Pomoć suda u izvođenju dokaza u međunarodnoj arbitraži

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COURT ASSISTANCE IN TAKING EVIDENCE IN INTERNATIONAL ARBITRATION

Master Thesis

Mentor: doc. dr. sc. Tena Hoško

Zagreb, June 2023

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Barbara Grlić

Summary

The parties in arbitration expect to resolve their dispute in a high-quality, exhaustive and more efficient manner compared to the proceedings before the state courts. In order to do this, the parties expect to be able to fully present their side of the story by obtaining and presenting the evidence they deem necessary to prove their claims. However, the tribunals are private forums and do not have the powers of the state courts at their disposal such as the state coercive apparatus. This limitation is especially evident when it comes to gathering of evidence, and even more so when the evidence is placed outside the country of the seat of arbitration. In such situations, cooperation between courts and the tribunals as well as international court assistance is needed. International conventions regulate the matter of court assistance in taking of evidence in international arbitration only in outline, leaving it up to each state to elaborate further with its procedural and arbitration laws the procedure and prerequisites for submitting such a request to the courts. This paper will primarily show how the framework for assistance of courts in taking of evidence in international arbitration is organized on the international level, and how different the state approach can be.

Key words: international court assistance, court assistance, powers of the tribunal, evidence, witness, request for court assistance

Sažetak

Stranke u arbitraži očekuju da će svoj spor riješiti na kvalitetan, iscrpan i učinkovitiji način u odnosu na postupak pred državnim sudovima. Kako bi to učinile, stranke očekuju da će moći u potpunosti iznijeti svoju stranu priče pribavljanjem i iznošenjem dokaza koje smatraju potrebnima za dokazivanje svojih tvrdnji. Međutim, arbitraža je oblik privatnog suđenja te tribunali nemaju na raspolaganju ovlasti državnih sudova kao što je državni aparat prisile. To ograničenje posebno dolazi do izražaja kada je u pitanju prikupljanje dokaza u arbitražnom postupku, a posebice kada je u pitanju potreba za prikupljanjem dokaza izvan države sjedišta arbitraže. U takvim situacijama potrebna je ne samo suradnja između sudova i tribunala, nego i međunarodna pravna pomoć. Međunarodne konvencije materiju pomoći suda u prikupljanju dokaza u međunarodnoj arbitraži uređuju samo okvirno, prepuštajući svakoj državi da svojim procesnim i arbitražnim propisima dodatno razradi postupak i preduvjete za podnošenje takvog zahtjeva sudu. Ovaj rad prvenstveno će prikazati kako je na međunarodnoj razini propisan okvir za pružanje pomoći suda u izvođenju dokaza u međunarodnoj arbitraži, te koliko različit može biti pristup pojedinih država.

Ključne riječi: međunarodna pravna pomoć, pomoć suda, ovlasti arbitražnog suda, dokazi, svjedok, zahtjev za pomoć suda

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1. INTRODUCTION

Court assistance is generally available from the courts of the country of the seat of arbitration.[1] For example, the state court can order a party to produce documents or force a witness to appear before the arbitrators. The effect of such state court orders can be reinforced by penal sanctions in the case of non-compliance.[2] The arbitral tribunals' powers in relation to the establishment of facts are limited because they can only order the parties to provide evidence, but the parties cannot be compelled to comply with evidentiary orders made against them.[3]

The role of the courts in arbitration is one of assistance and control. As set forth in the Explanatory Note to the Model Law, "[i]n addition to designating the law governing the arbitral procedure, the territorial criterion is of considerable practical importance in respect of articles […] which entrust State courts at the place of arbitration with functions of supervision and assistance to arbitration."[4] Circumstances in which court assistance is available and where a court may intervene in arbitral proceedings is often specified in both in international and national legislation to make international arbitration more effective.

2. INTERNATIONAL REGULATION OF COURT ASSISTANCE

The parties in an international arbitration have the right to expect that it is their decision which witnesses will tell the story since arbitration is a private, consensual way of dispute

[1] Girsberger, Daniel, Voser, Nathalie: 'Chapter 4: The Arbitral Procedure' in Daniel Girsberger, Nathalie Voser: International Arbitration: Comparative and Swiss Perspectives (Fourth Edition), Schulthess Juristische Medien AG, Zurich, 2021, p. 290, § 1021.

[2] Levine, Judith: 'Can Arbitrators Choose Who to Call as Witnesses? (And What Can Be Done If They Don't Show Up?)' in Albert Jan Van den Berg: ICCA Congress Series No. 18 (Miami 2014): Legitimacy: Myths, Realities, Challenges ICCA Congress Series, ICCA & Kluwer Law International, Volume 18, 2015, p. 349.

[3] UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, p. 118.

[4] Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, p. 26, para. 14.

resolution.[5] The right to be heard guarantees the parties the right to submit relevant statements of fact, to present legal arguments and to request taking of evidentiary measures.

According to Art. 18 UNCITRAL Model Law[6], "[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case." This approach is followed by a number of arbitration rules, such as Art. 17(1) UNCITRAL Arbitration Rules[7], Art. 22(4) ICC Rules[8] and Art. 14.1(i) LCIA Rules[9] as well as by some national arbitration laws, such as § 1042(1) German Code of Civil Procedure[10], Sec. 33(1)(a) English Arbitration Act[11] and Art. 182(3) Swiss PILA[12].

Failure to comply with these fundamental principles may provide grounds for setting aside, as reflected in Art. 34(2)(a)(ii)[13], 34(2)(a)(iv)[14] and 34(2)(b)(ii)[15] UNCITRAL Model

[5] Levine, *op. cit.* (n. 2), p. 355.

[6] UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, United nations commission on international trade law.

[7] UNCITRAL Arbitration Rules, 2021; „1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.".

[8] International Chamber of Commerce Arbitration Rules, 2021; "4) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

[9] The London Court of International Arbitration Arbitration Rules, 2020; "14.1 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include: (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s);".

[10] Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette) I page 3202; 2006 I page 431; 2007 I page 1781), last amended by Article 3 of the Act dated 24 September 2009 (Federal Law Gazette I page 3145); "(1) The parties are to be accorded equal treatment. Each of the parties is to be given an effective and fair legal hearing.".

[11] The English Arbitration Act 1996; „(1)The tribunal shall—(a)act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent".

[12] Swiss Federal Act on Private International Law (SPILA) of 18 December 1987; "3 Regardless of the procedure chosen, the arbitral tribunal shall guarantee the equal treatment of the parties and their right to be heard in adversarial proceedings.".

[13] It reads as follows: „(2) An arbitral award may be set aside by the court specified in article 6 only if (a) the party making the application furnishes proof that (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case".

[14] "(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in confl ict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law".

[15] „(b) the court finds that: the award is in conflict with the public policy of this State".

Law or Sec. 33(1)(a)[16] and Sec. 68(2)(a)[17] English Arbitration Act. Also, it may constitute grounds for refusing the recognition and enforcement of the award under the New York Convention[18] in its Arts. V(1)(d)[19] and V(2)(b)[20].

