not true only in English law in relation to material produced in arbitration, but also, for example, in France and Switzerland; also the scholars stressed, that the leading opinion in international arbitration is that confidentiality in disclosed material is desirable and should be practiced to the maximum extent lawfully admissible; see supra note 30, at 29-30; and Patrick Neill upholding implied practice of treatment of "all information concerning" as strictly confidential, with only some exceptions in 1995 Bernstein lecture, Confidentiality in Arbitration, (1996) 62 *Journal of the Chartered Institute of Arbitrators*, No. 3, cited in Redfern and Hunter, see supra note 30, at 30; Confidentiality is not implied in USA (see, e.g. *United States v. Panhandle E. Corat*) and Sweden (see, e.g. *Bulgarian Foreign Trade Bank Ltd. v. AI Trade Finance Inc.*), see Jeffrey W. Sarles, see supra note 120.

¹²³ Trakman, see supra note 120, at 6

¹²⁴ To prove it Collins refers to Michael F. Hoellering, How to Draft an AAA Arbitration Clause, 7 *Foreign Investment L.J.* 141, 152 (1992), at 151 ("Both the international and other AAA rules contain provisions safeguarding the privacy or confidentiality of the arbitral proceedings. . . . [T]hese safeguards apply only to arbitrators and AAA administrative staff, and do not extend to the parties themselves."); *Esso Austl. Resources Ltd. v. Plowman*, [1994] 1 V.R. 1 (Vict.) (a decision of the High Court of the State of Victoria in which the whole question was the subject of an exhaustive review by the Court of Appeal), see supra note 122.

¹²⁵ That categories of information to which confidentiality applies may vary according to the context is approved and stressed also by Trakman (included among these are the nature of oral arguments presented; facts arising there, such as trade secrets; the names and testimony of witnesses etc.). See Trakman, supra note 120, at 10

different approach may be warranted for different classes of material¹²⁶. Thus, the award (and perhaps the reasons for the award) may be treated differently from the transcript of evidence taken during the hearing, witness statements, expert reports, or written summaries by counsel of their legal arguments¹²⁷.

For example, in *Shearson* case¹²⁸, even though the documents' confidentiality was not at issue, there was no realistic prospect that the documents would be privileged from production. This distinction was the subject of analysis by Mr. Justice Hobhouse in *Prudential Assurance Co. v. Fountain Page Ltd.* where a party was able to obtain an injunction restraining a defendant in a subsequent Texas action from using witness statements which had been disclosed by the plaintiff to the defendant in previous litigation before the English High Court. An action in the English High Court had been settled shortly before trial, after the plaintiffs had served the defendants with copies of statements by their witnesses and the report of an expert in accordance with an order of the court. In subsequent Texas proceedings involving one of the defendants, it emerged that the witness statements and expert report had been disclosed to third parties and had been used both in the proceedings in Texas and in the taking of evidence on commission for the purpose of those proceedings in London. The plaintiff sought, and obtained, an injunction restraining the defendant from using the witness statements (but not the expert report) in the Texas proceedings. The defendant was not enjoined on the ground of privilege, for that had been lost when the statements were disclosed by the plaintiff to the defendants in the English action. The injunction was based on the ground that the confidentiality which was attached to them by reason of the implied undertaking given by the parties to the court in

¹²⁶ Different classes of materials may be treated differently for confidentiality purposes, either consensually by the parties or by a subsequent tribunal, Baldwin confirms, see Charles S. Baldwin, IV, *Protecting confidential and proprietary commercial information in international arbitration*, 31 *Tex. Int'l L.J.* 451 (1996); Due to Trakman observations and research, for the most part, international rules on confidentiality in commercial arbitration are general in nature and application. They tend not to define confidentiality and not to delineate the nature and extent of its application. There are various reasons for this, confidentiality in relation to arbitration is difficult to define; and that laws governing arbitral confidentiality are not consistent. While some international instruments do elaborate on different categories of confidential information, they describe what might be confidential rather than prescribe rules governing arbitral confidentiality. See Trakman, *supra* note 120, at 6

¹²⁷ Collins, see *supra* note 122.

¹²⁸ *Shearson Lehman Hutton v. Maclaine Watson & Co.*, [1988] 1 W.L.R. 946 (Q.B.) (holding that parties to arbitration have no special right to privacy or confidentiality), cited in Collins, see *supra* note 122.

the English litigation remained unaffected by (and, indeed, was required because of the plaintiff's compulsory disclosure of those documents pursuant to an order of the court).

According to Collins, a general proposition that material produced for or generated by arbitration cannot be disclosed to third parties or used for purposes unconnected with the arbitration, without the consent of the other party or the leave of the court, is a workable solution. Baldwin mostly confirms and upholds Collins' view that confidential information disclosed during the proceedings by the parties or by witnesses¹²⁹, shall not be divulged by an arbitrator or by the administrator. For instance, parties in a subsequent proceeding may be able to demonstrate different need for confidentiality concerning witness statements, expert reports, or summaries and work product of counsel; and documents produced during the course of an arbitration (*Hassneh Insurance Co. of Israel v. Mew*¹³⁰) and in circumstances where witnesses and evidence are heard consecutively in separate proceedings or stipulated into the record of a second proceeding, sensitive and unrelated information may be revealed in the second proceeding¹³¹.

According to Neill, in the case of an expert witness called by one party to the arbitration it has been laid down that such a witness owes an obligation not only to the side for whom he appeared but also to the other side to respect the confidentiality of the arbitration proceedings; and the parties and the arbitrator(s) owe to the witness a reciprocal obligation of confidence, which can be described with an example of the English case *London & Leeds Estates Ltd. v. Paribas Ltd.* that deals with the distinct problem of affidavits submitted by an expert witness in earlier arbitrations. In the third and latest arbitration the witness was giving expert evidence for the landlords in rental valuation arbitration. The tenants in that third arbitration sought to obtain by subpoena affidavits which the expert had given on behalf of tenants in two earlier arbitrations. In the case of one of the earlier

¹²⁹ The view is confirmed as well by Neill, who states that confidentiality, which binds the parties, and their successors and assigns, extends not only to documents disclosed (in the sense of documents produced as a result of the discovery process) but also to documents elaborated in the arbitration, that includes pleadings and written submissions, witnesses proofs and exhibits, transcripts, notes of the evidence and arguments. See Neill, *supra* note 120, at 289

¹³⁰ *Hassneh Insurance Co. of Israel v. Mew* [1993] 2 Lloyd's Reat 243 (Q.B.),

¹³¹ Baldwin, see *supra* note 126.

statements the judge allowed the subpoena to stand, ruling that the interests of justice overrode the confidentiality attaching to this earlier evidence. The judgment recognizes that the arbitrating parties in the earlier arbitrations owed a duty to each other and to the witness himself of confidence and privacy in relation to the evidence given. Witness owed a duty of confidence in respect of evidence given not only to the party who employed him but also to the opposite party¹³². Neill urges that Judge Mance J was entirely correct in the *London & Leeds Estates Ltd.* case to extend the obligation of confidence to arbitrators and witnesses in arbitrations and criticizes Australian approach in *Esso Austl. Resources Ltd. v. Plowman*¹³³ for rejecting an underlying obligation of confidence. The better view is, due to the scholar, that witnesses agree to give their evidence in arbitrations on the clear understanding that the hearings are in private and the whole matter is confidential between the parties¹³⁴.

In its article on confidentiality in international commercial arbitration Leon E. Trakman expressed various reasonable ideas on dealing with practical problems related to confidentiality in the modern business environment, which also provides the grounds for claim being made in the present research by the author of the thesis, and, thus, needs to act as a subject for analysis. Trakman states that confidentiality has different components and each component of confidentiality is important in protecting trade secrets, business and personal relations, along with a public trust in preserving those relations, but despite its importance, the concept of confidentiality is often not canvassed expressly in law, save by implied reference to privilege or privacy. The scholar urges that, practically, international commercial arbitrators need to appreciate the legal and contractual significance of confidentiality as it relates to proceedings over which they preside¹³⁵, and in respect of

¹³² *London & Leeds Estates Ltd. v. Paribas Ltd.* [1995] *Estates Gazette* at 134., cited in Neill, *supra* note 120, at 293

¹³³ *Esso Austl. Resources Ltd. v. Plowman*, [1994] 1 V.R. 1 (Vict.), cited in *Id.*, at 288 et al.

¹³⁴ Neill, see *supra* note 120, at 303

¹³⁵ According to Trakman, parties are likely to present briefs in support of their claims and counterclaims and adduce evidence on arbitral confidentiality; to make legal argument, refer to international conventions, arbitral usage and party practice. They are likely also to invoke business policy argument, such as emphasising the importance of confidentiality to their business enterprises, or conversely, that confidentiality be restricted in order to protect their enterprises. Surrounding all this is likely to be public policy argument: that agreements are binding, or that agreements ought not to be binding in the context of a malfeasance or overriding business interests. Each party may invoke comparable arguments to justify the converse results: for example, that

other proceedings out of which conflicts over confidentiality have arisen and also need to acknowledge that, should agreement between the parties fail, confidentiality may be determined either by the law of the place in which disclosure is sought to be enforced or prevented, or the law of the seat of the arbitration¹³⁶. But, to argue with the scholar, there are not a lot of countries expressly upholding confidentiality.

Making conclusion on his research, Trakman suggests that taking into account the constantly changing character of the law governing confidentiality in relation to arbitration, parties may be encouraged to adopt an express confidentiality agreement(s)¹³⁷ (that may be implemented at specified times, such as at the commencement of the arbitration, or when confidential information is first conveyed to that signatory), that might include:

- a) the types of information to be kept confidential (e.g. reserve, seismic and other technical data, documents and information obtained in discovery)- extent of confidentiality
- b) exceptions to confidentiality (where information may be disclosed);
- c) measures for the protection of confidentiality, such as in the manner in which hearings are to be conducted and documents transmitted.

However, Trackman admits, their agreement does not necessarily oblige third parties (witnesses), not parties to an arbitration agreement. Parties wishing to establish confidentiality relations with them need to conclude separate agreements. They can also adapt their confidentiality agreements to accommodate the particular circumstances of participants in arbitration proceedings

confidentiality should be protected in order to prevent the great economic loss of a party to an arbitration, or conversely, that it should be denied for that same reason. In responding to these requests, arbitrators will be expected to interpret arbitration or confidentiality agreements, will be called upon to apply the law governing arbitral confidentiality and will also be relied upon to provide reasoned awards on issues relating to confidentiality. See Trakman, *supra* note 120, at 3-4.

¹³⁶ *Id.*, at 1-4.

¹³⁷ In framing specific confidentiality agreements, parties should give due regard to the circumstances surrounding the participants subject to confidentiality, their actual or prospective knowledge about confidential matters, prospective communication with third parties and potential damage arising from such communication. In adopting such agreements, they can draw from confidentiality agreements that are used in particular trades or industries, such as construction, oil and gas and e-commerce. See Trakman, *supra* note 120, at 7-8.

who are not direct parties, such as witnesses, arbitrators, and other involved staff. Absent consistent methods of framing those provisions and agreements, confidentiality provisions are likely to be subject to disparate interpretations and no matter how carefully parties do so, there is always a risk that express provision for confidentiality may be construed as ambiguous or inadequate, or struck down as contrary to law or the risk that a court will not enforce a confidentiality agreement on public policy grounds¹³⁸. To draft a proper confidentiality agreement is uneasy task, but it is a reasonable option, when there is a real need to have guarantees. An appropriate method will be to use a general form for an average case and not to make endless adjustments to a particular case, and then make a witness sign it before starting a preparation process.

Some scholars note that even where national laws and institutional rules or the parties' agreement empower an arbitrator to order discovery, arbitrators of international disputes are often reluctant to do so (particularly that from civil law backgrounds), and may be unwilling to force parties to engage in extensive discovery, that may be contrary to the parties' intent or needs¹³⁹. Tribunals are more likely to use their powers to draw negative inferences from a party's refusal to produce evidence or witnesses¹⁴⁰.

The crucial issues related to such an impact on evidence assessment are established in the Art. 9.2 - 9.5 of IBA Rules on “Admissibility and Assessment of Evidence”, which provides for the arbitral tribunal at the request of a party or on its own motion to exclude from evidence or production any document, statement, oral testimony or inspection for the reasons, including:

- legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable;
- unreasonable burden to produce the requested evidence;

¹³⁸ Trakman, see supra note 120, at 8-10

¹³⁹ Gary B. Born, *International Commercial Arbitration in the United States*, Ch. 8, *Provisional Measures in Arbitration* (2001), at 834, cited in Baldwin, supra note 126.

¹⁴⁰ To illustrate, Baldwin refers to AAA International Rules, art. 24(3) (providing tribunal power to "make an award on the evidence before it" if party fails to produce evidence) and UNCITRAL Rules, art. 28(3).see note 126. This aspect related to witness evidence will be directly relevant to the issue discussed below in Chapter II.

- grounds of commercial or technical confidentiality that the arbitral tribunal determines to be compelling.

Also “the arbitral tribunal may, where appropriate, make necessary arrangements to permit evidence to be considered subject to suitable confidentiality protection”. And

“if a party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one party to which the party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the arbitral tribunal to be produced, the arbitral tribunal may infer that such evidence would be adverse to the interests of that party”¹⁴¹.

