DOI: <...>
https://orcid.org/0000-0002-2603-7149

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Jurgis Bartkus

# The Admissibility of Evidence in International Commercial Arbitration

**DOCTORAL DISSERTATION**

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Law (S001)

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**Academic supervisors:**
Prof. Habil. Dr. Vytautas Nekrošius (Vilnius University, Social Sciences, Law – S 001),
Prof. Dr. Ignace Claeys (Ghent University, Social Sciences, Law – S 001).

**Doctoral advisory committee:**
Prof. Habil. Dr. Vytautas Nekrošius (Vilnius University, Social Sciences, Law – S 001),
Prof. Dr. Ignace Claeys (Ghent University, Social Sciences, Law – S 001),
Prof. Dr. Piet Taelman (Ghent University, Social Sciences, Law – S 001).

This doctoral dissertation will be defended in a public and closed meetings of the Dissertation Defence Panel:

**Chairmans:**
Prof. Habil. Dr. Valentinas Mikelėnas (Vilnius University, Social Sciences, Law – S 001),
Prof. Dr. Michel Tison (Ghent University, Social Sciences, Law – S 001).

**Members:**
Prof. Habil. Dr. Kinga Flaga-Gieruszyńska (University of Szczecin, Social Sciences, Law – S 001),
Prof. Dr. Maud Piers (Ghent University, Social Sciences, Law – S 001),
Assoc. Prof. Dr. Rimantas Simaitis (Vilnius University, Social Sciences, Law – S 001),
Prof. Dr. Wannes Vandenbussche (Ghent University, Social Sciences, Law – S 001).

The dissertation shall be defended at a closed meeting of the Dissertation Defence Panel at 10:30 AM (GMT+3) on 6th November 2023 in Room No. 2.2. (Rule of Law) of the Ghent University Faculty of Law and Criminology. Address: Campus Aula, Voldersstraat 3, 9000, Room No. 2.2. (Rule of Law), Gent, Belgium. Tel. +32 9 264 67 62; e-mail: info@ugent.be

The dissertation shall be defended at a public meeting of the Dissertation Defence Panel at 4:30 PM (GMT+3) on 24th November 2024 in Room No. 302 of Vilnius University Faculty of Law. Address: Saulėtekio al. 9, 10221, Room No. 302, Vilnius, Lithuania. Tel. +370 5 236 6185; e-mail: tf@tf.vu.lt

The text of this dissertation can be accessed at the libraries of Gent University and Vilnius University, as well as on the website of Vilnius University: *www.vu.lt/lt/naujienos/ivykiu-kalendorius*

DOI numeris (suteikiamas atsiuntus disertaciją spausdinti)
https://orcid.org/0000-0002-2603-7149

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VILNIAUS UNIVERSITETAS

Jurgis Bartkus

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**Moksliniai vadovai:**
Prof. habil. dr. Vytautas Nekrošius (Vilniaus uiversitetas, socialiniai mokslai, teisė – S001),
Prof. dr. Ignace Claeys (Gento universitetas, socialiniai mokslai, teisė – S001).

**Doktorantūros konsultacinis komitetas:**
Prof. habil. dr. Vytautas Nekrošius (Vilniaus uiversitetas, socialiniai mokslai, teisė – S001),
Prof. dr. Ignace Claeys (Gento universitetas, socialiniai mokslai, teisė – S001),
Prof. dr. Piet Taelman (Gento universitetas, socialiniai mokslai, teisė – S001).

Ši daktaro disertacija bus ginama viešame ir uždarame disertacijos gynimo komisijos posėdyje:

**Pirmininkai:**
Prof. habil. dr. Valentinas Mikelėnas (Vilniaus uiversitetas, socialiniai mokslai, teisė – S001),
Prof. dr. Michel Tison (Gento universitetas, socialiniai mokslai, teisė – S001).

**Nariai:**
Prof. habil. dr. Kinga Flaga-Gieruszyńska (Ščecino universitetas, socialiniai mokslai, teisė – S001),
Prof. dr. Maud Piers (Gento universitetas, socialiniai mokslai, teisė – S001),
Doc. dr. Rimantas Simaitis (Vilniaus uiversitetas, socialiniai mokslai, teisė – S001),
Prof. dr. Wannes Vandenbussche (Gento universitetas, socialiniai mokslai, teisė – S001).