Courts may step in to help the tribunal gather all relevant facts and allow the parties to fully demonstrate their case in the proceedings. International regulations provide a basic framework, and each individual state has the freedom to supplement the rules with its own procedural laws based on its legal culture.

2.1. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

In explaining the purpose of the Article 27 of the UNCITRAL Model Law, Analytical Commentary notes that Art. 27 calls upon the courts to render assistance in taking evidence, in particular by compelling appearance of a witness, production of a document or access to a property for inspection.[21] It reads as follows: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."[22]

In these two short sentences it is explained how court assistance is to be provided: first, who may request court assistance and second, should the court execute the request. At the

[16] It states: „(1) The tribunal shall — (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent".

[17] „2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant— (a)failure by the tribunal to comply with section 33 (general duty of tribunal);".

[18] United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

[19] "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;".

[20] „Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.".

[21] International Commercial Arbitration Analytical Commentary on Draft text of a Model Law on International Commercial Arbitration Report of the Secretary-General, 1985, p. 59.

[22] UNCITRAL Model Law, *op. cit.* (n. 6), Article 27.

beginning of drafting of the Model Law, different views were expressed on whether court assistance should be regulated within the Model Law at all.[23] For example, concern was voiced that such procedural court assistance formed an "integral part of the procedural law of the legal system concerned" and that "the different legal systems procedural laws varied greatly in this respect".[24] As a solution to the problem, only basic provisions on the request for court assistance were suggested.

The first sentence of today's Art. 27 determines who may file a request for court assistance in taking evidence: either the arbitral tribunal itself or a party with the approval of the tribunal.[25] The court is being referred to as the "competent court". An explanation of how the courts' competence is to be determined can be found in the Analytical Commentary which explains that the competent court "is not necessarily the one designated pursuant to Article 6[26] since its competence may be based, for example, on the residence of the witness to be heard or the location of the property to be inspected".[27]

According to the adversary principle, the parties have to produce evidence in support of their case. Thus, the tribunal should not participate in gathering of evidence nor have the right to refuse the parties' request for court assistance. In one Indian case[28], the request for court's assistance in taking evidence failed because the party did not obtain the approval of the arbitral tribunal. In the words of the tribunal: "the petitioner has not obtained the approval of the arbitral tribunal before moving the court seeking its assistance for taking evidence by invocation of Section 27 of the Act. Therefore, the application as filed is not sustainable."[29] However, subjecting the parties' request to the approval of the court is important because

[23] Melis, Werner: 'Arbitration and the Courts' in Pieter Sanders: ICCA Congress Series No. 2 (Lausanne 1984): UNCITRAL's Project for a Model Law on International Commercial Arbitration, ICCA & Kluwer Law International, Volume 2, 1984, p. 94; Holtzmann, Howard M., Neuhaus, Joseph: 'UNCITRAL Model Law, Chapter V, Article 27 [Court assistance in taking evidence]' in Howard M. Holtzmann and Joseph Neuhaus: A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary, Kluwer Law International, Deventer; Boston; The Hague, 1989, p. 736.

[24] Binder, Peter: 'Article 27: Court Assistance in Taking Evidence', in Peter Binder: International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2019, p. 388.

[25] Analytical Commentary, *op. cit.* (n. 21), p. 60.

[26] „The Court with jurisdiction to perform the functions referred to in articles 11(3), (4), 13(3), 14 and 34 (2) shall be the ... (blanks to be filled by each state when enacting the model law).".

[27] Binder, *op. cit.* (n. 24), p. 391.

[28] SH. Satinder Narayan Singh v. Indian Labour Cooperative Society Ltd. & Ors., High Court of Delhi India, 17 December 2007, available at: https://indiankanoon.org/doc/530842/

[29] *Ibid.*, § 3.

"automatic court assistance would open the possibility of abuse of court process."[30] For that reason, the party should not be permitted to directly request a court for assistance, but rather have the tribunals' approval for the request.

Regarding the issue of how the tribunal's request should be drafted, in the end a combined approach was favoured. It would allow the court to decide whether assistance is to be given in such a way that the court itself takes evidence or whether it should only provide compulsion for the arbitral tribunal to take the evidence.[31] Also, Art. 27 does not specify the type of evidence in respect of which state court assistance may be sought, but instead refers to the provisions of the *lex fori*.[32] Thus, under the Model Law, parties have access to the same procedural devices in respect of evidence as those available in state court proceedings.[33]

The second sentence of Art. 27 is aimed at the local court, stating that it "may execute the request within its competence and according to its rules on taking evidence". The word "may" indicates the court's discretion, and the reference to the court's "rules on taking evidence" refers to the particular legal system's laws which govern the matter. "Art. 27 is silent with respect to the court's role in determining whether it should exercise its discretion in favour of providing the requested assistance."[34]

Regarding the courts' discretion, the tribunal must first be satisfied that the evidence may be useful for the arbitral proceedings before the tribunal can be expected to seek its assistance or to give leave to one of the parties to do so. "The tribunal must always weigh the competing relevant interests and value, including the time and expense of the addition discovery, and should be careful in the exercise of its powers."[35] In a Singapore case[36], a party made a request for a subpoena to be issued in order to compel an individual to disclose

[30] Report of the working group on international contract practices on the work of its third session, United nations commission on international trade law, United nations general assembly 1982, p. 16.
[31] Binder, *op. cit.* (n. 25), p. 389.
[32] The second sentence of Art. 27 reads as follows: „The court may execute the request within its competence and according to its rules on taking evidence.".
[33] Emanuele, C. Ferdinando, Molfa, Milo, Jedrey, Nathaniel E.: 'IV. State Courts Assistance in the taking of Evidence', in C. Ferdinando Emanuele, Milo Molfa, Nathaniel E. Jedrey: Evidence in International Arbitration: The Italian Perspective and Beyond, Thomson Reuters, Alphen aan den Rijn, The Netherlands, 2016, p. 140.
[34] UNCITRAL 2012 Digest of Case Law, *op. cit.* (n. 3), p. 120.
[35] Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, Court of Appeal of Alberta, October 31, 2005, Reasons for Judgment of the Honourable Mr. Justice O'Brien, p. 12, § 45, available at: https://www.canlii.org/en/ab/abca/doc/2006/2006abca18/2006abca18.html
[36] ALC v. ALF, High Court, Singapore, 11 August 2010, available at: https://www.elitigation.sg/gd/s/2010_SGHC_231

documents or provide answers pertaining to those documents. However, the tribunal had previously denied this request. The court application was dismissed and the applicant was considered to have abused the process.[37]

The issue of foreign court assistance (*i.e.*, assistance from a court in a country other than the one where the arbitration is seated) was seen as a difficulty.[38] The Model Law, which becomes part of the domestic law after adoption, may not be able to provide such court assistance because Art. 1(2)[39] reduces the application of Art. 27 to the territory of the *lex loci*.[40] It has been discussed whether the Model Law should be limited to arbitral proceedings taking place in the state where the court was located, or whether it should apply also for arbitrations abroad.[41] Those opposed to any regulation on court assistance pointed out that such regulations are "contrary to the private nature of arbitration" and "interfered with the internal procedural law."[42]

However, the absence in Art. 27 of "any reference to foreign arbitral tribunals should not be interpreted as preventing courts from providing assistance to the tribunals seated abroad on the basis of local procedural rules."[43] The view prevailed in the Working Group that international court assistance was an issue which "fell within the domain of international cooperation between States and that such international cooperation could only be achieved in a satisfactory way by international instruments such as conventions or bilateral treaties".[44] A Canadian court held that "courts could assist an arbitral tribunal with the discovery of evidence from third parties and that limiting the scope of Art. 27 cannot be justified on the basis that arbitration is not parallel to the court system."[45]

[37] UNCITRAL 2012 Digest of Case Law, *op. cit.* (n. 3), p. 21, § 6.