This provision will, thus, apply, like other parts of IBA Rules, if the parties have agreed to the application of the IBA Rules or the arbitral tribunal has decided to apply it (Art. 2.1 of IBA Rules)¹⁴².

At least some elements of business witness testimony¹⁴³ can fall at a minimum under one of three reasons stated above with the large degree of certainty, especially in international commercial disputes. This provision strikes the balance between the possibility and right of the Tribunal to draw negative inferences and the right of party to protect commercially sensitive information from the breach of its right to its exclusive use, that otherwise is not easy to enforce.

In this respect an interesting and correct approach to witness evidence and confidentiality, in the thesis author’s view, is the one adopted in the WIPO Expedited Arbitration Rules in the Art.74 “Confidentiality of Disclosures Made During the Arbitration”:

(a) any documentary or other evidence given by a party or a witness in the arbitration shall be treated as confidential and, *to the extent that such evidence describes information that is not in the public domain, shall not be used or disclosed by a party whose access to that information arises exclusively as a result of its participation in the arbitration to any third party for any purpose without the consent of the parties or order of a court*¹⁴⁴ having jurisdiction.

(b) For the purposes of this Article, a witness called by a party shall not be considered to be a third party. To the extent that a witness is given access to evidence or other information obtained in the arbitration in order to prepare the witness’s testimony, *the party calling such witness shall be responsible for the maintenance by the witness of the same degree of confidentiality as that required of the party.*

¹⁴¹ IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999).

¹⁴² But Burn and Skelton urges that Article 9(2) of the IBA Rules was drafted to leave the tribunal a wide discretion to determine which rules should apply and therefore provides scope for argument and uncertainty. See Burn and Skelton, *supra* note 2, at 128; The IBA Rules also do not address which rules should be applicable as to the determination of privilege. See Sindler and Wüstemann, *supra* note 1, at 623

¹⁴³ In international commercial arbitration, due to specificity of the disputes handled, it is highly probable for witness to be a person, engaged with the business process and activity, from engineer to CEO. This can also be a great deal of difference with the usual litigation witnesses categories and have its impact on the dealing with witness testimony.

¹⁴⁴ Here and hereunder the words were put in *Italic* by the author of the thesis.

This approach is primary interesting, because it provides a useful method of keeping commercially sensitive information confidential. Also such provision can, with a little appropriate adaptation, be included into:

- confidentiality agreements (also related to witnesses), the importance and the necessity of which were emphasized by Trakman;
- IBA Rules, which would contribute to its significance and guiding character for balancing the difference between civil and common law approach.

Business disputes having tend to appear as more and more complicated¹⁴⁵ and, thus, taking into consideration the constantly growing attraction of arbitration, there is a need not only to address the issue of interaction of witness evidence and commercially sensitive information, that can be disclosed not only to the adverse party, but also to third parties, but to find a universally appropriate solution of avoiding a danger to lose the lawfully achieved advantage and not be able to enforce the remedy. This leads to advantage of the legal privilege doctrine extension in international commercial arbitration as the doctrine being able to cover the variety of forms in which commercially sensitive information can appear in the proceedings. This aspect is a link between confidentiality measures and privilege role in the light thereof.

Confidentiality is the more general purpose notion, and privilege also has its place to be involved in the protection of sensitive information from becoming known to third persons. For further elaborations on the matter it is necessary to describe the doctrine of legal (evidentiary) privilege and it's most scrutinized (in litigation, but also in international commercial arbitration) type – the attorney-client privilege.

¹⁴⁵ Which, unfortunately, supports the contemporary trend in international commercial arbitration related to more complex character of disputes and “the spectrum of cases submitted to arbitration became much more broad”, outlined by scholars. See, e.g. Tibor Varady, *The language Issues in International Commercial Arbitration – Notions and Questiones*, Prawo Prywatne Czasu Przemian – Festschrift Soltysinski-Poznan 2005, at 953, cited in Varady / Barcelo / Von Mehren, see supra note 68, at 35

2.2 Contemporary doctrine of legal (evidentiary) privilege

In this sub-chapter the general doctrine issues related to international commercial arbitration and witness evidence contemporary doctrine of attorney-client legal privilege applicable to international commercial arbitration will be discussed as well, the importance of which relates to the fact that counsel (lawyers) can give witness testimony in international commercial arbitration in comparison to litigation. Thus, the matter of at least their proper conduct and strategy in dealing with commercially sensitive information comes into play.

As was already defined in the introduction¹⁴⁶, legal privilege is a right to withhold the testimonial evidence from a legal proceeding, including the right to prevent another from disclosing¹⁴⁷. Privilege as a part of doctrine of evidence is considered even as one of the four pillars of Evidence¹⁴⁸ in the basics of the Anglo-American trial system.

Mistelis indicates privilege as one of few instances - precisely, flow of information protected by law, ethics or agreement - of interaction of third parties with arbitration¹⁴⁹.

The scholars urge that the question is very topical at the moment largely because “after decades of relative stability, the ambit of privilege or similar protections is now in a state of flux following significant increases in challenges to assertions of privilege”¹⁵⁰.

Many scholars mention the interconnection between the issues of legal privilege and witness testimony in international commercial arbitration¹⁵¹.

¹⁴⁶ See supra note 5.

¹⁴⁷ Mosk and Ginsburg, supra note 5, at 345; Sindler and Wüstemann describe the privilege rules impact on the admissibility of evidence as follows. Claims of legal privilege can arise in several ways: a) a party might seek documents from another party that are covered by legal privilege under the latter party's local law; b) a party witness might be asked about discussions with his or her lawyer. If applicable, evidentiary privileges allow a person to refuse to testify or to disclose certain information or to oblige others to refrain from doing so, even though that information might be relevant for the outcome of the dispute. See Sindler and Wüstemann, supra note 1.

¹⁴⁸ Paul Rothstein, Teaching evidence, 50 St. Louis U. L.J. 999 (Summer 2006)

¹⁴⁹ Loukas A. Mistelis, Confidentiality and Third Party Participation, Vol. 21 No. 2 Arbitration International 211 (2005).

¹⁵⁰ The last years have seen a proliferation of cases especially in common law countries. To mention just a few: In England - Three Rivers District Council v Bank of England (No 5) [2003] EWCA Civ 474; Three Rivers District Council v Bank of England (No 10) [2004] EWCA Civ 218; United States of America v Philip Morris Inc. & Others and British Tobacco [2004] EWCA Civ 330. In Australia - Vance v Mc Cormick [2004] ACTWC 78; Pratt Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 122; Kennedy v Wallace [2004] FCAFC 337. In the EU: AM&S Europe Ltd v. Commission [1982] ECR 1575; Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission [2003] ECR II – 4771, cited in Sindler and Wüstemann, supra note 1, at 610;

The procedure for dealing with privilege issues are quite well established in litigation, but there is almost no guidance in international arbitration and, thus, multiple rules of legal privilege could have some bearing¹⁵². According to Sindler and Wüstemann, recent jurisprudence has confirmed that privilege questions can be uneasy even on the domestic level, and in an international, multi-jurisdictional context, and particularly where a client operates in multiple jurisdictions, the complexities, pitfalls and uncertainties are even heightened¹⁵³. While there is a general consensus in international arbitration practice that privilege protection should apply¹⁵⁴, there are basically no set rules and there is little published authority available. Absent an agreement by the parties, questions of when, how and in what circumstances, privilege protection could, or should, be available, and the

¹⁵¹ E.g. Kreindler describes the issue of attorney-client privilege as the one that can arise in arbitration with the participating experts or counsels from USA in regard to procedural disputes in course of arbitration about “whether the expert is impermissibly declining to answer a question or reveal the factual or documentary basis for forming his opinion” on the ground of such privilege. He further describes the practice that shows different attitudes to the importance of such issue, but stresses that the tribunal, definitely, has an obligation to consider the legitimate character of its invocation as a part of due process and equal treatment observance, and the role of the counsel is to ensure that the tribunal understands the factual and legal basis for proper assessment of the arguments on privilege to make a proper evaluation of them in course and after the expert-witness oral examination (the issue can be raised before the tribunal even spontaneously). See supra note 113, at 101,103; See also Trackman, Mosk and Ginsburg, Burn and Skelton, Sindler and Wüstemann supra notes 1, 2, 5, 120.

¹⁵² When lawyers, clients and arbitrators are based in different countries, there is ample scope for confusion and differences of assumption as to the applicable principles of privilege. Factor in the possibility of different laws governing the contract, the arbitral procedure and the seat of the arbitration, and there are even further possibilities for a diversity of approaches. Super imposed over these multiple legal systems are the applicable arbitral rules themselves. The scholars point only to the International Arbitration Rules of the AAA and ICDR as the rules of a major arbitral body to refer to legal privilege. Article 20.6 of AAA states: “(...) The tribunal shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client”. See Burn and Skelton, supra note , at 124; Sindler and Wüstemann add to the list of rules mentioning the issue of privilege or professional secrecy Art. 38(2) of the former International Rules of the Zurich Chamber of Commerce (IAR) and Art. 20(7) ICC Rules. There is no single international code of commonly accepted principles even though all professional privileges have the same rationale - to encourage frank and open communications between professionals and those with whom they have a professional relationship. The number, type and scope of those privileges can vary dramatically not just from one country to another but also among common law or civil law countries (see ANNEX 1). The privilege may be held by the professional, the client, or perhaps even both; it may be subject to certain exceptions and may or may not be waivable. See Sindler and Wüstemann, supra note 1, at 616, 622

¹⁵³ Also they emphasize that one of the problems of the reality of modern commerce is that clients operate across borders and are therefore subject simultaneously to different systems. When dealing with a multinational corporation, it is not possible to maintain a firewall between different procedures in different countries. In an increasingly global corporate and investment environment, multinational corporations and individuals operating across borders, require and receive legal advice in many different jurisdictions. With increased international expansion, corporations are now also exchanging information and documents to an extent undreamt even some years ago. As corporations operate in more international locations, often unfamiliar ones, they face greater challenges, complexities and risks. All perfect ingredients for more (and more complex) disputes. Id., at 614

¹⁵⁴ The first question is of course whether the privileges that apply in civil litigation also exist in international arbitration. There seems to be general agreement at least in principle that by choosing arbitration the parties do not automatically waive their right to privilege protection and that some protection should be afforded in arbitration because of the important public policy goals privileges reflect. Id., at 619

extent of that protection, are left to the arbitrators who must act fairly between the parties, be mindful of their legitimate expectations and yet not run the risk of jeopardizing enforceability of their award¹⁵⁵.

It is important to stress that, in practice, the privileges most likely to appear in international arbitration are the attorney-client privilege¹⁵⁶, the business or trade secrets privilege, the privilege protecting settlement discussions, and the National security or State secrets privilege¹⁵⁷.

According to Burn and Skelton, attorney-client privilege permits clients or their witnesses and lawyers to discuss matters overtly, but, applicability, scope, effect and the requirements for legal privilege differ according to national laws. Also the practice of international arbitration indicates that legal privilege is, at least in part, a substantive right¹⁵⁸, because where the right is only procedural in nature, there would be a risk that clients whose disputes were being dealt with in arbitral proceedings rather than before the courts would not enjoy the protection of legal privilege. And that would not be in accordance with the parties' legitimate expectation that their discussions with lawyers would be dealt with identically, whether a subsequent dispute was to be resolved in litigation or arbitration¹⁵⁹. However, commentators generally agree that it is not really possible to fit privilege questions in arbitration neatly into either a procedural or a substantive matter category, as they encompass elements

¹⁵⁵ *Id.*, at 610.

¹⁵⁶ The mostly discussed one. In England, the law of legal privilege was recently considered in the *Three Rivers*. The privilege issues in that case concerned whether communications between a client and its solicitors in relation to the preparation of a statement to give to an independent inquiry in the financial services sector were privileged. The House of Lords (overturning the decision of the Court of Appeal) ruled that, so long as there was a relevant legal context (which included the preparation of statements for the independent inquiry), legal privilege would apply. See *Three Rivers v Bank of England litigation* [2004] UKHL 48 and [2004] EWCA Civ 218, cited in Burn and Skelton, at 125 and Joan Loughrey, *Legal advice privilege and the corporate client*, *The International Journal of Evidence & Proof*, (2005) 9 E&P at 183 et seq.

¹⁵⁷ Mosk and Ginsburg, see *supra* note 5, at 384

¹⁵⁸ In *Three Rivers* Lord Scott stated that “[L]egal advice privilege is both”. This may be a fair assessment in the context of litigation where no-one disputes that legal privilege exists in English law. However, whether the right is substantive or procedural in nature may be a real issue in international arbitration. In cases where the substantive law is English, a party could argue that the right to refuse disclosure is merely a procedural issue relevant to court litigation and so should not apply in international arbitration. See Burn and Skelton *supra* note 2, at 126; According to Mosk, Ginsberg and Berger, from the public policy judgements underlying these privileges it is obvious that these issues have a substantive nature, because very often, these judgements relate to the value of certain kinds of information or communication and such judgements are substantive in nature, even if they are manifested in procedural law in certain jurisdictions because they relate to the taking of evidence. Focusing on the value of the relevant information or communication allows a substantive qualification (*Three Rivers* case). Mosk and Ginsburg, *supra* note 5, at 377, cited in Klaus Peter Berger, *Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion* Vol. 22 No. 4 *Arbitration International* 505 (2006)

¹⁵⁹ Burn and Skelton, *supra* note 2, at 124-125

from both. Therefore one might suggest a cumulative approach where both the procedural law governing the arbitration and the law of the closest relationship to the evidence should apply and, in the event of conflict, the most protective one should prevail. Again, however this may only work as long as no issues of equal treatment arise¹⁶⁰.