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# ABBREVIATIONS

| | |
|---|---|
| **ALI/UNIDROIT Principles** | ALI/UNIDROIT Principles of Transnational Civil Procedure |
| **ECHR** | Convention for the Protection of Human Rights and Fundamental Freedoms |
| **ECtHR** | European Court of Human Rights |
| **ELI/UNIDROIT Rules** | ELI/UNIDROIT Model European Rules of Civil Procedure |
| **FRE** | Federal Rules of Evidence |
| **IBA Rules** | IBA Rules on the Taking of Evidence in International Arbitration |
| **ICC Arbitration Rules** | Rules of Arbitration of the International Chamber of Commerce |
| **LCC** | Civil Code of the Republic of Lithuania |
| **LCIA Arbitration Rules** | London Court of International Arbitration Rules |
| **LCPC** | Civil Procedure Code of the Republic of Lithuania |
| **Model Law** | UNCITRAL Model Law on International Commercial Arbitration |
| **New York Convention** | United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards |
| **Supreme Court of Lithuania** | The Supreme Court of the Republic of Lithuania |

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# INTRODUCTION

The famous philosopher – and fierce critic of the admissibility rules – Jeremy Bentham was of the opinion: "Evidence is the basis of justice", and when you "exclude evidence, you exclude justice" (Bentham, 1827 quoted Stein, 2015, p. 469). Although, as this thesis will show, Bentham's opinion is not entirely correct (see **part 2.2.1.**), the opinion demonstrates the risks involved in deciding to exclude evidence submitted by one of the parties in proceedings.

This should come as no surprise. When faced with the question of the admissibility of evidence, various fundamental aspects come into play. On the one hand, if a decision to exclude evidence is unjustified, there is a risk that the truth will not be established in proceedings and, consequently, that justice will not be done. On the other hand, failure to exclude inadmissible evidence runs the risk of violating the principle of fair or efficient proceedings or undermining other fundamental legal values (see **part 1.1.3.2.**, see also Nunner-Kautgasser, Anzenberger, 2016, p. 196–200). We are unlikely to find rules of evidence that challenge such fundamental legal values in the same way that the rules of admissibility of evidence do.

It is true that examining admissibility rules in international commercial arbitration may, at first glance, appear to be a daunting task. International commercial arbitration is understood as an alternative dispute resolution method based on the parties' agreement which is characterised by two features: 1) the international aspect, which, in this thesis, is understood as defined in Art. 1(3) of the Model Law[1]; 2) the commercial aspect, *i.e.* the nature of the dispute is commercial. This concept should be interpreted as set out in footnote 2 to Art. 1(1) of the Model Law[2] (for a more detailed discussion

[1] Art. 1(3) of the Model Law provides: "An arbitration is international if: (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or (b) one of the following places is situated outside the State in which the parties have their places of business: (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country." (UNCITRAL Model Law on International Commercial Arbitration, 1985).

[2] Footnote 2 to Art. 1(1) of the Model Law states: "The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not."

of the concepts of international and commercial arbitration, see Redfern *et al*., 2015, p. 8–12).

The very definition of international commercial arbitration determines its contractual nature, which allows the parties themselves to agree on the place of arbitration, the conduct of the arbitration, *ad hoc* or institutional rules of arbitration proceedings and various other aspects of the arbitration process (see Lew *et al*., 2003, p. 27–30). The parties' agreement may also include agreement on the admissibility rules in arbitral proceedings (see **part 1.2.**). The contractual nature of arbitration seems to give the impression that the rules of admissibility of evidence exist only to the extent that the parties agree on their application, which would make any analysis of the rules of admissibility of evidence dependent on the will of the parties in a particular dispute.