[38] Binder, *op. cit.* (n. 24), p. 391.

[39] „(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.".

[40] Binder, *op. cit.* (n. 24), p. 392.

[41] Melis, *op. cit.* (n. 23), p. 95.

[42] *Ibid.*; Holtzmann/Neuhaus, *op. cit.* (n. 23), p. 738.

[43] UNCITRAL 2012 Digest of Case Law, *op. cit.* (n. 3), p. 119.

[44] The Report of the Working Group on International Contract Practices on the work of its sixth session, United nations commission on international trade law, United nations general assembly, 1983, para. 43.

[45] Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, *op. cit.* (n. 35), para. 25.

2.2. CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The approach that international court assistance was a subject of international cooperation between States and that it should be regulated through conventions and bilateral treaties was welcomed by the Hague Conference[46]. The Conference rendered the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

The Convention seeks to overcome the differences between legal systems regarding the process of obtaining evidence by establishing a uniform framework of cooperation mechanisms to facilitate and streamline the taking of evidence abroad. This is achieved with two separate and independent systems: (1) Letters of Request and (2) diplomatic officers, consular agents, and commissioners. The Convention allows transmission of letters of requests between the signatory States from the court where the evidence is sought to the court where the evidence is located.

Art. 1 states: "In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act."

The requests should come from "judicial authorities".[47] Therefore, tribunal would need to approach the judge of a court in the State where the arbitration is seated who then prosecutes the request through the framework of legal assistance in order for it to be executed by the state court, for example, for the witness to be heard by the court at its domicile.[48]

Art. 9 of the Convention states that a Letter of Request shall be executed expeditiously and that the judicial authority which executes a Letter of Request applies the methods and procedures according to its own law. However, it will follow a requested special method or

[46] Hague Conference on Private International Law is The World Organisation for Cross-border Co-operation in Civil and Commercial Matters established in 1955 and currently has 91 Members.

[47] Blackaby, Nigel, Partasides, Constantine, Redfern, Alan: '6. Conduct of the Proceedings', in Nigel Blackaby, Constantine Partasides, Alan Redfern: Redfern and Hunter on International Arbitration (Seventh Edition) 7th edition, Oxford University Press, Oxford, United Kingdom; New York, NY, 2023, p. 6.136.

[48] Levine, *op. cit.* (n. 2), p. 352; Born, Gary B.: 'Chapter 16: Disclosure in International Arbitration (Updated September 2022)' in Gary B. Born: International Commercial Arbitration (Third Edition), Kluwer Law International, The Netherlands, 2021, p. 2599.

procedure, unless this is incompatible with its own law or is impossible to perform it because of its internal practice and procedure or practical difficulties.

Art. 10 further explains that the requested authority shall apply the appropriate measures of compulsion which are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

While the arbitrators possess powers and responsibilities similar to those of a judicial authority, the tribunal cannot be categorized as a "judicial authority" under the Convention's definition.[49] Thus, they cannot directly ask the courts for court assistance, but the Convention can only be seen as a guideline for the tribunals in that manner.[50] The tribunals could use the Convention indirectly, by addressing the court at the seat of arbitration. In practice, many of the contracting states lend their judicial assistance to an arbitral tribunal with its juridical seat in another contracting state, or have otherwise enacted legislation that permits courts to provide assistance to foreign tribunals.[51] For example, the English Arbitration Act, at Sec. 44, permits English courts to provide assistance to foreign arbitral tribunals, but Sec. 2(3) provides that the courts can refuse to do so if it would be “inappropriate”.

Just as the UNCITRAL Model Law left the detailed regulation to the international cooperation of states and national laws, the drafters of the Convention were guided by a similar logic.[52] Extending the Convention explicitly to arbitral proceedings has its advantages. For example, the tribunals could choose to obtain evidence under either the Convention or the law of the seat, especially when the latter does not regulate court assistance in arbitration.[53] Also, it could lead to a faster and more efficient process for obtaining court assistance in the taking of evidence since execution of the request between the courts often takes too long.[54] This would

[49] Born, *op. cit.* (n. 48), p. 2599.
[50] Cavassin Klamas, Caroline: 'Finding a Balance Between Different Standards of Privilege to Enable Predictability, Fairness and Equality in International Arbitration' in Revista Brasileira de Arbitragem, Comitê Brasileiro de Arbitragem CBAr & IOB, Kluwer Law International 2015, Volume XII, Issue 45, 2015, pp. 167-168; Raess, Lorenz: 'Court Assistance in the Taking of Evidence in International Arbitration', 1st edition, 30 September, Lorenz Raess sui generis, Zurich 2020, p. 118.
[51] Blackaby/Partasides/Redfern, *op. cit.* (n. 47), p. 6.136.
[52] Hague Conference on Private International Law: Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1985), 24 International Legal Materials 1668 (1985), 1679.
[53] Raess, *op. cit.* (n. 50), p. 122.
[54] *Ibid.*, p. 124.

not only make arbitral proceedings more expedient and practical, but also promote international arbitration as an alternative dispute resolution method.

2.3. INTERNATIONAL BAR ASSOCIATION RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

In 1999, the International Bar Association[55] issued the IBA Rules on the Taking of Evidence[56] in order to enable efficient and economic conduct the phase of gathering of evidence to arbitrators and parties in international arbitration. "The IBA Rules reflect and combine procedures of many different legal systems and thus may be particularly useful when parties come from different legal cultures."[57]

The Rules include provisions on the production and presentation of documents, the presentation of the testimony of witnesses of fact, expert witnesses and inspections as well as procedural rules for the conduct of evidentiary hearings. "The Rules are designed to be used in conjunction with, and adopted together with, institutional, ad hoc or other rules or procedures governing international arbitrations."[58]

The IBA Rules acknowledge the possibility of the tribunals' recourse to the courts in Art. 4.9 which states that if a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may ask the Tribunal to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Tribunal to take such steps itself. "If arbitrators consider it extremely important to hear a person who has refused to appear, they can apply to a national court".[59] In the case of a request to the Tribunal, the Party shall identify the intended witness, describe the subjects on which the testimony is sought and state why such subjects are relevant and material to the outcome of the case. The Tribunal shall decide on this request and shall take or authorize any Party to take such steps as the Tribunal

[55] Organisation for international legal practitioners, bar associations and law societies established in 1947 whose members are more than 80,000 individual international lawyers and some 190 bar associations.
[56] IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council 17 December 2020, International Bar Association.
[57] Girsberger/Voser, *op. cit.* (n. 1), p. 276.
[58] IBA Rules, *op. cit.* (n. 56), p. 5.
[59] Levine, *op. cit.* (n. 2), p. 348.

considers appropriate if it determines that the testimony would be relevant and material to the outcome of the case.