Where a contentious issue of privilege arises, Burn and Skelton emphasize, the party seeking to resist disclosure will argue that requiring disclosure of material covered by at least one set of rules of legal privilege would not be an appropriate means for establishing the facts of the case. In the absence of specific guidance there is always a risk that material that would be privileged in litigation may not be protected in arbitral proceedings¹⁶¹.

An arbitral tribunal appears to have a wide discretion to determine which rules or standards to apply, which seem to be not an easy task in the light of facts and matters related to the guidance and certainty in the applicable law and institutional rules, that is discussed above and hereunder¹⁶². In theory, tribunals might even rule that no such rules should apply, though this would risk provoking an application to the courts in the seat of the arbitration by reason of serious irregularity. Alternatively, the losing party might resist enforcement under the New York Convention, arguing that disallowing protection on grounds of legal privilege is contrary to public policy in the country of enforcement; and the tribunal must therefore ensure that its chosen approach to privilege will not prove to be a barrier to enforcement and must act fairly and impartially towards the parties¹⁶³.

¹⁶⁰ See Mosk and Ginsburg, see supra note 5, at 377; Gabrielle Kaufmann-Kohler and Philippe Bärtsch, *Discovery in International Arbitration: How Much is too Much?*, *SchiedsVZ* (January 2004), at 19., cited in Sindler and Wüstemann, supra note 1, at 623

¹⁶¹ Burn and Skelton, supra note 2, at 127; The scholars outline as well that there is no general rule of legal privilege applicable in international arbitration, so the issue is settled on the circumstantial basis. Although the problem so far needs to be addressed seldom, privilege issue require detailed consideration, e.g., where a party has to decide whether to disclose a document that would help its case if doing so would arguably amount to waiving privilege in related documents. *Id.*, at 124

¹⁶² Precisely, AAA and ICDR rules as the only expressly addressing the privilege issue and uncertainties related to application of Art. 9.2 of IBA Rules.

¹⁶³ The scholars come to the conclusion that where conflicting principles of privilege (drawn from different legal traditions) have given rise to argument, acting fairly may involve the tribunal undertaking a complicated balancing act (likely to have to consider the rules of privilege that apply in the law governing procedural issues, the law the parties choose to apply to the contract and the law of the place in which the documents were created), at a solution that combines features of each system involved. Alternatively, as Rubenstein and Guerrina suggest, the tribunal could "select the law that accords the broadest selection to privileged information". (J.H. Rubinstein

2.3 Attorney-client privilege: from litigation into arbitration

2.3.1 Attorney-client privilege doctrine

According to Sindler and Wüstemann, the right to proper legal advice¹⁶⁴ is reflected in the principle of legal privilege, as it is known in common law countries, and the principle of the 'professional secrecy' of civil law countries. Both concepts, in current legal thinking, are mainly based on the principle of a client's right of defense, and therefore a proper functioning of the administration of justice. Many privileges were developed in the common law jurisdictions as a result of obligations to disclose internal documents or communications as part of the discovery process and where, in contrast to proceedings in civil law jurisdictions, parties must disclose all relevant documents, even those detrimental to one's case.

Such protections, known as 'attorney-client privilege' (US), 'solicitor-client privilege' (Canada), 'legal professional privilege' (UK) or 'client legal privilege' (Australia), have been recognized by the highest courts in the various common law jurisdictions although the precise scope of such privileges can vary slightly between the common law jurisdictions. A worldwide survey by Lex Mundi reveals that the attorney-client privilege is known in more than 90 jurisdictions¹⁶⁵.

The privilege is that of the client not the lawyer. The role of the lawyer is crucial to the existence of the privilege, but it is the client who can waive the privilege. The lawyer must protect the privilege unless instructed otherwise¹⁶⁶. Broadly, such privilege is a right to resist the (otherwise)

and B.B. Guerrina, *The Attorney-Client Privilege and International Arbitration* 18 J. Int'l Arb. 587 (2001), cited in Burn and Skelton, *supra* note 2, at 128). Arbitrators will often adopt a pragmatic solution rather than relying on strict application of a certain set of rules and if considering the competing rules allows the tribunal to "distil" common principles to apply or to select the broadest set of legal principles available, this solution will usually be acceptable to the parties. See Burn and Skelton, *supra* note 2, at 127

¹⁶⁴ According to the US Supreme Court in *Upjohn Co v. US* (1981) 449 US 383, the purpose of legal privilege is 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice [...] The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client'; see also *R v Derby Magistrates' Court, ex parte B* (1996) AC 487; and Lord Hoffmann in *R (Morgan Grenfell & Co Ltd) v Special Commissioner for Income Tax* (2002) 2 MRI 299., cited in Sindler and Wüstemann, *supra* note 1, at 614

¹⁶⁵ Lex Mundi, *In-House Counsel and the Attorney-Client Privilege* (2004), available at URL: <<http://www.lexmundi.com>>, cited in Berger, at 502, for more details see the ANNEX 1

¹⁶⁶ Berger, *supra* note 158, at 614-615

compulsory disclosure of confidential information contained in a communication¹⁶⁷ made orally or in writing between a lawyer (including an in-house counsel) and client, where the statements or materials were made or brought into existence for the dominant purpose of obtaining or giving legal advice, or where the communications took place for use in existing or contemplated proceedings¹⁶⁸.

The issue even has attracted attention of ECJ in several decisions concerning essentially attorney-client privilege matter and was discussed in the decisions related to ECHR Art. 6 and Art.8.

It is significant that although there is no explicit provision for attorney-client privilege in EU law, the Court has considered that privilege forms a general principle common to the Member States of the EU and this case highlights the increasing importance of privilege issues also within the EU¹⁶⁹. In the AM & S judgment of 1982, the European Court of Justice found that this limited notion of the attorney-client privilege constitutes a general principle of EU law (confirmed in Hilti AG V. Commission [1990] Rs. T-30/89). Essentially, written communications were privileged if they were made between a company and an 'independent' lawyer (defined by the ECJ as 'lawyers who are not bound to the client by a relationship of employment') who was qualified to practice in the EU, and were made for the purpose and in the interest of its rights of defense in relation to Commission proceedings. Protection was not only granted in relation to correspondence between lawyer and client/corporation during the investigation phase but also to correspondence exchange prior to such investigation if it had a relationship to the subject-matter of that procedure. This decision provoked controversy insofar as it excluded in-house counsel and non-European Union lawyers. Under the AM&S test, an US in-house counsel, and indeed even an independent (outside) counsel not qualified in the EU, was not covered¹⁷⁰.

¹⁶⁷ It is an essential pre-requisite of privilege that the communication is confidential. *Id.*, at 613

¹⁶⁸ See e.g. *Baker v. Campbell* (1983) 153 CLR 52, *Grant v Downs* (1976) 135 CLR 674 (High Court of Australia), *US v British American Tobacco* - the proceedings must actually be taking place or there must be a 'real prospect' of litigation taking place, *Id.*, at 615

¹⁶⁹ *Sindler and Wüstemann*, at 626; But there are no such soft law standards on a global scale. *Berger*, *supra* note 158, at 509

¹⁷⁰ *Id.*, at 626-627

However, in 2003 in the *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission* the President of the European CFI posed the question whether the view maintained by the court in the *AM & S* judgment can still be upheld for that in-house counsel who is bound by strict rules of professional ethics¹⁷¹. It was argued that in view of the new decentralized antitrust procedure introduced through the Anti-Trust Procedure Regulation 1/2003, which puts an increased burden on legal departments, in-house counsel of European companies should enjoy a greater degree of protection by applying the attorney-client privilege to them¹⁷².

There has been speculation in recent years that human rights legislation which gives effect to the ECHR could affect the operation of the doctrine of privilege¹⁷³. In *General Mediterranean Holdings SA v Patel & Anor* the Court found that interference with the right to consult a lawyer of one's choosing violates Art. 6 of the ECHR guaranteeing the right to a fair hearing (able to seek legal advice without fear that those communications will be disclosed, but, on the other hand, those 'protected' communications might be vital to a fair trial of another party), including legal assistance and that interference with correspondence between lawyer and client infringes the principle of respect for privacy established in Art. 8 of ECHR.

The question arises as to the extent to which a court (or a tribunal) might indeed have to conduct a balancing exercise between upholding privilege and ensuring all relevant evidence is made

¹⁷¹ *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission* [2003] ECR II-4771 (interim measures), para. 122 et seq.: "It is ... necessary to determine whether, in the present case, the applicants ... have adduced serious evidence of such a kind as to demonstrate that, taking into account developments in Community law and in the legal orders of the Member States since the judgment in *AM & S v. Commission*, ... , it cannot be precluded that the protection of professional privilege should now also extend to written communications with a lawyer employed by an undertaking on a permanent basis ... The President considers that arguments to that effect have been submitted in the present case and that they are not wholly unfounded"; the decision on interim relief has been repealed, cited in Berger, *supra* note 158, at 504

¹⁷² C. Seitz, *Unternehmensjuristen und das Anwaltsprivileg im europäischen Wettbewerbsverfahren – Wandel in der europäischen Rechtsprechung?* in (2004) *Europäische Zeitschrift für Wirtschaftsrecht* 231 at 233., cited in Berger, *supra* note 158, at 505; In fact, there are European jurisdictions such as Belgium, Denmark, the Netherlands or Spain (*Lex Mundi, In-House Counsel*.... *supra* note., at 20,25,28,65 et seq.) where the privilege extends to both outside and in-house counsel. In Germany, the legal situation is far from settled (See F. von Schlabrendorff and A. Sheppard, 'Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution' ICC Publishing, Publication 693 (2005), at 752.) The prevailing view is that in-house counsel who are admitted to the Bar and who may act as practising attorneys for clients other than their company ('Syndikusanwälte') may invoke the attorney-client privilege at least insofar as the legal work for their employer is concerned, cited in Berger, *supra* note 158, at 507

¹⁷³ Sindler and Wüstemann, *supra* note 1, at 629

available. In the decision of the European Court of Human Rights in *Dowsett v. United Kingdom*¹⁷⁴ where withholding relevant evidence on the grounds of public interest immunity was held to violate a defendant's right to a fair trial under Article 6 (1) of the ECHR¹⁷⁵. Regimes governing disclosure, privilege, the position of the lawyer (particularly in-house), as well as the position of the client, vary (sometimes extensively) between different, and even neighboring, jurisdictions. The legal nature of the right can also differ: it can be considered part of substantive or procedural law, depending on the jurisdiction, and this in turn has implications for choice of law analyses¹⁷⁶.

Comparing civil and common law jurisdictions, Sindler and Wüstemann stress that in civil law jurisdictions, even though there is no similar concept of discovery, lawyers can generally also call on privileges in civil proceedings: privileges which provide for the obligation of secrecy for persons (including lawyers) who through their functions are depositories for the secrets or confidential information of others. In-house counsel in civil law jurisdictions is generally not able to invoke the privilege. The civil law concept of 'professional secrecy' founded essentially in professional ethics, is again seen as necessary to allow a client to seek legal advice in full confidence that the information given to the lawyer will not be used against him. In certain civil law systems, professional secrecy may even provide for the confidentiality of communications between lawyers (e.g. France, where correspondence between lawyers is confidential and may not even be disclosed to the client) while in many other civil law systems and in the common law systems this is not the case. And unlike in

¹⁷⁴ *General Mediterranean Holdings SA v Patel & Anor* 1999 QB (all ER) 673, *Dowsett v. United Kingdom* (App No. 39482/98), cited in Sindler and Wüstemann, *supra* note 1, at 629-630

¹⁷⁵ The reason for arbitrator not to apply Art. 6 of the ECHR is that it was not designed for arbitral proceedings. The trend of the case law (e.g. Swiss Federal Supreme Court decisions - BGE 112 Ia 166; BGE 128 III 50) has been to the effect that Article 6 (1) rights are waivable, i.e. the parties can opt out of their right to an independent and impartial tribunal in the public system of justice by choosing private arbitration. Nevertheless, failing to consider human rights issues can be a question of due process which while not a basis for a separate action challenging an award, may become a factor in enforcement depending on local requirements and policy issues. Where parties have contractually agreed to relevant procedures or issues such as confidentiality and privilege it may not be an issue, however the position is less certain where they have not. Matters such as disclosure, privilege and evidence are governed primarily by rules of domestic law, rather than the ECHR (*L v. United Kingdom*, unreported, 7 September 1999). *Id.*, at 631-632.

¹⁷⁶ *Id.*, at 631

common law jurisdictions, in the context of (civil) proceedings, the issue of privileges is considered to be a matter of procedure.

What is clear in both common law and civil law jurisdictions is that privilege cannot be relied on as a blanket defense to disclosure. Objections must be raised and considered on a case-by-case basis and the privilege must be claimed with respect to each specific communication at issue. The privilege, for example, does not protect communications generated or received by a lawyer acting in some other capacity. An arbitrator or mediator, whose function can be described as judicial rather than legal, does not generally qualify as a lawyer for privilege purposes, but is bound by general obligation of confidentiality¹⁷⁷.