Such a conclusion would not be entirely correct. While the right of the parties to agree on the rules of evidence cannot be forgotten, legal scholars take the view that international arbitration proceedings can be characterised by a specific system of rules of evidence. For example, R. Pietrowski points out: "International arbitrations vary considerably in terms of the nature of the parties, the subject matter of the dispute, the law governing the dispute and the law governing the arbitration itself. Nevertheless, various principles and rules of evidence have emerged from the process of international arbitration over the past two centuries which are generally applicable to all arbitrations unless the parties agree otherwise." (Pietrowski, 2006, p. 407; see also O'Malley, 2019, p. 4).

The reasons for the creation of this evidentiary system are manifold. Some authors argue that the main reason for the emergence of the evidentiary system in international arbitration is a common sense, which dictates that both the parties and the arbitral tribunals themselves should follow certain rules of evidence (see Cheng, 1987 quoted O'Malley, 2019, p. 2–3). The need for rules of evidence in arbitration has also been compounded by the fact that, as will be shown in more detail in the following parts of this thesis, parties are reluctant to agree on the application of rules of evidence (see **parts 1.2., 3.1.1.2.**, see also Park, 2003, p. 289).

Without going into the reasons for the emergence of this evidentiary system, it is important to note that international commercial arbitration can be characterised by an evidentiary system that exists in many cases independently of the parties' right to agree on the application of rules of evidence. It is precisely this aspect that makes it possible to analyse various rules of evidence which fall within the evidentiary system in international commercial

arbitration. An important but, as will be shown below, often unjustifiably neglected part of the evidentiary system is the admissibility of evidence.

**The identification of the scientific problem**. This thesis follows the position of ancient philosopher Aristotle: "A 'thesis' is a supposition of some eminent philosopher that conflicts with the general opinion [...]." (Aristotle, 350 quoted Ross (ed.), 1928, p. 11). The admissibility of evidence in international commercial arbitration can be characterised by three general opinions, which are challenged in this thesis.

*Firstly*, the admissibility of evidence does not play an important role in international commercial arbitration procedure. This prevailing view is reflected in legal scholarship: "International adjudicatory bodies generally consider questions of weight in relation to all submitted evidence and do not wish to hear separate claims as to admissibility. In the WTO context, a panel considered that 'there is little to be gained by expending our time and effort ruling on points of "admissibility" of evidence *vel non*'." (Waincymer, 2012, p. 792; see also Brower, 1994, p. 48).

This view is confirmed by arbitral awards. We can find examples of arbitration proceedings where, although the parties raised issues of admissibility of evidence, the arbitral tribunals simply ignored admissibility issues and decided only on the relevance of the presented evidence (National Bank of Xanadu v. Company ACME...). In addition, some arbitral tribunals, even after finding that a party's evidence is inadmissible, still decide to evaluate the inadmissible evidence. For example, in ICC arbitration case the arbitrators stated: "Since the record of these proceedings was closed at the end of the September 2010 Hearing, this production is inadmissible. The Tribunal nevertheless observes that, if the extract were admissible, it would be of no assistance to the Respondent […]." (Sonera Holding B.V. v. Cukurova…; Entes Industrial Plants Construction and…; see **part 2.2.1.**).

The view of legal scholarship and arbitral case law, which determines the second or even third-class role of admissibility of evidence in international commercial arbitration proceedings, has direct consequences. For instance, the admissibility of evidence in international commercial arbitration is touched upon in almost every treatise on international commercial arbitration. However, the analysis in treatises is usually limited to an indication of the arbitral tribunal's general approach towards the admissibility of evidence and the application of certain admissibility rules (see, *e.g.* Born, 2021, p. 2481–2487; Redfern *et al*., 2015, p. 377–378.). There is a lack of both the conceptual analysis which would identify the admissibility rules that are applicable in international commercial arbitration and the purposive analysis which would identify and explore the main underlying purposes behind admissibility rules.

Accordingly, this rather declarative approach towards the admissibility of evidence up to now has prevented a clear understanding of both specific rules on the admissibility of evidence set out in the sources of international commercial arbitration, and the importance of these rules in arbitration proceedings.