The IBA Commentary to Art. 4.9 explains that under most domestic arbitration laws, either the tribunal or a party with its approval may ask national courts to compel the witness to appear or to examine the witness itself. Also, it notes that "it shall be the State courts at the seat of arbitration which may help the arbitral tribunal to obtain testimony from a recalcitrant witness".[60]

In transnational proceedings "witnesses often are not domiciled in the country where the arbitration has its seat. The arbitral tribunal may then have to request help from foreign courts, directly or indirectly."[61] Those options are slightly more complex, and will depend on where the witness is located. The arbitral tribunal may then have to request help from foreign courts, directly or indirectly. The power of an arbitral tribunal in such circumstances is, as Art. 4.9 states, limited to whatever steps are legally available to it. In some cases, however, the tribunal may decide instead to authorise a party to approach the foreign courts itself. Proceeding in this manner might be more efficient if, for example, the party requesting the evidence is located in that country, speaks the local language or already has local legal counsel.[62]

3. NATIONAL REGULATION OF COURT ASSISTANCE

3.1. GERMAN CODE OF CIVIL PROCEDURE

The first codification of arbitration law on a federal level in the 10th Book of the Code of Civil Procedure is to a large extent already based on the same principles which today underlie the Model Law – party autonomy and limited court intervention.[63] A useful addition to Art. 27 of the UNCITRAL Model Law, and at the same time a manifestation of the trust awarded to

[60] Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, IBA task force for the revision of the IBA Rules on the taking of evidence in international arbitration / Consolidated amendments, January 2021, p. 20.

[61] *Ibid.*

[62] *Ibid.*

[63] Nacimiento, Patricia, Böckstiegel, Karl-Heinz, Kröll, Stefan M.: 'Part I: Germany as a Place for International and Domestic Arbitrations – General Overview', in Patricia Nacimiento, Stefan M. Kröll, Karl-Heinz Böckstiegel: Arbitration in Germany: The Model Law in Practice (Second Edition), Kluwer Law International, The Netherlands, 2015, p. 4.

the arbitrators, is displayed in § 1050 of the German code of civil procedure. The provision allows the tribunal to participate in the judicial taking of evidence. Unfortunately, it does not provide details on the exact modalities of this participation. § 1050 reads as follows "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a court assistance in taking evidence or performance of other judicial acts which the arbitral tribunal is not empowered to carry out. Unless it regards the application as inadmissible, the court shall execute the request according to its rules on taking evidence or other judicial acts. The arbitrators are entitled to participate in any judicial taking of evidence and to ask questions."

Assistance in taking evidence is left to the Local Courts of first instance because they are usually closer to the parties. Pursuant to § 1062, the jurisdiction for nearly all arbitration-related proceedings is concentrated in the Higher Regional Courts (*Oberlandesgericht*).[64] The reason for arbitration-related proceedings being initiated before these Courts of Appeal is that the function of the first instance is performed by the arbitral tribunal.[65]

German arbitration law[66] provides court assistance in facilitating the presence of witnesses before arbitral tribunals located outside of Germany, with the condition that the court has the discretion to determine the appropriateness of providing such support. Regarding the international court assistance, § 1050 in conjunction with § 1025(2)[67] expressly allows the competent state court to issue evidentiary orders if the tribunal is seated abroad. § 1025(2) expressly states that 1050 also applies if the place of arbitration is situated outside Germany or has not yet been determined. The Local Court ("*Amtsgericht*"), in whose district the judicial act is to be carried out, is competent for assistance in the taking of evidence and other judicial acts in accordance with § 1050 and § 1062(4).

[64] It reads as follows: „(3) In the cases provided for by section 1025 (3), that higher regional court (Oberlandesgericht, OLG) shall have jurisdiction in the district of which the plaintiff or the defendant has his registered seat or his habitual place of abode. (4) That local court (Amtsgericht, AG) shall be responsible for providing assistance in taking evidence and other actions reserved for judges (section 1050) in the district of which the said action is to be taken.".

[65] Nacimiento/Böckstiegel/Kröll, *op. cit.* (n. 63), p. 18, § 42.

[66] German Arbitration Law 98, Tenth Book of the Code of Civil Procedure, Arbitration Procedure, Sections 1025 – 1066, as promulgated on 5 December 2005, (Bundesgesetzblatt (BGBl., Federal Law Gazette).

[67] It reads as follows: „(2) The stipulations of sections 1032, 1033 and 1050 are to be applied also in those cases in which the venue of the arbitration proceedings is located abroad or has not yet been determined.".

3.2. ENGLISH ARBITRATION ACT

The English court has extensive evidentiary powers in support of arbitration proceedings. The key procedural provisions are set forth in: Sec. 43, which enables the use of the same procedures as in a domestic litigation:

(i) to secure the attendance of a reluctant witness in the arbitral proceedings; and
(ii) to order the witness to produce documents; and

Sec. 44, which may be used:

(i) to secure witness evidence;
(ii) where the witness is outside the United Kingdom, to request the assistance of the foreign courts in taking the witness' evidence; and
(iii) to order the preservation of specific evidence in the possession of a non-party.[68]

Sec. 43 reads as follows: "(1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence. (2) This may only be done with the permission of the tribunal or the agreement of the other parties. (3) The court procedures may only be used if — (a) the witness is in the United Kingdom, and (b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland. (4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings."

The application of Sec. 43 will be appropriate where the party requesting the courts' assistance wishes to obtain (i) testimony that is relevant to the arbitration from a witness in the UK, or (ii) documents that are relevant to the arbitration and are in the possession of a witness in the UK. While Sec. 43 is drafted in such a way as to only allow a party to apply to a court, a tribunal may indirectly achieve the same result, at least if the witness sought is under the control of one of the parties. The tribunal could issue a "peremptory order requiring the presence of a witness in the power of a party which, if disobeyed, may be followed by a court order in support.

[68] Emanuele/Molfa/Jedrey, *op. cit.* (n. 33), p. 172.

If the court order is disobeyed, it is a contempt of court which may lead to a criminal prosecution."[69]

Sec. 44 reads as follows: "(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings. (2) Those matters are — (a) the taking of the evidence of witnesses; (b) the preservation of evidence; (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings; […] (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively. (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order. […]"

According to Sec. 44**,** a party is empowered to apply to the English court to (i) obtain or preserve evidence from a witness who is unable or unwilling to attend the hearing; and (ii) obtain oral or documentary evidence from a witness from outside the jurisdiction by asking the English court to issue a letter of request to the foreign court of the jurisdiction in which the witness is to be found (*e.g.*, pursuant to the Hague Evidence Convention).[70]

Sec. 43 and 44 "apply even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined."[71] Namely, in the Sec. 43 and Sec. 44 in conjunction with Sec. 2(3)[72] of the English Arbitration Act, it is expressly allowed to the competent state court to issue evidentiary orders if the seat of the tribunal is situated in a foreign country.[73] Sec. 44 of the English act expands the scope of the power granted in Sec. 43 to arbitrations that have their legal seat outside of the United Kingdom, but only where the court is satisfied that "it is appropriate" by reason of a connection with England and

[69] Levine, *op. cit.* (n. 2), p. 350.