According to the scholars, it generally up to lawyers to raise the privilege on their client's behalf. In evaluating claims of privilege, arbitrators cannot be expected to have complete knowledge of privilege law in the domestic law of the parties and the burden must be on the person asserting the privilege to show its existence and applicability (including establishing its application to a particular communication). As the party asserting the privilege is generally required to prove its existence, the tribunal will not need to conduct its own separate enquiry other than evaluating the evidence and law on the issue brought before it. The tribunal, like a court, will also need to balance the privilege claimed with the need for the evidence - a request for the production of documents should not make it possible for the requesting party to gain unauthorized knowledge of commercial or business secrets or other confidential information of the other party which is not in the public domain¹⁷⁸.

Sindler and Wüstemann describe an interesting situation, that can occur and cause difficulties - in some cases, it may be necessary to review the contents of the documents to decide if and to what extent protection is due. The tribunal can review the documents itself without the party requesting the documents having access to them or may entrust the review of the controversial materials to a third party expert or advisor. This private investigation approach is however not without its own pitfalls,

¹⁷⁷ Id., at 620

¹⁷⁸ Id., at 624

particularly if the tribunal itself looks at the documents yet denies access to one of the parties. The appointment of a neutral expert (Art. 3(7) IBA Rules; Art. 52 and 55 WIPO Rules) may avoid delay in the proceedings as the proceedings can continue while the expert considers potential privilege issues. However, whether this would be effective in a complex case (where familiarity with all the issues may be required) is questionable¹⁷⁹.

In international commercial arbitration not only parties could come from different countries and bring in different scopes and legislative definitions of privileges, but also could the experts, that make in this case the problem even more complicated.

2.3.2 In-house counsel

Sindler and Wüstemann also present dilemmas and difficulties that are heightened by the fact that in many places in-house counsel are assuming more important roles in the transaction of companies' legal business and while lawyers of varied backgrounds work in the same company, doing the same work, with the same obligations yet they can be treated very differently for privilege purposes.

Many civil law jurisdictions¹⁸⁰ do not afford any protection to communications between in-house counsel and clients at all (e.g. Switzerland, France, Sweden, Italy). In these jurisdictions, company lawyers are not viewed as independent and generally do not even qualify for membership in local bar associations. As employees of a corporation, they nevertheless have the general contractual duty to maintain secrecy.

In common law jurisdictions it is generally clear that communications between in-house counsel and clients for the main purpose of giving or receiving confidential legal advice are privileged from production - as long as the in-house counsel is 'independent' from the client (in the sense that

¹⁷⁹ Id., at 618

¹⁸⁰ Diana Good, Patrick Boylan, Jane Larner, Stephen Lacey, *Privilege: a world tour* and *Privilege: the in-house view*, available at URL: <<http://www.practicallaw.com>>

lawyer is subject to the same standards of professional and ethical conduct as in private practice notwithstanding their employment relationship with the client)¹⁸¹.

In *Hilti AG V. Commission* [1990] Rs. T-30/89¹⁸² it was confirmed that if an in-house lawyer is merely reporting the text or content of legally privileged communications received from an external, EU-qualified lawyer, then such report will also be privileged. However, privilege will be lost if the advice is amended, contains the in-house lawyer's opinion, or is widely circulated beyond relevant staff.

Author of the thesis thinks that it is not easy to trace, and although indirectly concerns the issue of a waiver, the relevant issues are to have a standard of estimation, because in case of a transnational company huge transaction, that will involve different types of lawyers and the documents drafted with the participation of both types, it can be problematic to divide the parts that makes the document unprivileged. In case the document will involve commercially sensitive information and there will be a question of disclosing the information contained therein, may be it is better to refer to it as privileged as a whole.

2.3.3 A client and a kind of advice

Two additional important problems are outlined by the scholars: who amounts to a client in relation to privilege and what kind of advice is protected¹⁸³.

In the corporate context, the most common problem for privilege purposes in common law is determining who among the corporation's employees speaks on its behalf. In larger entities, 'the client'¹⁸⁴ may not be the entity itself but a specific group or body within that entity for example, the Board, a specific committee or even an individual (then communications with other employees of a company may not be privileged, even though they may otherwise fall within the relevant privilege

¹⁸¹ Sindler and Wüstemann, *supra* note 1, at 625; Berger, *supra* note 158, at 502

¹⁸² *Hilti AG V. Commission* [1990] Rs. T-30/89, cited in Sindler and Wüstemann, *supra* note 1, at 627

¹⁸³ Together with Sindler and Wüstemann this problems are studies and considered as important by YIAG members (*supra* note 3) and other practitioners, who are engaged in the research on the topic by their articles published on the web-sites of the law firms they work for.

¹⁸⁴ The case *Upjohn v. US* (49 US 383 (1981)) refers to the nature of the corporation as a client. See also *Waterford v The Commonwealth* (1987) 163 CLR 54, cited in Sindler and Wüstemann, *supra* note 1, at 627

definition). This means that when the 'client' seeks the help of colleagues in preparing materials for the lawyers, the colleagues' work will not be protected by legal advice privilege nor will their communication with the lawyers. Similar issues can arise in relation to in-house counsel.

In *Three Rivers*, the House of Lords did not give any guidance on communications between lawyer and client's employees. Longmore LJ in the leading judgment held that only the documents produced by the internal unit of the Bank were privileged, because only it was a client, and non-client employees and officers (everyone else in the Bank, including Governor) were to be considered to be external third parties, that was based on the case law unrelated to corporate client or internal communications status and, according to Joan Loughrey¹⁸⁵, there are different sets of consideration to be applied to communications made by the employees of a corporate entity and those of an independent third party, because the company can only act through its employees.

Due to Loughrey, this makes little sense in the light of company law and agency principles. The Governor and the court of directors of the Bank have the authority to manage the Bank, under English law. When the Governor appointed the officers of the Bank Inquiry Unit, he delegated to them powers of management for the purposes of dealing with the inquiry. However, as a matter of agency law, his, and the court of directors', powers to take decisions on behalf of the Bank remained and were at least equal to the unit. Insofar as *Three Rivers* [2002-2003¹⁸⁶] seems to confine the client to those persons who had been designated as client contacts to the exclusion of other employees and officers who had equivalent or greater, authority to act on the Bank's behalf, it is difficult to justify in principle. Identifying the client with the board of directors (*Price Waterhouse v. BCCI Holdings (Luxembourg) SA*¹⁸⁷) is also not practically correct, because it is rare for the board to be the source of the request for legal advice and, except where a decision as to whether to litigate must be taken, rare for external

¹⁸⁵ Joan Loughrey, Legal advice privilege and the corporate client, 9 *The International Journal Of Evidence & Proof*, 187 (2005).

¹⁸⁶ *Three Rivers v Bank of England (Disclosure)* (No. 4) [2002] EWHC 2730, [2003] CP Rep 34

¹⁸⁷ *Price Waterhouse v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583.

lawyers to advise the board directly¹⁸⁸. This test would therefore largely deprive a company of the protection of legal advice privilege. Similarly, in *Re British & Commonwealth Holdings plc*¹⁸⁹, Gatehouse J identified the client as ‘each of the persons through whom the company acts and who are responsible for taking decisions’¹⁹⁰.

The scholar is mostly inclined, after making analysis of both control group test and the dominant purpose test of determining a corporate client, to advise the use of some form of the former, because its restrictive conception of the client is consistent with rationale for legal advice privilege, since companies will not lose the privilege only by distribution or action on legal advice, as well as because the test allows a defensible basis for distinguishing between communication from external and internal agents¹⁹¹.

Due to Sindler and Wüstemann, careful consideration needs to be given as to how a client obtains advice from its internal or external lawyers, and from whom those lawyers should obtain information and instructions. Problems could arise if it is arguable that the employee does not constitute the ‘client’. In the US, courts have traditionally applied a ‘control group’ test or a ‘subject-matter’ test to see who within the corporation is in a position to control or take a substantial part in the determination of corporate action or who has responsibility to deal with the lawyers.

The over problem that often arises is the problem of lawyers acting in several capacities - external lawyer may act as board member or officer of the corporation to which the advice is given. If acting as board member or officer, there is no privilege. In which capacity the lawyer acted during the relevant conversation or during the creation of the relevant document, and how does that affect the privilege is a relevant question in this respect. Organizations employing in-house lawyers expect their lawyers to ‘know the business’ of the organization, and in many cases they expect their in-house

¹⁸⁸ I. Eagles, Legal Professional Privilege and the Corporate Client 12 New Zealand Universities Law Review 297-303(1987), cited in Loughrey, see supra note 185, at 190

¹⁸⁹ *Re British & Commonwealth Holdings plc*, Unreported, Commercial Court, 4 July 1990, Id., at 190 -191

¹⁹⁰ Id., at 190 -191

¹⁹¹ Id., at 203

lawyers to participate in business decisions and often ask them for business, technical or strategic advice¹⁹².

2.3.4 Waiver

The waiver of privilege aspect arises in relation to the assessment of arguments of party to dispute claiming privilege to be applied.

Describing the English approach, Loughrey¹⁹³ urges that, if a privilege is recognized as attaching to certain communications with the company, it seems illogical to remove it when the company seeks to act on the advice given, provided that the privilege is not used to shield non-privileged information which might also be contained in the documentation. In *The Good Luck* case¹⁹⁴, the internal documentation which discussed or recorded the contents of legal advice was held to be privileged even though the documentation was produced for a non-privileged commercial purpose: information, once privileged, is always privileged. This is subject to there being no waiver of privilege. The plaintiffs did not seek to shield from production those parts of the documentation which did not refer to privileged lawyer–client communications¹⁹⁵. The defendants were therefore not permitted to obtain documentation created by the plaintiffs who referred to advice on the legal implications of a commercial decision to advance funds to the defendants. It has been accepted that even if privileged documentation is disclosed to external third parties, this will not result in a complete loss of privilege, provided that the privileged communication is disclosed in confidence; it can remain privileged against the rest, although privilege will have been waived insofar as those third parties are concerned¹⁹⁶.

¹⁹² Sindler and Wüstemann, see supra note 1, at 628

¹⁹³ Loughrey, supra note 185, at 194-195

¹⁹⁴ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd* (“*The Good Luck*”) [1992] 2 Lloyd’s Rep 540 at 542, cited in Loughrey, supra note 185, at 194

¹⁹⁵ Case law established that clients can reveal non-privileged parts of documentation without waiving privilege in the remainder: *The Sagheera* [1997] 1 Lloyd’s Rep 160; *GE Capital Commercial Finance Ltd v Sutton* [2004] EWCA Civ 315, [2004] 2 BCLC 662, cited in Loughrey, supra note 185, at 194

¹⁹⁶ *B v Auckland District Law Society* [2003] UKPC 38, [2003] 2 AC 736 at [68]; *USP Strategies plc v London General Holdings Ltd* [2004] EWHC 373, *The Times* (30 April 2004) at [20] and [29] per Mann J (at [16–17], a distinction was made by Mann J between communications for the purposes of preparing to give instructions to solicitors and communications containing advice), cited in Loughrey, supra note 185, at 195

Rubinstein urges that the uncertainty over what sorts of communications between an attorney and a client are immune from discovery in international arbitrations further compounded by the absence of any established choice-of-law rules to determine which law will govern the existence and scope of the privilege, and the extent to which the privilege can be waived has a significant impact on the process of trial preparation and the presentation of evidence. The obvious concern arises as to whether communications between counsel and witness would be subject to disclosure. While it is doubtful that many arbitral tribunals would be willing to permit such questioning, the absence of any established framework to govern the nature and scope of the attorney-client privilege should give the practitioner a measure of pause at the prospect that such communications could come out¹⁹⁷.

As it can be seen, lots of the problems, that do not immediately come into mind while starting to deal with the issue of attorney-client legal privilege, arise and, moreover, not all the range is settled or any unique balancing solution found, that makes the subject-matter still appealing to a scholar. And this is only about the one kind of privilege that is likely to arise international commercial arbitration.

2.3.5 An applicable law

Several authoritative scholars' articles deal with the privilege and applicable law, but the issue is still on agenda for the arbitration practitioners, although even in the absence of recognition of privilege the confidentiality issue can be remedied by the other consensual methods.

W.W. Park comes out with "one particular enlightening example of culture clash to communications from in-house lawyers, which are privileged in the United States¹⁹⁸ but not in many European countries"¹⁹⁹ and proposes the way for arbitrator to proceed with the application of rules of the place where the relevant memo was written, but in this case other party's legitimate expectations will be neglected, and, thus, it will put the award in jeopardy.

¹⁹⁷ Javier H. Rubinstein, "International commercial arbitration: reflections at the crossroads of the common law and civil law traditions", 5 Chi. J. Int'l L. 303 (2004).

¹⁹⁸ See e.g. NCK Organization Ltd. v. Bregman, 542 F. 2d 128, 133 (2nd Cir. 1976)

¹⁹⁹ W.W. Park, see supra note 20, at 62

One of the three reasons, named by Berger, why legal issues related to privilege determination in international arbitration are regarded as diverse, complex and disputed by arbitral practice and legal doctrine is that there are no established conflict-of-laws rules for the determination of the law applicable to privileges in international arbitration. Unfortunately, there is not only agreement on differences but also on two basic policy considerations:

- 1- international arbitrators should accede to an appropriate privilege objection raised in good faith;
- 2- the need for legal certainty and predictability and the need to safeguard the parties' legitimate expectations as to the application of a certain privilege standard are particularly strong in this field of law because '[p]arties rely on privileges'.