[70] Merkin, Robert, Flannery, Louis: Merkin and Flannery on the Arbitration Act 1996 (6th Edition), Informa Law from Routledge, Milton Park, Abingdon, Oxon; New York, 2020, p. 181.

[71] Emanuele/Molfa/Jedrey, *op. cit.* (n. 33), p. 173.

[72] „the court may refuse to exercise any such power if, in the opinion of the court, the fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so.".

[73] Girsberger/Voser, *op. cit.* (n. 1), p. 291.

Wales or Northern Ireland.[74] Therefore, the English court has discretion to refuse to exercise its powers under Sec. 43 and Sec. 44 in respect of foreign arbitration if: "[T]he fact that the seat of the arbitration is outside England and Wales or Northern Ireland, or that when designated or determined the seat is likely to be outside England and Wales or Northern Ireland, makes it inappropriate to do so." Unlike Sec. 43, Sec. 44 is non-mandatory, allowing the parties to mutually agree to exclude its application.[75] Consequently, if arbitration is conducted in Italy, the parties involved may have the option to seek assistance from the English court in order to obtain evidence located in England. In this respect, the English Arbitration Act goes far beyond the provisions of the Model Law on state court assistance in evidentiary matters.

3.3. SWISS PRIVATE INTERNATIONAL LAW ACT

Regarding the assistance of the Swiss courts, Art. 184(2)(3)[76] of the Swiss private international law Act expressly states that "[i]f the assistance of state judicial authorities is required for the taking of evidence, the arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the state court at the seat of the arbitration. The state court shall apply its own law." If the consent of the tribunal is missing, the state court has to refuse the parties' request for the assistance.[77] A Swiss court seized with a request to assist in evidence taking for an arbitration can either examine the evidence itself at the (Swiss) location of the relevant evidence, *e.g.* the residence of witnesses or the location of documents, or it authorizes the arbitral tribunal to do so.

While a state court may simply order compliance, threatening with the sanctions of Art. 292[78] of the Swiss Criminal Code[79], the tribunal does not have authority to sanction

[74] Levine, *op. cit.* (n. 2), p. 354.

[75] Emanuele/Molfa/Jedrey, *op. cit.* (n. 33), p. 187.

[76] It reads as follows: „(2) If the assistance of state judicial authorities is required for the taking of evidence, the arbitral tribunal, or a party with the consent of the arbitral tribunal, may request the assistance of the state court at the seat of the arbitration. (3) The state court shall apply its own law. Upon request, it may apply or consider other forms of procedure".

[77] Girsberger/Voser, *op. cit.* (n. 1), p. 296.

[78] It states: „Any person who fails to comply with an official order that has been issued to him by a competent authority or public official under the threat of the criminal penalty for non-compliance in terms of this Article shall be liable to a fine.".

[79] Swiss Criminal Code of 21 December 1937 (Status as of 23 January 2023).

compliance with coercive measures.[80] It may therefore become "necessary" to request judicial assistance from a state court pursuant to Art. 184(2) Swiss PILA. An arbitral tribunal will, in most cases, request judicial assistance only if absolutely necessary because of delays in the proceedings that can generally be caused by such requests. Alternatively, the arbitral tribunal may exercise its discretion to freely assess a party's conduct (e.g. refusal of the party to produce documents) and draw such adverse inference as it deems fit.[81] "An appropriately drawn adverse inference is not a violation of a party's right to be heard."[82]

Art. 184(2) SPILA only allows Swiss courts to assist in evidentiary matters if arbitration is seated in Switzerland. However, with the 2020 revision of Chapter 12 of the SPILA, a new Art. 185a was inserted, which states: "(2) An arbitral tribunal sitting abroad or, with the consent of the arbitral tribunal, a party to a foreign arbitration may request the assistance of the state court at the place where the taking of evidence is to be carried out. […]" It means that a foreign tribunal seeking assistance from a Swiss state court regarding evidence does no longer have to use the channels of international judicial assistance.[83] For example, it had to request the foreign state where the tribunal is seated, by a request based on the Hague Evidence Convention, to provide judicial assistance. Such procedure was lengthy and often burdensome involving both the foreign state and Swiss courts.

3.4. ITALIAN CODE OF CIVIL PROCEDURE

Article 816-ter, second paragraph, c.p.c. of the Italian code of civil procedure empowers the tribunal to seek court assistance to compel the attendance of a recalcitrant witness. The second and third paragraphs provide as follows: "(2) If a witness refuses to appear before the arbitral tribunal, the tribunal may, when it is deemed proper in light of the circumstances, request the president of the court at the seat of the arbitration to order the appearance of the witness. (3) In this case, the time limit to render the final award is suspended

[80] Veit, Marc D.: 'Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 184 [Procedure: taking of evidence]' in Manuel Arroyo: Arbitration in Switzerland: The Practitioner's Guide (Second Edition), Kluwer Law International, Alphen aan den Rijn, 2018, p. 182.
[81] Girsberger/Voser, *op. cit.* (n. 1), p. 296.
[82] Waincymer, Jeffrey Maurice: 'Part II: The Process of an Arbitration, Chapter 10: Approaches to Evidence and Fact Finding' in Jeffrey Maurice Waincymer: Procedure and Evidence in International Arbitration, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2012, p. 775.
[83] Girsberger/Voser, *op. cit.* (n. 1), p. 298.

from the date of the order until the date of the hearing scheduled for the appearance of the witness."[84] Therefore, a party's ability to seek judicial assistance depends on a witness' refusal to appear before the tribunal. It may be sought only by the tribunal and only to the extent that the tribunal finds it proper to seek such assistance.[85] The goal of this provision is to prevent the parties' dilatory tactics, contribute to an efficient and speedy dispute resolution, and finally to ensure that court assistance is sought only when it is truly necessary.

When deciding whether to seek court assistance, the tribunal will consider the following factors:

(i) whether the witness justified the refusal to appear;
(ii) whether the testimony is relevant and material to the outcome of the dispute;
(iii) whether the applicable arbitration evidentiary rules allow the requesting party to rely upon alternative remedies (*e.g.*, to remove from the record the statement of that witness); and
(iv) whether the witness is subject to the Italian jurisdiction.[86]

Generally, Italian arbitration law provisions apply if and to the extent that the seat of the arbitration is Italy.[87] Like most arbitration laws, the Italian *lex arbitri* does not empower a party to seek foreign state court assistance in evidentiary matters. Thus the described judicial assistance will only be available to arbitration proceedings seated in Italy.

3.5. CROATIAN REGULATIONS ON COURT ASSISTANCE

The Croatian Law on Arbitration[88] in Art. 45 regulates the legal assistance of the court to the tribunal in presenting evidence. The arbitral tribunal, or one of the parties with the approval of the arbitral tribunal, may request legal assistance from the competent court in order to present evidence that the tribunal itself could not present (para. 1). The provisions on the presentation of evidence before the court in the Republic of Croatia apply to the procedure for presenting evidence before the requested court (para. 2). Arbitrators are authorized to

[84] Art. 816 ter of the Italian Code of civil procedure (Official Gazette no. 253 of 10-28-1940).
[85] Emanuele/Molfa/Jedrey, *op. cit.* (n. 33), p. 146.
[86] Emanuele/Molfa/Jedrey, *op. cit.* (n. 33), p. 147.
[87] Emanuele/Molfa/Jedrey, *op. cit.* (n. 33), p. 146.
[88] Croatian Law on Arbitration ("Official Gazette" No. 88/01.).

participate in the presenting of evidence before the requested court and to ask questions of the persons being heard by the court (para. 3).

According to Art. 181(1) of the Croatian Code of Civil Procedure[89], Croatian courts will provide legal assistance to foreign courts in cases stipulated by an international agreement and when there is reciprocity in providing legal assistance. Further, Art. 182 states that Courts provide international legal assistance in the manner provided for in Croatian law. The action that is a foreign court requests can also be performed in the manner required by the foreign court, but only if such a procedure is not contrary to the public policy of the Republic of Croatia. For the same reason, a Croatian court can reject providing of the legal assistance, which is stated in Art. 182(2). In its judgment[90] of May 23, 2008, the High Commercial Court of the Republic of Croatia explained that civil proceedings before Croatian courts are conducted according to the rules of domestic procedural law (*lex fori*) even when the parties are foreign persons, and when the merits of the claim should be decided on the basis of foreign material rights. As an exception to this rule, domestic courts can act according to the rules of foreign procedural law only in the case when they comply with requests from foreign courts (Art. 182).

Regarding the form of the request, Arts. 183 and 184 state that, unless otherwise stipulated by an international agreement, the requests of both the foreign and domestic courts have to be submitted through diplomatic channels in one of the official languages of the court or attach a certified translation in that language. These rules are of subsidiary importance - they are applied only if nothing else has been determined by the international agreement and the Republic of Croatia is bound by a series of treaties and conventions on the provision of international legal assistance in civil matters.[91]

[89] Croatian Law on Civil Procedure ("Official Gazette of SFRY" No. 4/77, 36/77, 36/80, 6/80, 69/82, 43/82, 58/84, 74/87., 57/89., 20/90., 27/90., 35/91., "Official Gazette" No. 53/91., 91/92., 112/99., 129/00., 88/ 01, 117/03, 88/05, 2/07, 96/08, 84/08, 123/08, 57/11, 148/11 - official consolidated text, 25/13 ., 89/14., 70/19., 80/22., 114/22.).

[90] Judgement of the High Commercial Court of the Republic of Croatia, 23 May 2008, available at: https://www.iusinfo.hr/sudska-praksa/VTSRH201G2008SPzB6161A074

[91] Convention on the delivery abroad of judicial and extrajudicial documents in civil or commercial matters (Council of Europe), European (EU) Convention on Mutual Legal Assistance in Criminal Matters, Convention on Civil Procedure (HCCH) etc. and bilateral treaties with more than 30 countries.

3.6. CONCLUSION

States have followed Art. 27 in their procedural laws, but a small number of them give the tribunal the possibility to request foreign court assistance. German procedural law gives discretion to the court regarding the permission of court assistance to the tribunal and if the parties want to request the court assistance, they need to get the approval of the tribunal to do so. The same regulation is set forth in the rest of the mentioned procedural laws but with some extensions especially regarding international court assistance. Namely, English courts were given broad evidentiary powers in support of arbitration and in Switzerland a foreign tribunal seeking assistance from a Swiss court does no longer even have to use the channels of international judicial assistance. On the other hand, Italian and Croatian procedural rules do not mention the possibility of international legal assistance in arbitration at all. Therefore, states have the discretion to regulate this matter and they have used that right in accordance with their needs.

4. TRIBUNALS' POWERS IN CASE OF CRIMINAL ACTIVITIES

State courts have many instruments to forcibly obtain well-hidden evidence, ranging from requesting documents from third parties such as banks, state authorities and others, summoning witnesses and obtaining their testimonies under oath. Certain criminal activities, such as corruption, are difficult to prove since the corrupt parties often do all in their power to hide its trace.[92]

The EDF v. Romania case[93] shows how difficult it is to prove corruption. The claimant alleged that one of the members of Romania's government tried to obtain an extension of a concession contract through corruption. The tribunal affirmed that bribery contravenes the

[92] Rose, Cecily E., 'Questioning the Role of International Arbitration in the Fight against Corruption' in Journal of International Arbitration, Volume 31, Issue 2, Volume 31, Issue 2, 2014, p. 184; Menaker, Andrea: 'Chapter 5: Proving Corruption in International Arbitration' in Domitille Baizeau, Richard Kreindler: Addressing Issues of Corruption in Commercial and Investment Arbitration, International Chamber of Commerce (ICC), Alphen aan den Rijn, The Netherlands, 2015, p. 92; Pitkowitz, Nikolaus: 'Chapter 18: The Arbitrator's Duty to Challenge Corruption' in Neil Kaplan, Michael Pryles, Chiann Bao: International Arbitration: When East Meets West – Liber Amicorum Michael Moser, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2020, p. 217.

[93] EDF (Services) Limited v. Romania, International Centre for Settlement of Investment Disputes (ICSID) case, available at: https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf

standards of fair and equitable treatment, international public policy, transparency, and legitimate expectations. However, it refused to accept as evidence the claimant's audio tape of the contentious conversation for lack of authenticity, unlawful obtainment and delayed submission and ultimately denied the claim. The tribunal stated: "In any case, however, corruption must be proven and is notoriously difficult to prove since, typically, there is little or no physical evidence."[94] Consequently, corruption is usually established by state authorities which have far-reaching prosecutorial and coercive powers.[95]

On the other hand, arbitrators do not have the tools available state courts and the police for the investigations. For example, the police has the right to seize documents and other evidence, to conduct searches, and to interrogate witnesses, who may face criminal charges if they provide false testimony or refuse to testify.[96] As it was stated in Valery Belokon v. Kyrgyz Republic case[97]: "162. State authorities are in a much better position that an international body to investigate allegedly criminal activities, including money laundering, by a subject of that state."

Tribunals' lack of coercive powers in evidentiary matters is one of the most significant shortcomings of arbitration as compared to litigation.[98] Arbitrators are private judges appointed to adjudicate a dispute between the parties who are bound by an arbitration. On the other hand, state court judges have powers granted to them by the rules governing the administration of justice. As it can be seen in both international and national regulations, the arbitral tribunal is dependent on a local court issuing an order for production of evidence.