There are at least two parties in an arbitration that may have relied on different privileges with different protection standards²⁰⁰.

In view of the risk of unequal treatment caused by the parties' diverse legal backgrounds it has been suggested to develop best practice standards, i.e. to prefer ex ante rule-making by formulating agencies such as the IBA instead of ad hoc decision-making by international arbitrators in a given case²⁰¹.

According to Berger, some common law jurisdictions tend to qualify evidentiary privileges as a substantive matter, others regard them as procedural (*Union Planters National Bank v. ABC Records, Inc.*, 82 F.R.D. 472 (W.D. Tenn. 1974); *Duttie v. Bandler & Kass*, 127 F.R.D. 46, 52 (S.D.N.Y. 1989)). Civil law jurisdictions also favor a qualification as a procedural issue²⁰². The difference is substantial. Under a procedural view, the tribunal would have to apply the privilege rules of the law applicable to the arbitral procedure. Under the territorial theory which prevails in almost all

²⁰⁰ Mosk and Ginsburg, see supra note 5, at 381-382, cited in Berger at 501; Berger, supra note 158, at 500-501

²⁰¹ N. Voser, Harmonization by Promulgating Rules of Best International Practice in International Arbitration in *German Arbitration Journal* 117 (2005); J.H. Rubinstein and B.B. Guerrina, The Attorney-Client Privilege and International Arbitration 18 *J. Int'l Arb.* 601(2001); W.W. Park, Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion 19 *Arb. Int'l* 279 at 294 et seq. (2003)

²⁰² Mosk and Ginsburg, supra note 5, at 368, cited in Berger, supra note 158, at 504

modern arbitration laws (Art. 1(1) of the UNCITRAL Model Law; s. 1025(1) of the German Arbitration Act; s. 2(1) of the English Arbitration Act 1996) this would be the arbitration law at the seat of the arbitration. Such an approach has the attractiveness of a single law to be applied to the issue of evidentiary privileges immaterial of which party raises the privilege. Unequal treatment of the parties could be avoided at the outset. Under a substantive perspective, the arbitral tribunal would have to apply the general conflict of laws rules contained in the applicable arbitration law. This approach, however, has a potential for unequal and unfair treatment of the parties because it could lead to the application of different laws with different privilege standards.

Analyzing comparative approach of which rules should apply to qualifying privileges, Berger presents three initial prerequisites:

- it has been practically acknowledged that an international arbitral tribunal is under no obligation to apply the general conflict of laws rules which the courts at the seat of the arbitration have to apply;
- international arbitral tribunals are inclined and entitled to take a comparative approach in tackling choice of law issues;
- in making choice of law decisions, international arbitral tribunals should do justice to the legitimate expectations of the parties, and parties' reliance interest is particularly relevant in the area of evidentiary privileges²⁰³.

Berger outlines the following choice-of-law approaches and possible outcomes/drawbacks:

1. Based on substantive qualification of evidentiary privileges, arbitral tribunal must determine the law applicable to the privilege at issue by reference to the *classical conflict of laws rules*. That the

²⁰³ It would be unsatisfactory and will not support the legitimate expectations of the parties if the law of the seat of the arbitration would be applied to the issue of evidentiary privileges when the relevant communication took place or the relevant documents were exchanged in another jurisdiction or even in another continent, years before the seat was chosen (for mere purposes of convenience) or the arbitration was commenced. Berger, see supra note 158, at 504; Berger also refers to Mosk and Ginsberg, supra note 5, at 383: 'The forum State does not have a policy interest in the rights and relationships of the parties or witnesses in an arbitration, if those parties or witnesses have no relationship to that State other than the fact that the arbitration is being held there' and Rubinstein and Guerrina, supra note 163, at 590;

parties have chosen in the agreement the law applicable to the issue is extremely rare in practice²⁰⁴. Also, the communication and information to which the privilege relates will often have taken place in a jurisdiction other than the one chosen by the parties to govern their contract. For both reasons, extending the choice of law clause to the issue of evidentiary privileges would in most cases violate the parties' legitimate reliance interests.

2. International arbitration must develop its own conflict of laws approach for the determination of the law applicable to evidentiary privileges. There is one conflict rule which almost every tribunal applies consciously or intuitively and which has developed into a transnational rule of conflict of laws: *the closest connection* (apply the law of the jurisdiction with which the events or the communication which form the subject of the evidence issue before it are most closely connected²⁰⁵). This law can and will in many cases be different from the law applicable to the substance of the dispute and the law applicable to the arbitral procedure, but the application of such test does not produce uniform results: some favor the application of *the law of the state of the attorney's practice*; others – of the place where the *entire attorney-client relationship* has its predominant effects, regardless of whether the lawyer was licensed in that state.

In the case of the attorney-client privilege (the law with which the attorney-client relationship has its closest connection), the law of the state where the attorney-client relationship was established and which prevails even when the arbitral procedure is conducted in another country²⁰⁶:

- If the attorney and the client have their domiciles or places of business in the same country, the law of that country applies;

²⁰⁴ F. von Schlabrendorff and A. Sheppard, Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution in Liber Amicorum in Honour of Robert Briner (2005), at 770, cited in Berger, *supra* note 158, at 505

²⁰⁵ F. von Schlabrendorff and A. Sheppard, *supra* note 204, at 768; Mosk and Ginsburg, *supra* note 5, at 381 et seq.; J.H. Rubinstein and B.B. Guerrina, *supra* note 163, at 598; Renfield Corat and others v. E. Remy Martin & Co. and others, 98 F.R.D. 442, 445 (1982), ICC Award 5717, (1990) 2 ICC Bull.22, cited in Berger, *supra* note 158, at 507

²⁰⁶ B.F. Meyer-Hauser, Anwaltsgeheimnis und Schiedsgericht (2004), para.195; S. Bradford, Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution in 52 U Pitt. L Rev. 946(1991) cited in Berger, *supra* note 158, at 506

- If they reside in different countries, one might be tempted to argue that the law where the attorney resides or is admitted to the Bar applies, because only the attorney is likely to know about the scope of the privilege²⁰⁷;

- Based on difference between civil and common law - when the party is from a common law jurisdiction where the privilege is tied to the client, the law of the party applies; and where the party is from a civil law country where the privilege is vested in the attorney (as a right to refuse testimony) - the law of the place where the attorney is admitted to the Bar applies.

That would not do justice to the parties' reliance interest which plays such an important role in this context and which is focused on the parties' own privilege rules. Thus, it is the law of the jurisdiction where the party has its place of business at the moment the relevant communication took place and where most of the attorney-client contact occurred which will be applied in most of these cases²⁰⁸. In case of witness testimony it is the law of the domicile of the witness which must be applied²⁰⁹.

Arbitral tribunal for upholding equality of the process may establish most favored nation rule or least favored nation rule for application to privileges. In the case of former it will always be the law of the country where the party has its residence or place of business that will contribute to preserving parties' reliance interest. The latter will mean that both parties will have to present evidence on the basis of that neither communication will be protected, that will violate the interest of both parties, and attorney (in cases when privilege is vested in him) can be subject to professional sanctions for non-compliance with privilege standards²¹⁰.

Generally, the scholars mostly respect the most favored nation choice of law approach, if the closest connection test fails to solve the conflict of privileges. Advantages of such an approach include

²⁰⁷ F. von Schlabrendorff and A. Sheppard, *supra* note 204, at 771; S. Bradford, *supra* note 206, at 948, cited in Berger, *supra* note 158, at 506

²⁰⁸ Mosk and Ginsberg, *supra* note 5, at 382, cited in Berger, at 506

²⁰⁹ Berger, *supra* note 158, at 504-507

²¹⁰ *Id.*, at 513

general respect to confidentiality of communications protected, preservation of expectations, rules as certain and predictable, as well as it will compensate the absence of harmonization of the rules on privilege²¹¹.

2.4 Business privilege though confidentiality: economic and private business needs

Confidentiality doctrine includes privilege doctrine. There are various types of privileges. The most elaborated is the attorney-client that will be described below. Professional privileges apply to certain kinds of communications received or transmitted in the course of the exercise of professional relationships²¹².

In the recent years, international transactions became so much complicated as to include parties and related participants on both sides from more than two countries, and different issues and approaches to handling this complexity have emerged in nearly all spheres of commercial transactions management. When it goes smoothly – it can work nearly perfect, but in less disadvantageous situations, which occur rather often (e.g. when dispute arises), it can cause such a bunch of problems, some of that can hardly be expected at the time of conclusion of the arbitration agreement²¹³.

Nevertheless, the agreements/clauses/commitments on confidentiality are relevant to lots of international commercial contracts, and they are still paid more attention by a prudent businessman than the arbitration agreements. But at least some of the aspects of the former are not easy to enforce and apply remedies thereto on the international scale. It can amount to a part of a business risk. But it does not preclude practice from striving towards perfection.

²¹¹ Rubinstein and Guerrina, *supra* note 163, at 596; Matthieu de Boisseson, Report “Evidentiary Privileges in International Arbitration” on the ICCA Conference “International Arbitration 2006: Back to Basics?” in Montreal, 01.06.2006, at 13 et seq., F. von Schlabrendorff and A. Sheppard, *supra* note

²¹² Berger, *supra* note 158, at 2

²¹³ E.g. if a party to a contract or any other person/legal entity involved in the transaction (e.g. a middleman) cheats by contracting independently and directly with the business partner of the party who provided information (and this commercial contact) by passing over the party itself (and no confidentiality clause related to it and protecting this party participation in the transaction was included in the contract or a separate confidentiality agreement). This example is taken and brought from the authors work experience.

Catherine Pedamon urges that stability and predictability are the two supreme requirements of most participants in international transactions and notes that international investors “prefer to deal with one set of legal rules and principles”²¹⁴.

According to Trackman, confidentiality on some matters may be essential to the survival of a business, on others may be barely relevant, so in formulating confidentiality provisions or agreements, consideration should be given to that which should be rendered confidential, the reason for doing so, the extent of confidentiality desired, and the means of so providing²¹⁵. Also, due to the scholar, it is necessary to consider the nature of the applicable law and its relationship to arbitral confidentiality and to assess the manner in which confidentiality requirements are governed by law (by statute, regulation, or common law, and business, varying from trade usage to party practice). In such circumstances, it may be necessary to vary confidentiality provisions to accommodate differences in applicable laws and business practices. The other idea is the need for parties to estimate the cost of devising a confidentiality provision or agreement that may be measured in terms of the cost of negotiating and drafting a confidentiality provision or agreement, in terms of the concessions that a party may need to make in order to secure one. There are also risk costs, e.g. insisting on a confidentiality agreement may frustrate the interests of a prospective party in order to avoid seeking alternative business opportunities. A further risk is the likelihood – and cost – of enforcing confidentiality provisions or agreements as a matter of both law and business practice²¹⁶.

Quite wide, but still not entirely determinable group of professionals is involved in international business and base the success of its activity on the confidentiality thereof. This group can include, but is not limited to specialists on project financing techniques, IT system administrators, technological workers (R&D), bank officers, auditors, journalists, providers of international marketing

²¹⁴ Catherine Pedamon, *How is Convergence Best Achieved in International Project Finance?*, 24 *FORDHAM INT'L L.J.* 1272, 1274 (2001), cited in Loughrey, *supra* note 185, at 194

²¹⁵ For example, the confidentiality of customer lists may be very important to a party to arbitration – or those lists may be widely known. Preserving confidential financial records may be essential to prevent competitors from knowing about them: or that information, too, may be well known. See Trackman, *supra* note 120, at 9

²¹⁶ *Id.*, at 9-10

services. The problems with giving witness testimony by this group can cause problems the solution of which can be related to business or trade secrets privilege²¹⁷ claim by the party who presents such witnesses for him to be able not to disclose in their testimony at least the crucial aspects related simultaneously to their confidential actions and the case (managing a transaction schemes, numerical data, sources, financial information etc.). The other party can have commercial competing interest in such information and insist on disclosure, especially if it does not have such valuable information to disclose in response thereto. This should not result in the treatment of such testimony as acting against the party whose witness rejected to present it.

In this respect the legal weight of contractual obligation of confidentiality. Can its presence in the agreement between the party and employee/service provider acting as a witness in arbitration be considered as constituting a ground for business privilege application by the Tribunal? Can such witness give testimony and read from the documents that will not be produced for inspection to the other party?²¹⁸

Sarles comes up with an interesting general suggestion about making confidentiality clause a part of arbitration agreement (as one of crucial aspect) and touching upon the issue of privileged categories included in transaction as a possible solution²¹⁹. The idea is considered to be wise by the author of the thesis, but not easy to implement; however, the attention to proper and enforceable drafting of a confidentiality agreement, including arbitration matters, is to be paid. Possible answers and approaches to the questions above remain unsettled, and thus, there is even no need to refer to existing efforts on its harmonization.

To analyze the notion properly - that still has not been done on the global level - “business or trade secrets privilege” or “grounds of commercial or technical confidentiality that the arbitral tribunal

²¹⁷ See note 155, although it is accepted that such privilege exists it is not determined in the scholars` articles to what information does it refer.