Tribunals do not normally have the power to order the production of documents in control of a non-party to the arbitration, including a witness proffered in the arbitration who is not in any significant relationship with the parties to the arbitration. Further, they also cannot

[94] *Ibid.*, p. 64, § 221.
[95] Khvalei, Vladimir : 'Chapter 4: Standards of Proof for Allegations of Corruption in International Arbitration' in Domitille Baizeau, Richard Kreindler: Addressing Issues of Corruption in Commercial and Investment Arbitration, International Chamber of Commerce (ICC), Alphen aan den Rijn, The Netherlands, 2015, p. 72.
[96] *Ibid.*
[97] Valeri Belokon v. The Kyrgyz Republic, PCA (Permanent Court of Arbitration), 24 October 2014, available at: https://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207008_0.pdf
[98] Emanuele/Molfa/Jedrey, *op. cit.* (n. 33), p. 137.

impose civil or criminal sanctions for contempt against a party who fails to comply with a document production or other evidentiary order.[99]

In the light of inherent limitations, the most common way of compelling the production of evidence for the tribunals is indirectly, by means of drawing adverse inferences.[100] The tribunal can draw adverse inferences from the party's failure to secure the presence of the witness.[101] Adverse inferences can apply to witnesses who could easily be called or who refuse to answer certain questions as well as to documents not produced.[102]

"The notion of an adverse or negative inference refers to the conclusion drawn by the adjudicator from the inexcusable failure of a party to produce evidence which could be adverse to that party's interest."[103] The idea behind this doctrine is as follows: assume that a party with the burden of proof, after being offered a reasonable opportunity to disclose evidence that can reasonably be expected to be in its control, fails to do so without providing any convincing excuse; in such situations, the adjudicator may infer that the party has something to hide and that requested evidence would be detrimental to that party's claims or defence.[104]

According to Igbokwe, in its decision on whether to draw adverse inferences, the tribunal should ensure that:

(i) there is sufficient indication of a criminal activity;
(ii) the party against whom adverse inferences are being drawn has refused to present evidence that can reasonably be expected to be within that party's capacity or to provide witnesses for an interview;
(iii) the inference being drawn derives from the facts and is related to the evidence or testimony being withheld from the tribunal;
(iv) the requested evidence must be reasonably accessible to the inference opponent;

[99] Igbokwe, Emmanuel O.: 'Chapter 6: Investigating Bribery and Corruption in Practice', in Emmanuel O. Igbokwe: Dealing with Bribery and Corruption in International Commercial Arbitration: To Probe or Not to Probe, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2022, p. 264.
[100] Blackaby/Partasides/Redfern, *op. cit.* (n. 46), § 6.137.
[101] Levine, *op. cit.* (n. 2), p. 345.
[102] Waincymer, *op. cit.* (n. 82), p. 775.
[103] Sharpe, Jeremy K.: 'Drawing Adverse Inferences from the Non-production of Evidence' in William W. Park (ed), Arbitration International, The Author(s); Oxford University Press, Volume 22, Issue 4, 2006, p. 550.
[104] Van Houtte - Van Poppel, Vera, 'Chapter 5. Adverse Inferences in International Arbitration' in Teresa Giovannini and Alexis Mourre: Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossiers of the ICC Institute of World Business Law, International Chamber of Commerce (ICC), Volume 6, 2009, p. 195.

(v) the party against whom the inference is drawn must be aware of its obligation to produce evidence rebutting the adverse inference; and,

(vi) the parties are given the opportunity to express their views on the tribunal's decision to draw adverse inference.[105] Having satisfied itself that these requirements are met, the tribunal should draw adverse inference.

Nevertheless, there are circumstances where a greater involvement of the arbitral tribunal in the process of gathering evidence is warranted. For example, if the arbitral tribunal suspects that a public policy issue is at stake or even violated, it may and should proceed in an inquisitorial manner. In such situations, a tribunal that simply restricts itself to making a pro forma request to the parties to present more evidence would appear to be stuck in the passive attitude towards bribery and corruption, and would, it is submitted, not have fulfilled its duty to protect the integrity of arbitration. Therefore, arbitrators should ask the parties to provide more evidence where needed, and if such evidence is fully useless and/or insufficient, the arbitrators should do more on their own initiative. This, it is submitted, should be the preferred approach if international commercial arbitrators are to be seen as contributing to the efforts of the international community to combat bribery and corruption.[106]

5. CONCLUSION

In establishing the degree of judicial involvement into arbitral process, party autonomy should be taken into account and given utmost significance. At the same time, arbitrations' flexibility needs to be balanced with security in order to avoid any abuse of court involvement. Balancing those two factors requires and results in cooperation of arbitrators and courts. At the Mexico Congress, the Rapporteur of Working Group II, Mr. Howard Holtzmann, drew the conclusion in his Report "that arbitration and the courts are not competitive, but that they are complementary … they are partners – partners in a system of international justice".[107] Therefore, the principle of party autonomy should not extend to total autonomy as it is also necessary to ensure that international commercial arbitration is effective. Arbitration cannot

[105] Igbokwe, *op. cit.* (n. 99), p. 287.
[106] *Ibid.*, p. 271.
[107] Melis, *op. cit.* (n. 23), p. 84.

prosper, without the active and effective support of the national courts and that way contribute to the administration of justice.

6. REFERENCES

Books

1. Binder, Peter: 'Article 27: Court Assistance in Taking Evidence', in Peter Binder: International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2019
2. Blackaby, Nigel, Partasides, Constantine, Redfern, Alan: '6. Conduct of the Proceedings', in Nigel Blackaby, Constantine Partasides, Alan Redfern: Redfern and Hunter on International Arbitration (Seventh Edition) 7th edition, Oxford University Press, Oxford, United Kingdom; New York, NY, 2023
3. Nacimiento, Patricia, Böckstiegel, Karl-Heinz, Kröll, Stefan M.: 'Part I: Germany as a Place for International and Domestic Arbitrations – General Overview', in Patricia Nacimiento, Stefan M. Kröll, Karl-Heinz Böckstiegel: Arbitration in Germany: The Model Law in Practice (Second Edition), Kluwer Law International, The Netherlands, 2015
4. Born, Gary B.: 'Chapter 16: Disclosure in International Arbitration (Updated September 2022)', in Gary B. Born: International Commercial Arbitration (Third Edition), Kluwer Law International, The Netherlands, 2021
5. Emanuele, C. Ferdinando, Molfa, Milo, Jedrey, Nathaniel E.: 'IV. State Courts Assistance in the taking of Evidence', in C. Ferdinando Emanuele, Milo Molfa, Nathaniel E. Jedrey: Evidence in International Arbitration: The Italian Perspective and Beyond, Thomson Reuters, Alphen aan den Rijn, The Netherlands, 2016
6. Girsberger, Daniel, Voser, Nathalie: 'Chapter 4: The Arbitral Procedure' in Daniel Girsberger, Nathalie Voser: International Arbitration: Comparative and Swiss Perspectives (Fourth Edition), Schulthess Juristische Medien AG, Zurich, 2021
7. Holtzmann, Howard M., Neuhaus, Joseph: 'UNCITRAL Model Law, Chapter V, Article 27 [Court assistance in taking evidence]' in Howard M. Holtzmann and Joseph Neuhaus: A Guide to the UNCITRAL Model Law on International Commercial Arbitration:

Legislative History and Commentary, Kluwer Law International, Deventer; Boston; The Hague, 1989

8. Igbokwe, Emmanuel O.: 'Chapter 6: Investigating Bribery and Corruption in Practice', in Emmanuel O. Igbokwe: Dealing with Bribery and Corruption in International Commercial Arbitration: To Probe or Not to Probe, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2022
9. Khvalei, Vladimir : 'Chapter 4: Standards of Proof for Allegations of Corruption in International Arbitration' in Domitille Baizeau, Richard Kreindler: Addressing Issues of Corruption in Commercial and Investment Arbitration, International Chamber of Commerce (ICC), Alphen aan den Rijn, The Netherlands, 2015
10. Menaker, Andrea: 'Chapter 5: Proving Corruption in International Arbitration' in Domitille Baizeau, Richard Kreindler: Addressing Issues of Corruption in Commercial and Investment Arbitration, International Chamber of Commerce (ICC), Alphen aan den Rijn, The Netherlands, 2015
11. Merkin, Robert, Flannery, Louis: Merkin and Flannery on the Arbitration Act 1996 (6th Edition), Informa Law from Routledge, Milton Park, Abingdon, Oxon; New York, 2020
12. Pitkowitz, Nikolaus: 'Chapter 18: The Arbitrator's Duty to Challenge Corruption' in Neil Kaplan, Michael Pryles, Chiann Bao: International Arbitration: When East Meets West – Liber Amicorum Michael Moser, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2020
13. Raess, Lorenz: 'Court Assistance in the Taking of Evidence in International Arbitration', 1st edition, 30 September, Lorenz Raess sui generis, Zurich 2020
14. Veit, Marc D.: 'Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 184 [Procedure: taking of evidence]' in Manuel Arroyo: Arbitration in Switzerland: The Practitioner's Guide (Second Edition), Kluwer Law International, Alphen aan den Rijn, 2018
15. Waincymer, Jeffrey Maurice: 'Part II: The Process of an Arbitration, Chapter 10: Approaches to Evidence and Fact Finding' in Jeffrey Maurice Waincymer: Procedure and Evidence in International Arbitration, Kluwer Law International, Alphen aan den Rijn, The Netherlands, 2012

Research paper

1. Cavassin Klamas, Caroline: 'Finding a Balance Between Different Standards of Privilege to Enable Predictability, Fairness and Equality in International Arbitration' in Revista Brasileira de Arbitragem, Comitê Brasileiro de Arbitragem CBAr & IOB, Kluwer Law International 2015, Volume XII, Issue 45, 2015, pp. 159 - 179
2. Levine, Judith: 'Can Arbitrators Choose Who to Call as Witnesses? (And What Can Be Done If They Don't Show Up?)' in Albert Jan Van den Berg: ICCA Congress Series No. 18 (Miami 2014): Legitimacy: Myths, Realities, Challenges ICCA Congress Series, ICCA & Kluwer Law International, Volume 18, 2015, pp. 315 - 356
3. Melis, Werner: 'Arbitration and the Courts' in Pieter Sanders: ICCA Congress Series No. 2 (Lausanne 1984): UNCITRAL's Project for a Model Law on International Commercial Arbitration, ICCA & Kluwer Law International, Volume 2, 1984, pp. 83 - 97
4. Rose, Cecily E., 'Questioning the Role of International Arbitration in the Fight against Corruption' in Journal of International Arbitration, Volume 31, Issue 2, Volume 31, Issue 2, 2014, pp. 183 - 264
5. Sharpe, Jeremy K.: 'Drawing Adverse Inferences from the Non-production of Evidence' in William W. Park (ed), Arbitration International, The Author(s); Oxford University Press, Volume 22, Issue 4, 2006, pp. 549 - 571
6. Van Houtte - Van Poppel, Vera, 'Chapter 5. Adverse Inferences in International Arbitration' in Teresa Giovannini and Alexis Mourre: Written Evidence and Discovery in International Arbitration: New Issues and Tendencies, Dossiers of the ICC Institute of World Business Law, International Chamber of Commerce (ICC), Volume 6, 2009, pp. 195 – 217

Arbitral awards and court decisions

1. ALC v. ALF, High Court, Singapore, 11 August 2010, available at: https://www.elitigation.sg/gd/s/2010_SGHC_231
2. EDF (Services) Limited v. Romania, International Centre for Settlement of Investment Disputes (ICSID) case, available at: https://www.italaw.com/sites/default/files/case-documents/ita0267.pdf

3. Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, Court of Appeal of Alberta, October 31, 2005, Reasons for Judgment of the Honourable Mr. Justice O'Brien, available at: https://www.canlii.org/en/ab/abca/doc/2006/2006abca18/2006abca18.html
4. SH. Satinder Narayan Singh v. Indian Labour Cooperative Society Ltd. & Ors., High Court of Delhi India, 17 December 2007, available at: https://indiankanoon.org/doc/530842/
5. Valeri Belokon v. The Kyrgyz Republic, PCA (Permanent Court of Arbitration), 24 October 2014, available at: https://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207008_0.pdf
6. Judgement of the High Commercial Court of the Republic of Croatia, 23 May 2008, available at: https://www.iusinfo.hr/sudska-praksa/VTSRH201G2008SPzB6161A074

Other sources

1. Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, IBA task force for the revision of the IBA Rules on the taking of evidence in international arbitration / Consolidated amendments, January 2021
2. Croatian Law on Arbitration (Official Gazette No. 88/01.)
3. Croatian Law on Civil Procedure ("Official Gazette of SFRY" No. 4/77, 36/77, 36/80, 6/80, 69/82, 43/82, 58/84, 74/87., 57/89., 20/90., 27/90., 35/91., "Official Gazette" No. 53/91., 91/92., 112/99., 129/00., 88/ 01, 117/03, 88/05, 2/07, 96/08, 84/08, 123/08, 57/11, 148/11 - official consolidated text, 25/13 ., 89/14., 70/19., 80/22., 114/22.)
4. Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006
5. German Arbitration Law 98, Tenth Book of the Code of Civil Procedure, Arbitration Procedure, Sections 1025 – 1066, as promulgated on 5 December 2005, (Bundesgesetzblatt (BGBl., Federal Law Gazette)
6. German Code of Civil Procedure as promulgated on 5 December 2005 (Bundesgesetzblatt (BGBl., Federal Law Gazette)
7. Hague Conference on Private International Law: Report of the Special Commission on the Operation of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1985), 24 International Legal Materials 1668 (1985), 1679

8. IBA Rules on the Taking of Evidence in International Arbitration, Adopted by a resolution of the IBA Council 17 December 2020, International Bar Association
9. International Chamber of Commerce Arbitration Rules, 2021
10. International Commercial Arbitration Analytical Commentary on Draft text of a Model Law on International Commercial Arbitration Report of the Secretary-General, 1985
11. Italian Code of civil procedure (Official Gazette no. 253 of 10-28-1940)
12. Report of the working group on international contract practices on the work of its third session, United nations commission on international trade law, United nations general assembly, 1982
13. Swiss Federal Act on Private International Law (SPILA) of 18 December 1987
14. The English Arbitration Act 1996
15. The London Court of International Arbitration Arbitration Rules, 2020
16. The Report of the Working Group on International Contract Practices on the work of its sixth session, United nations commission on international trade law, United nations general assembly, 1983
17. UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration
18. UNCITRAL Arbitration Rules, 2021
19. UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006, United nations commission on international trade law
20. United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)