²¹⁸ General problematic issue related to any witness in arbitration was stressed by Gelinas, see note 46.

²¹⁹ Jeffrey W. Sarles, see supra note 120.

determines to be compelling”²²⁰ should be properly and precisely defined to include all the necessary ground in not very broad, but concrete terms.

If it can be inferred at least from the USA trade secrets law²²¹ and case law, what is meant under the “trade secret” notion. To be considered a trade secret, information must fulfill three requirements: 1) it must confer a competitive advantage when kept secret; 2) it must be secret; and 3) it must be protected by reasonable secrecy precautions. Some US states add the requirements of novelty (usually as probative of secrecy), continuous use in the party's business, or concreteness (as only one factor in determining the limits of a proprietary claim and the commercial value)²²².

But with the confidentiality-advantage-protection-concreteness requirements fulfilled, commercially sensitive information can be used just for several, or even one, particular transaction, so far, that does not diminish its commercial value to the party. The elaborated notion of “business privilege” can include and protect it also.

And once more a detailed and useful solution can be found in the WIPO Arbitration Rules, Art. 52 on “Disclosure of Trade Secrets and Other Confidential Information” of which states that:

(...) confidential information shall mean *any* information, regardless of the medium in which it is expressed, which is:

- (i) in the possession of a party;
- (ii) not accessible to the public;
- (iii) *of commercial, financial or industrial significance*; and
- (iv) treated as confidential by the party possessing it.

The procedure to secure it is established as follows:

(b) A party invoking the confidentiality of any information it wishes or is required to submit in the arbitration, including to an expert appointed by the Tribunal, shall make an application to have the information classified as confidential by notice to the Tribunal, with a copy to the other party. Without disclosing the substance of the information, the party shall give in the notice the reasons for which it considers the information confidential.

²²⁰ see e.g. Mosk and Ginsburg, *supra* note 154 and note 140 –Art.9 of IBA Rules

²²¹ The appeal to the USA trade secrets law in the context of basic principles is justified, because, due to Hill, trade-secret protection may be referred to 1851 in England and 1868 in the United States. In this respect the *Morison v. Moat*, 68 Eng. Reat 492, 9 Hare 241 (1851) English case and *Peabody v. Norfolk*, 98 Mass. 452 (1868) American case are to be indicated. And the common law of trade-secret protection has developed over the last century through two primary policy objectives: 1) to encourage research and innovation, and 2) to maintain standards of commercial ethics (e.g., *E.I. du Pont deNemours Co. v. Masland*, 244 U.S. 100 (1917); *E.I. du Pont deNemours Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970); *Fleming Sales Co. v. Bailey*, 611 F.Supat 507 (D. Ill. 1985)), see James W. Hill, Trade secrets, unjust enrichment, and the classification of obligations, 4 *Virginia Journal of Law & Technology* 2, Spring 1999;

²²² See M. Milgrim, *Milgrim on Trade Secrets* §§ 1.03-.04 (1996), *Restatement (First) of Torts* § 757, cmt. b (1939); *Forest Lab., Inc. v. Formulations, Inc.*, 299 F. Supat 202 (E.D. Wis. 1969), *F. Jager, Trade Secrets Law* § 3.02, at 5.05 (1996), cited in Hill, *supra* note 221.

(c) The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.

(d) In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed. Any such confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.

(e) The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 55 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal²²³.

The author of the thesis urges that the reasonable combination of different solution related to confidentiality, privilege and witness evidence can be found and produce a synergistic effect.

It may seem a rather sophisticated solution, but embracing all this questions with legal privilege notion can convey to the problem a certain legal ground and starting point for future development in a right direction, in which the parties expectations will not be frustrated.

The research result points and practical considerations to be taken into account are the following:

1). Flexible character of arbitration and, moreover, - its ingenuity in case of conflict of legal approaches on the level of international commercial arbitration can be an important tool in dealing with such sort of problems (bright examples of a relieve to parties are the lawful solutions the courts come up with when the agreement to arbitrate is pathological);

2). Protection of trade secrets, valuable commercial information is a concern of developed countries in the international transactions. Secrets are an important intellectual resource that can amount to a company's most valuable assets, and can be destroyed "even without a physical transfer"²²⁴. A trade secret is not generally known by others, and its only exclusivity depends on private efforts to maintain its secrecy²²⁵. In *Kewanee Oil Co. v Bicorn Corp.*, the US Supreme Court

²²³ WIPO Arbitration Rules, available at URL: <<http://www.wipo.int/amc/en/arbitration/rules/#cond2>>

²²⁴ See *Rockwell Graphics Sys. v. DEV Indus.*, 925 F.2d 174, 180 (7th Cir. 1991) (Posner, J.) (stating the importance of trade secrets) and *Victoria A. Cundiff, The Economic Espionage Act and You*, 490 pLI/Pat 9, 33-4 (1997), cited in Hill, *supra* note 221.

²²⁵ James R. McKown, *Discovery of trade secrets in litigation in the United States*, *European Intellectual Property Review*, 1993, 15(9), at 327

stated: “The maintenance of standards of commercial ethics and the encouragement of invention are the broadly stated policies behind trade secret law”²²⁶.

3). It is a necessity to define and elaborate on the business/trade secrets legal privilege in international commercial arbitration, the categories to which it can apply and the role of the confidentiality agreement/clause in relation to privilege application²²⁷. To justify the extension or concretization of the legal privilege doctrine to certain categories of witness in international commercial arbitration the existing scientifically approaches should be analyzed²²⁸. The conclusion can be drawn that business privilege is in line with the basic ideas expressed in most of approaches to evidentiary privileges.

4). It is a necessity to consider the aspects and findings on attorney-client legal privilege approach and how it can be applied to business/trade secrets legal privilege;

5). It is a necessity for arbitral tribunals on the international trade (global market) level to consider the importance of business achievements to the commercial entity as much cautious as possible, like to the US citizen his entitlements under the U.S. Constitution put in jeopardy of the infringement. Such an important economic matter can amount to public policy consideration (not in the sense of New York Convention).

6) It is a necessity to make the efforts to harmonize at least the business/trade secrets legal privilege in international commercial arbitration approach, the need for what can be justified by high steaming by any country of its companies (and, thus, economical) prosperity.

The overall result should constitute a globally harmonized standard for application at least in international commercial arbitration, based on the best practices approach (e.g. combination of USA trade secrets law related achievements, WIPO Arbitration Rules corresponding provisions, international commercial contracts in resources, e-commerce, project financing transactions etc.),

²²⁶ *Kewanee Oil Co. v Bicorn Corat*, 416 US 470, at 481 (1974), cited in McKown, supra note 225.

²²⁷ Trade secrets / business privilege will, obviously, not fall directly under the light of the justification provided for the attorney-client privilege. But can the entrepreneur's rights be reconsidered for the purpose of justifying such an approach or is there another way?

²²⁸ See ANNEX 2 to the present thesis.

according to which commercially sensitive information contained in a witness testimony of more categories of witnesses, than attorneys, could be subject to concrete procedure with several workable alternatives to preserve its confidentiality and value for the party who appropriately possesses it.

Conclusion

Witness evidence forms an important part of evidence in international commercial arbitration, although proceedings can be, if allowed by applicable rules to be²²⁹, only document-based.

Direct and cross examination of witnesses in international commercial arbitration basically has the same features and underlying principles as in litigation, but the procedure can vary according to the influence of common or civil law element in arbitration. The difference between both approaches is substantial, but the flexible character of arbitration allows to adapt the rules to the circumstances of the case and to make nearly the best choices from both. It is an advantage of the procedure. But the adaptation is complex, because the panel may be composed of the representatives of both (civil and common law) systems.

The same flexible character also influence the evaluation of evidence by concerning another, than in litigation, approach to the need and procedure of making an oath and the consequences and impact of false testimony.

The combination of two or even three techniques of evidence presentation and taking – oral testimony, affidavits and witness conferencing – is applied, but affidavits is anyway needed for preparation and are accepted as commonly used.

In this context the burden on counsel to prepare the witness increases, but the practice is reasonable to put it on him mainly in the case the witness is essentially important for the dispute.

The arguments in favor of witness conferencing technique are appealing and interesting, but it is still not universally applied. Probably, that can be improved by summarizing results of a study conducted on the basis of more representative sampling, then the one W.Peter presented in his article, although the latter is one of the best the author of thesis read on it.

²²⁹ E.g. Art.24 (1) of the UNCITRAL Model Law, Art. 20 (6) of the ICC Arbitration Rules, Art. 19.1 of LCIA Rules, Art. 29 (2) of CIETAC Rules.

The interaction of witness testimony and confidentiality in international arbitration produces certain difficulties related to the need to protect information from outside disclosure by the third parties not bound to preserve confidentiality.

Other confidentiality problem, more precise – of protecting confidential commercial information (and not in the arbitration meaning of the word) – relates to a possibility for a party to shape or exclude some witness evidence, that will contain information related to that protected by business privilege, for it not to be misappropriated and unlawfully used by a competitor, and not to be in this case judged on that basis. The essence of the problem is that the trade secret notion is insufficient to cover all the edges, because of special requirements attributed to it as mandatory (e.g. competitive advantage, reasonable secrecy precautions and continuous use are not only evaluative, but in some sort restrictive to cover all types of commercially sensitive information).

The unresolved, but important conflict of privilege is related to witness evidence at a minimum due to the fact that attorney-client privilege became more important in the context of international commercial arbitration, because of the accepted practice of a possibility for a counsel to testify.

The best description of the problem can be inferred from the article of Michelle Sindler and Tina Wüstemann that urge :

“[i]n the absence of shared values and common ethical norms, in areas where there are no settled rules and there are no universal standards, there is a need for decisive action by arbitral tribunals who must properly monitor and moderate divergent approaches. Arbitrators must demonstrate a willingness to take control and to be tough and pragmatic when this is needed. They cannot shy away from making difficult decisions. If you are in a contentious situation, you need a decision-maker even on sensitive issues”²³⁰.

And their wise suggestion about it is being fair and reasonable for legal subjects to be able to freely choose the sources of their legal advice and assistance and for “their choice not to be restricted by later applying different and unexpected rules of privilege” can, generally, be extended not only to legal advise²³¹.

Due to Sindler and Wüstemann, experience shows that arbitrators seek a workable solution and tend to apply the rules of privilege that are shared by the parties, without regard to the rules of the

²³⁰ Sindler and Wüstemann, *supra* note 1, at 637.

²³¹ *Id.*, at 638

forum. Where one party would expect to enjoy greater evidentiary privileges before its national courts, in practice tribunals tend to allow the other party to also benefit from such additional privilege protection²³². But the difficulties exist and some of it could be reduced if a harmonized approach to rules of privilege (including, but not limited to its application and scope) could be found and adopted²³³.

As already mentioned, although many transnational or global standards do exist, it remains questionable whether, in light of the extent to which national rules on privilege vary, such ‘harmonized’ or ‘transnational’ approach (even if one could be found) could really be workable in practice given the nature of privilege rights and protections and the diversity in approach that exists even within the common law and civil law systems themselves. Too much discretion on the part of a tribunal, particularly in a sensitive area like this, leaves perhaps too much potential for decisions which are contrary to expectations (which arose long before arbitration was even contemplated). In the event of a conflict between the privilege rights generally enjoyed in its own jurisdiction by each party to the arbitration, there is no legislation, rule or binding authority addressing exactly how to solve the dilemma, which can certainly be far more complex today than before because of the nature of modern business²³⁴.

The analysis of possible ways to find a solution, conducted by Burn and Skelton, leads one to the conclusion that, although the uncertainties from contradictory rules of privilege could be cured by the insertion of a relevant provision in the arbitration agreement itself, dealing with such detailed issues in arbitration agreements rarely arises, and, thus the issue could be considered at an early stage following reference of a dispute to arbitration and before an exchange of evidence, that would allow such issues to be raised and addressed in advance or it would see a challenge to assumptions on how privilege issues would later be addressed. And it can, probably, result in agreement regarding which, if any, rules of

²³² Id., at 638.

²³³ Nathalie Voser, Harmonization by Promulgating Rules of Best International Practice in International Arbitration, *SchiedsVZ* 3/2005, at 118; See e.g. Gabrielle Kaufmann-Kohler/Philippe Bärtsch, Discovery in International Arbitration: How Much is too Much?, *SchiedsVZ* (January 2004), at 21., cited in Sindler and Wüstemann, *supra* note 1, at 638.

²³⁴ Sindler and Wüstemann, *supra* note 1, at 639

privilege apply to the proceedings²³⁵. Fair treatment, to be equal and fair, need sometimes to be applied with the exclusion of some part of disclosure for both and, thus, treating equally with preserving the opportunity to be different in competitive positions (like with Human Rights).

²³⁵ Burn and Skelton, see supra note 2, at 129

ATTORNEY-CLIENT PRIVILEGE THROUGH 22 JURISDICTIONS**ANNEX 1**

The information for the table was borrowed from Diana Good, Patrick Boylan, Jane Larner and Stephen Lacey ("Linklaters"), Privilege: a world tour, Article: know-how, Published on 18-Nov-2004, available at <http://www.practicallaw.com/2-103-2508>

COUNTRY	DISCLOSURE	PRIVILEGE
Belgium	<p>NO formal process of disclosure.</p> <p>But parties must produce the set of exhibits on which they rely, which will be served on the other side and at court.</p>	<p>Those entrusted with a duty of confidence by status or profession, such as lawyers and doctors, cannot reveal confidential information except where they are called to give evidence in legal proceedings or where the law requires them to disclose the information in question (Art. 458, Belgian Criminal Code, 1867). This concept is referred to as "professional confidentiality".</p> <p>In addition, the Professional Conduct Rules of the Belgian Bar forbid a lawyer testifying to facts that were revealed to him during the course of the exercise of his profession.</p> <p>Correspondence between a lawyer and his client is confidential by nature. Even the client may not produce correspondence from his lawyer marked as confidential unless the lawyer consents. However, correspondence previously marked by the lawyer as non-confidential may be used in court. Correspondence between Belgian lawyers is also confidential in principle and cannot be used in evidence (Art. 444, Judicial Code). However, some correspondence between lawyers will be classified as "official" and can be produced in court. The Professional Conduct Rules determine how the distinction should be made. Conflicts are resolved by the head of the bar.</p>
Brazil	There is NO obligation on a party to list or disclose documents but parties will generally produce those documents they consider support their own case.	All documents relating to the relationship between client and lawyer are privileged under federal law , including documents held at the client's premises.
Czech Republic	NO , neither party is obliged to disclose documents before trial, although the claimant will generally submit documentary evidence in support of its case to the court with the claim.	There is no concept of privilege expressly recognized in Czech law. However, communications between a lawyer (attorney) and his client are protected generally, as a lawyer is obliged to keep the affairs of his client confidential (section 21 of Act No 85/1996 Coll, on the Legal Profession (as amended)). Communications between an attorney and his client are therefore "privileged" from disclosure as long as they are in the attorney's possession , unless the client consents. The same communications, however, may not always be privileged in the possession of the client.
France	There is NO process in French civil procedure that is equivalent to documentary discovery or disclosure. Parties to civil proceedings in France generally only produce the documents that they consider to support their respective cases.	<p>The relationship between a lawyer (avocat, admitted to the local bar) and his client is protected by professional confidentiality obligations (Art.s 226-13, New Criminal Code), which prohibit a professional who is subject to a confidentiality obligation from divulging information obtained by him from his client.</p> <ul style="list-style-type: none"> - Any material written by a lawyer in relation to a matter handled on behalf of a client, - Correspondence between a lawyer and a client, - Correspondence between a lawyer and his opposing

		<p>lawyers in relation to the matter are <i>protected by professional confidentiality</i> unless there is express indication to the contrary (Art.s 66-5, Law of 31 December 1971). A client cannot release his lawyer from his obligation to keep these documents confidential but is not himself bound by this confidentiality obligation.</p> <p>Privilege for in-house lawyers is not recognised.</p>
Germany	<p>There is <i>NO</i> duty to disclose documents to the other side, other than those upon which a party intends to rely. Only very limited means of obtaining disclosure from the court exist.</p>	<p>The relationship between a lawyer and his client is protected by <i>a number of professional confidentiality regulations</i>. In the absence of the consent of the client, a lawyer is prohibited from divulging any confidential information or documents obtained in the course of his professional activities (section 203(1), Criminal Code). This obligation to preserve confidentiality is mirrored by the right of the lawyer to refuse to divulge such information (sections 383 and 142(2), Civil Procedure Code).</p> <p>In addition, documents entrusted to a lawyer in his professional capacity, and which remain in his possession, are protected from disclosure (section 97, Criminal Procedure Code).</p> <p>Privilege for in-house lawyers is not recognised.</p>
Hong Kong	<p><i>Probably, YES</i>, Parties <i>are obliged to disclose</i> documents which are in their possession, custody or power and which relate to matters in question in the action.</p>	<p><i>Legal professional privilege is recognised</i> in the same way in Hong Kong as it was in the UK before the first Court of Appeal judgment on privilege in the case of <i>Three Rivers</i>. Legal advice privilege protects communications between lawyer and client (that is the company as a whole and not just a section of it) and other documents created by the client for the dominant purpose of the giving or receiving of legal advice.</p> <p><i>Litigation privilege</i> protects the same documents, as well as communications with third parties for the purpose of the giving or receiving of legal advice or gathering evidence in connection with the proceedings. Internally circulated documents revealing or reproducing privileged lawyer-client communications also are privileged, even where such documents are brought into existence for a non-privileged purpose.</p> <p>Lawyer-client communications held at the client's premises are generally protected from production to regulatory and other investigative bodies, except where they relate to fraud offences.</p>
Hungary	<p>There is <i>NO</i> obligation under Hungarian law to disclose documents before the commencement of a trial. The parties to the dispute prepare evidence in support of their case and rely on them at the trial.</p>	<p>Lawyers (attorneys) are obliged to keep confidential all information that comes to their knowledge in connection with the provision of their professional services (Hungarian Act on Attorneys (Act 11 of 1998)). This provision on <i>legal privilege</i> extends to all documents containing any relevant facts or information prepared or held by the attorney.</p> <p>In addition, the Hungarian Acts of Civil Procedure (Act IV of 1959 (the Code of Civil Procedure is separately enacted as Act III of 1952)) and Criminal Procedure (Act I of 1973) both provide specific provisions in relation to the right to refuse to testify in respect of information protected by legal privilege. In the course of an official investigation, the attorney may not reveal information relating to his client, although he must not obstruct the actions of the public authority in question.</p>

		However, attorney-client communications held at the client's premises are not protected from disclosure.
Italy	There is NO formal process of disclosure. The parties must produce the set of exhibits on which they rely, which will be served on the other side and at court.	There is <i>no recognised doctrine of privilege</i> in Italy. However, there are certain circumstances in which Italian law will protect particular documents and communications from disclosure where that is necessary to safeguard the lawyer-client relationship. A lawyer cannot be obliged to give evidence of any information acquired by reason of his profession, including conversations and communications with his clients (Art. 200, Italian Code of Criminal Procedure), nor can he be obliged to disclose any document which is in his possession as a result of his professional activities if he declares in writing that the document is covered by professional confidentiality (Art. 256, Italian Code of Criminal Procedure). Likewise, lawyer-client communications held at the client's premises are generally protected from disclosure.
Japan	There is NO concept of disclosure in Japan, although applications may be made to the court for production of specific documents.	Although Japan <i>does not have a doctrine of legal professional privilege akin to client-attorney privilege or the work product doctrine</i> , it <i>recognises as privileged from disclosure confidential communications between a bengoshi (registered lawyer) and a client</i> (Lawyers Law and Professional Ethics Code). The protection only operates to prevent the lawyer having to disclose those communications - the same communications are not so privileged in the hands of the client.
Luxembourg	NO , A party is obliged to disclose only the documents on which it wants to rely.	<i>A right to legal privilege is expressly recognised</i> in the Criminal Code, in the Law of August 1991 on the legal profession (the Law), and in the Luxembourg Bar Association Regulation (LBAR). A lawyer is subject to <i>a duty of professional confidentiality</i> in accordance with Art. 458 of the Criminal Code (Art. 35, the Law) (Art. 5.1.1, LBAR).. He must keep confidential all aspects of a matter on which he is instructed, and must not communicate or publish any information regarding the matter under consideration. The duty extends to any information that the lawyer obtained as a result of his being instructed on a matter, from the client or a third party, and whether the information concerns the client or a third party (Art. 5.1.2, LBAR). The duty is general and unlimited in time (Art. 5.1.3 LBAR). There is nothing in Luxembourg law to prevent the seizure by regulatory and other investigative bodies of lawyer-client communications held at the client's premises. However, any documents seized must be returned (Art. 35, Law on the Legal Profession of August 1991).
The Netherlands	NO , Dutch law does not provide for a general duty to disclose comparable to the UK or US discovery rules. However, the Dutch law of procedure does contain a <i>limited number of specific regulations which allow</i> the court to order the disclosure of specific documents.	Those entrusted with a <i>duty of confidence</i> by status or by profession (such as priests, doctors, lawyers and notaries) cannot be forced to reveal confidential information (Art. 843a sub 3, Dutch Act on Procedure in Civil Matters (Wet-boek of Burgerlijke Rechtsvordering) (Rv) and Art. 165 sub 2b, Rv). This <i>right to legal privilege</i> only relates to information

		<p>revealed to lawyers in their professional capacity. The Professional Conduct Rules of the Bar forbid a lawyer from testifying to facts that were revealed to him by his client in the course of the exercise of his profession, although a client can give his lawyer permission to use specific confidential information in court.</p> <p>Information about the client revealed to the lawyer by third parties is not subject to legal privilege, except where it has been revealed to him within a separate client relationship. Correspondence between Dutch lawyers is confidential in nature and cannot be used in court, except where the client's interests require this. However, even in such a case, the prior consent of the other party or the president of the local bar is required. Lawyer-client communications held at the client's office are protected from seizure by regulatory and other investigative bodies.</p>
People's Republic of China	Generally, parties to litigation will need to apply to the court for an order to effect exchange of evidence.	<p>The <i>concept of legal privilege is not recognised</i> in the People's Republic of China (PRC).</p> <p>A lawyer must keep confidential information relating to the state and commercial information that he learns as a result of his professional practice (Art. 33, PRC Lawyers Law). There are, though, <i>no regulations on legal privilege that entitle a lawyer to refuse to disclose confidential information in court proceedings</i> or pursuant to a request from a government authority. On the contrary, the People's courts, the People's legal representatives and the public security organs have authority to collect or obtain evidence as necessary (PRC Criminal Procedure Law).</p>
Poland	There is <i>NO</i> obligation on parties to litigation to disclose any documents other than those on which they intend to rely.	Advocates and legal advisers are <i>obliged to keep confidential all material obtained</i> in connection with giving legal advice (Advocates Law 1982 and the Legal Advisers Law 1982 (as amended)). This obligation <i>extends to all support staff</i> working with a given advocate or legal adviser. In addition, lawyer-client communications held at the client's premises are not protected from disclosure.
Portugal	<i>NO</i> , disclosure must be made of documents that a party intends to use to support its own case, to enable its opponent to prepare its defence.	<p><i>Duty of confidence</i>, a lawyer (advogado) must keep confidential all facts that come to his knowledge during the course, and as a result, of the exercise of his legal profession (Art. 81, Portuguese Bar Association Professional Conduct Rules). The confidentiality in communications between a lawyer and his client can be waived by the client, although confidentiality in communications between lawyers acting for opposing parties may only be waived with the consent of the Portuguese Bar Association (Ordem des Advogados). Investigative bodies may not seize lawyer-client communications held at the client's premises.</p>
Romania	There is <i>NO</i> obligation on parties to disclose documents unless the court specifically requires a party to do so.	Those entrusted with a duty of confidence by status or by profession (such as lawyers, doctors and pharmacists) may not reveal confidential information, except where their clients give permission or where the law requires them to disclose the information in question (uncivil procedure and the Criminal Procedure Codes). This concept is referred to as

		<p>"professional confidentiality". In addition, a lawyer is forbidden from testifying to facts that were revealed to him in the course of the exercise of his profession unless prior permission has been given by the client (Lawyers' Law No. 51/1995 (as amended), and the Professional Conduct Rules of the Bar). Exceptions are very limited (for example, in relation to money laundering actions). However, documents are only protected for as long as they are in the lawyer's possession.</p>
Russia	There is NO obligation on parties to disclose documents unless the court specifically requires a party to do so.	<p>Russian legislation recognises as privileged any information or communications between an advocate (a lawyer who is qualified to represent clients in court) and his client, if they are produced in the course of the provision of legal assistance by the advocate to the client. An advocate may not disclose confidential client information. In addition, he cannot appear as a witness in court proceedings, nor be questioned on the information he has gained in the course of carrying out his professional duties as an attorney at law.</p> <p>In contrast, a Russian lawyer (who can be anyone who has completed a law degree) does not benefit from such protection against disclosure and must disclose any information requested by an authorised regulatory or investigative state body. This extends to communications between lawyer and client held at the client's premises.</p> <p>Privilege for in-house lawyers is not recognised.</p>
Slovakia	NO , parties must disclose to the court the documents upon which they wish to rely. The other side then has access to these.	<p>An advocate is obliged to keep confidential all information acquired in connection with litigation, subject to certain defined exceptions (Act 586/2003 Coll. on Advocacy (Act on Advocacy)). The scope of the information protected against disclosure by an advocate is not defined any further. In legal theory and practice it is generally accepted that this duty applies not only to the documents prepared for a client but also to all information communicated to an advocate by a client. In addition, it includes information not directly communicated by a client but acquired by an advocate in the process of advising on a particular case, where the information concerned is not publicly known.</p>
Spain	NO , disclosure must be made of the documents that a party intends to use to support its own case.	<p>Lawyers (abogados, for whom membership of the bar is obligatory) must keep confidential all facts and matters that they come to know through the conduct of their professional obligations (Art. 542, Law of Judicial Authority (Ley Organica del Poder Judicial)). This is reinforced by the imposition on lawyers of a duty not to disclose facts and documents that have come into their possession as a result of their professional activities (Spanish Professional Conduct Code (June 2000) and General Statute for Spanish Lawyers (Estatuto General de la Abogacía Español, approved by Royal Decree 658/2001 of 20 June). Clients may not release their solicitor from this duty, although they are not bound by it themselves. However, relevant documents in the client's possession continue to benefit from confidentiality and do not have to be disclosed to investigative bodies.</p> <p>Disclosure of confidential information contrary to professional confidentiality obligations is punishable with a prison term, fine and/or disqualification from</p>

		practice (Art. 199.2, Spanish Criminal Code).
Sweden	There is NO concept of disclosure of documents in Swedish law, although during the preparation for trial each party must submit all documents it wishes to present as evidence. Further, a party must indicate what additional items of written evidence it is holding if asked to by the opposing party.	<p><i>The concept of legal professional privilege is recognized</i>, although it is limited and depends on the identity of the lawyer.</p> <p>Legal privilege is primarily an exception to the general obligation to give testimony provided by the Swedish Procedural Code (SPC). Swedish advokats (that is, members of the Swedish Bar Association) and their assistants have a right to legal privilege, which protects all confidential information gained by them in the provision of legal services generally (chapter 36, section 5, SPC). In addition, investigative authorities are not entitled to seize lawyer-client communications held at the client's premises. This right may be overridden where the examination is authorised by law or the client consents to the disclosure.</p> <p>However, legal privilege available to non-advocate trial lawyers is limited to protecting only confidential client communications entrusted to the lawyer for the purposes of the litigation.</p> <p>Privilege for in-house lawyers is not recognized.</p>
Switzerland	NO , but in civil proceedings, the procedural rules of many cantons provide that a respondent can be ordered, but not compelled, to deliver documents in its possession. The court can, however, draw adverse conclusions from a respondent's refusal to produce a document. Third parties have a duty to deliver documents requested by court order.	<p>Information received by an independent lawyer from a client or from third parties in the context of an attorney-client mandate remains confidential. Lawyers <i>are obliged not to disclose such information and can invoke a privilege based on the applicable procedural laws to protect it.</i></p> <p>The information is protected if it is in the lawyer's possession. The protection will include correspondence between lawyer and client, memoranda, notes and, to some extent, documents received from the client. All such material is protected provided it relates to legal advice. No protection is granted to information relating to other services by external lawyers.</p> <p>Privilege does not extend to material in the client's possession. As a result, correspondence between lawyer and client found at the premises of the client or third parties is not protected.</p>
UK (England and Wales)	YES , a party to litigation must disclose, broadly, those documents on which he relies and those that adversely affect his own case, adversely affect another party's case, or which support another party's case (Civil Procedure Rule 31.6).	<p>Documents that are covered by <i>legal privilege</i> are protected from disclosure. Legal privilege comprises two main types:</p> <p><i>Legal advice privilege.</i></p> <ul style="list-style-type: none"> - applies to confidential communications between a lawyer and his client - for the purpose of giving or receiving legal advice, in respect of the client's legal rights and obligations. - communications between the lawyer and (the client's employees, or) third parties are not covered. <p><i>Litigation privilege.</i></p> <ul style="list-style-type: none"> - arises once litigation is in reasonable prospect. - documents that come into existence at the request of a lawyer or at the request of a client with the intent to pass them on to the lawyer (including those generated by third parties, for example, witnesses and experts), will be privileged from disclosure, provided that they are for the purpose of obtaining evidence or giving or receiving legal advice in connection with the litigation. <p>Relevant documents held at a client's premises will be protected from disclosure to regulatory and other</p>

USA	<p>YES, disclosure (discovery) does take place, but it is mainly up to the parties to request disclosure of documents from the opposing party, as the mandatory disclosure requirements under the federal rules are quite limited and the states in the main have no such rules.</p>	<p>investigative bodies.</p> <p>US jurisdictions <i>recognise several legal privileges</i>, with two being the most common: <i>the attorney-client privilege and the work product doctrine</i>.</p> <p>The attorney-client privilege protects confidential communications between an attorney and his client that are made:</p> <ul style="list-style-type: none"> - in the course of legal representation. - for the purpose of providing legal advice to the client by the attorney. - only the communication and not the underlying facts. <p>A client cannot shield documents from disclosure simply by sending them to his lawyer.</p> <p>The work product doctrine:</p> <ul style="list-style-type: none"> - protects documents and tangible things prepared in anticipation of litigation by an attorney or an attorney's agent - does not provide absolute protection. - it does not prevent disclosure of an attorney's mental impressions, conclusions, opinions or legal theories with respect to actual or reasonably anticipated litigation. <p>Other applicable privileges in the US are the common interest privilege and privilege against self-incrimination. This is not an exhaustive list.</p> <p>The treatment of lawyer-client communications by regulatory and other investigative bodies is considered in more detail in the second part of this feature.</p>
<p>THE CONCLUSION OF SCHOLARS</p>	<p>Legal professional privilege exists in most jurisdictions but its scope and application varies widely. The concept of legal privilege differs across jurisdictions around the world, creating significant risks for multinational companies and their legal advisers.</p> <p>As both litigation and regulatory investigations become increasingly international, these differences (and their potential consequences) present a significant risk for companies and their legal advisers. In-house counsel advising companies operating in multiple jurisdictions are particularly exposed.</p> <p>Advice that is privileged in the country where it is given may not be protected in other countries where a company operates. Similarly, advice produced by a locally qualified lawyer may be privileged, while the same advice produced by a foreign lawyer practising in the jurisdiction might not be privileged.</p> <p>In civil law jurisdictions, the difference in approach to the question of privilege flows from the fact that these jurisdictions do not have a similar system of either transparency or the obligation to provide disclosure. The obligation in most civil law countries amounts to no more than a duty on a party to disclose the documents which support its case and upon which it wishes to rely.</p>	
<p>AUTHOR` OF THESIS CONCLUSION</p>	<p>The concept of full disclosure (to disclose all in possession, also that is not in favor) is known mostly to common law countries (information on New Zealand and Australia is lacking in the survey).</p> <p>All others studied have the general rule of disclosing the position and evidence supporting it.</p>	<p>The survey primary concerns a general presence of legal privilege or duty of confidence notion (the difference between them is described in the sub-chapter 2.3, CH.II of the thesis).</p> <p>And extends to the criminal procedure approach, that is not related to the thesis research, but is important for attorney client privilege.</p> <p>The relevance of the national law to the privilege in international commercial arbitration can be inferred from sub-chapter 2.3 (2.3.5), CH.II of the thesis, because potentially this law can turn out to be applicable to the issue of privilege and influence the outcome of the dispute on privilege application.</p> <p>The impact of the place of document (information) storage is important for its treatment in many cases.</p> <p>The concept seems to be the most elaborated in the common law jurisdictions.</p>

*DOCTRINES FOR THE EVALUATION
OF NEW PRIVILEGE ACCEPTABILITY*

ANNEX 2¹:

APPROACHES TO PRIVILEGES:	THE ESSENCE OF APPROACH	MISCALCULATIONS IN RELATION TO UNIVERSAL APPLICATION POSSIBLE	BUSINESS PRIVILEGE ANALYSIS
1 - Wigmore`s utilitarian model of privilege law ²	<p>Is based on the protection of relationships in society, balanced against the truth-seeking function of the judicial system.</p> <p>Four fundamental conditions to the recognition of an evidentiary privilege:</p> <p>(1) The communications must originate in a confidence that they will not be disclosed.</p> <p>(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.</p> <p>(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.</p> <p>(4) The injury that would incur to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.</p>	<p>1- Wigmore`s approach, if the one to be applied, will exclude some privileges already existing and used, because they will not fit under its requirements³.</p> <p>2- few ordinary people are aware of protected relationships and modify behavior to take advantage of them (confirmed by empirical studies, but the studies also indicate that people have a dramatically lower likelihood to communicate if they are informed that a conversation is not privileged (Miller)</p> <p>3- his factors are sometimes very much hypothetical and result in the recognition of privileges based on pure speculation of how people might act. (Louisell)</p> <p>But the approach remains an important consideration in the recognition of new privileges, <i>Jaffe v. Redmond</i>, 518 U.S. 1 (1996) and it is a valuable model to analyze the extension of the attorney-client privilege.</p>	<p>This privilege is claimed to be properly defined as part of business or trade secrets privilege and extended to the instances when commercially sensitive information does not fall under the notion of trade secrets.</p> <p>The extension, as well as its harmonisation is claimed solely for the purpose of international commercial arbitration.</p> <p>Thus, author of the thesis assume that the business privilege should not necessarily totally fall under any of the approaches, it should just be in the boundaries of the basis ideas⁴.</p> <p>Analizing Wigmore`s criterias, it can be proposed, that:</p> <p>(1) when contracting with other legal subject it can be presupposed that the business relations, valuable information obtained in course of negotiations and business interaction related to transaction if amounts to business sensitive, will not be disclosed outside the transactions and/or a group of persons concerned and solely for the benefit thereof. The first criteria`s basic idea is upheld.</p> <p>(2) International transactions cause a clash</p>

¹ John AT Killacky, Expanding the tripartite relationship: extending evidentiary privilege to fourth-party legal audits, *University of Illinois Law Review* 1339, 2000.

² 8 J. Wigmore, *Evidence* § 2285 (J. McNaughton ed., rev. ed. 1961), Raymond F. Miller, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 *Conn. L. Rev.* 771, 782, 787-89 (1999), David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 *Tul. L. Rev.* 101, 110 (1956), at 111-12, cited in Killacky, *supra* note 1.

³ See Killacky. The scholar`s critics is also confirmed by Louisell.

⁴ In his article on one of the possible extensions of privilege John AT Killacky claims that the extension to be justified must comport with one of these models, but urges, that all have their drawbacks.

			<p>of different cultures and business traditions; but deceit and bad faith is an internationally unacceptable consequences of business dealings.</p> <p>The element of confidentiality here includes:</p> <ul style="list-style-type: none"> - confidence in other party not to override the other party; - confidence in non-disclosure of the facts and information provided solely for one or several particular transactions; - confidentiality of schemes, sources and methods for the success of the project; - confidentiality and no further use of the good that was exclusively agreed upon; <p>This can be said to be in line with the second criteria.</p> <p>Third criteria can be justified as related to business privilege, because of economic development and FDI attraction reasons.</p> <p>The forth's criteria idea is less related to arbitration, but can be upheld by the business-friendly feature of arbitration. It is less easy to enforce the remedy against missappropriation in this case, than to decide a case without disturbing commercially sensitive information.</p>
2 - Rights-based analysis approach ⁵	<p>Focuses on the social benefits arising from the recognition of privacy defined by the scholar as voluntary and secure control that a person possesses over communication.</p> <p>Both parties rely on the respective privileges in order to foster full disclosure of client confidences and effective representation in litigation.</p>	Not specified by the scholars	Is hardly related to international commercial arbitration sphere.
3 – Political expression approach ⁶	<p>Privileges are explained purely as a means of political expression; evidentiary privileges are coupled with political power.</p>	The model seeks to explain evidentiary privileges, rather than justify their	State economic interest is to preserve a stable development of economy

⁵ Thomas G. Krattenmaker, Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence, 62 Geo. L.J. 61, 85-87 (1973), cited in Killackey, supra note 1.

	Two reasons for this theory: (1) most privileges protect persons in relatively high positions of power in society, e.g., attorneys, physicians, and clergy; (2) most new privileges have been created by legislative act, that certainly requires the exercise of political power	existence. This is ineffective to analyse the extension. But if a privilege were recognized, the requisite power structure would be consistent with the model.	and international business interactions. And to provide guarantees of essential protection for its companies and their foreign partners. States have power to induce harmonization or to allow it.
4 – Approach of economic benefits and burdens that increase ⁷	One of the newer models, arises out of the law and economics movement. This approach essentially applies a cost-benefit calculation to determine the best resolution. Five basic factors: (1) the costs of producing evidence; (2) how those costs are allocated between the parties; (3) the effect of interparty transactions on evidence; (4) the extrinsic effects of adopting certain evidentiary rules; (5) optimizing the yield of costs and benefits.	One of the major criticisms of economic analysis is that it is premised on the idea "that people are rational agents who optimize their decisions within constraints placed on them by their environment" ⁸ . Economic analysis is a useful but underused in resolving various evidentiary issues.	The burden on arbitrators deciding the case can, definitely, increase. But they can anyway be in difficult situation when facing seemingly non-fundamental issue of privilege. Business privilege will not increase cost, it can optimize costs and benefits. And can lie on a party claiming it as a burden to find alternative or additional evidence, but should not be judged against it in the award.
AUTHORS' CONCLUSION ON BUSINESS PRIVILEGE: The privilege is in line with the basic ideas expressed in most of approaches to evidentiary privileges. There is no need to create something new and revolutionary, just to extend, define, harmonize and, thus, preserve one of the generally accepted economic values.			

⁶ See Miller, *supra* note 2, cited in Killacky, *supra* note 1.

⁷ See Richard D. Friedman, *Economic Analysis of Evidentiary Law: An Underused Tool, An Underplowed Field*, 19 Cardozo L. Rev. 1531, 1531-38 (1998), cited in Killacky, *supra* note 1.

⁸ Myrna S. Raeder, *Cost-Benefit Analysis, Unintended Consequences, and Evidentiary Policy: A Critique and a Rethinking of the Application of a Single Set of Evidence Rules to Civil and Criminal Cases*, 19 Cardozo L. Rev. at 1591. (1998) (describing the response to an attempt to justify attorney work-product privilege under an economic model to the Evidence Section of the American Association of Law Schools).

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