*Secondly*, arbitral tribunals tend to take a liberal approach towards the application of the admissibility rules. This dominant approach is reflected in legal scholarship: "Arbitration tribunals will admit almost any evidence submitted to them in support of parties' position, they retain significant discretion in the assessment and the weighing of the evidence. Accordingly even hearsay evidence will be admitted." (Lew *et al*., 2003, p. 561; see also Redfern, *et al*., 2015, p. 378; see **part. 2.1.**).

This approach is so ingrained in the entire international arbitration process that some authors even regard the admissibility of submitted evidence as a procedural right of a party (Sandifer, 1975 quoted Reisman, Freedman, 1982, p. 740) or even as a procedural principle (Amerasinghe, 2005, p. 167; see **part 2.1.**). The reasons for the liberal approach include the influence of the principle of free evaluation of evidence, the duty of arbitrators to establish the truth, the duty of arbitrators to give the parties an opportunity to present their case in arbitration proceedings, the institutional set-up of the arbitration process, *etc*. (see **part 2.2.**).

This generally accepted approach towards the admissibility of evidence is so entrenched that it has virtually never been challenged. To date, legal scholarship has not assessed in detail the reasons for this view and the validity of the view itself. In other words, legal scholarship does not provide a detailed analysis that would reveal whether the liberal approach is, in fact, a valid approach in international commercial arbitration.

*Thirdly*, in the absence of an agreement to the contrary by the parties, the question of the admissibility of evidence is left to the broad discretion of arbitral tribunals. As will be shown in this thesis, an analysis of various sources of arbitration law suggests that admissibility rules are not formulated as *ex ante* legal rules that explicitly determine whether particular evidence is admissible but as discretionary provisions that are applied while balancing the various criteria relevant to the arbitration case (see **part 1.2.4.**). In this respect, the ICC arbitral tribunal has rightly noted: "By virtue of the I.C.C. Rules (notably of Articles 16 et seq., in particular 20, 21 and 31), the arbitrator has a wide discretion in matters of procedure, for instance, he has the right to proceed with the hearing of the case 'by all appropriate means' […] having the power (but not the duty) of hearing witnesses, if he believes this is useful." (Indian company v. Pakistani bank...). Hence, in the absence of an agreement

between the parties to the contrary, the question of the admissibility of particular evidence will be left to the arbitrators' broad discretion.

The broad discretion of arbitrators in the context of the admissibility of evidence reflects the prevailing opinion that evidentiary issues should be left to the arbitrators' discretion rather than to detailed rules of evidence. Legal scholarship recognises that the broad discretion of arbitrators ensures one of the most important values of international commercial arbitration, *i.e.* the flexibility of the process, which is fulfilled by giving arbitrators a broad mandate to adapt the arbitral process and its conduct to the expectations of the parties or to the procedural situation (see Holtzmann, Neuhaus, 1989, p. 584). This broad discretion, according to eminent arbitration practitioners, is the "prevailing orthodoxy" or even the "essence" of the entire arbitral process (Park, 2006, p. 148; Lane, 1999, p. 424; see **part 3.1.**).

Although we can find various criticisms of the broad discretion of arbitrators in legal scholarship (see, *e.g*. Park, 2003). At least in the context of the admissibility of evidence, the broad discretion of arbitrators has not been critically assessed. To date, we cannot find a detailed analysis which would help to answer the question – is arbitrators' discretion the most appropriate tool to deal with the admissibility of evidence in international commercial arbitration? Moreover, is the procedural flexibility, which is associated with broad discretion, really an absolute value, and can we justify this value in terms of other procedural values, such as a lack of legal certainty?

Therefore, these three generally held opinions, *i.e.* the lack of focus on the admissibility of evidence, the liberal approach towards the application of the admissibility rules and the wide discretion of arbitrators, can be seen as the *status quo* of admissibility of evidence in international commercial arbitration. The main scientific problem addressed in the dissertation concerns the validity of this *status quo* in international commercial arbitration, *i.e.* the dissertation aims, by various methods, firstly, to provide an explanation of the existing *status quo* of admissibility of evidence and, secondly, to provide a critical assessment of it.

**The object of the dissertation research**. The dissertation focuses on the admissibility of evidence in international commercial arbitration. As already mentioned, the admissibility of evidence in international commercial arbitration is essentially characterised by three aspects, which are analysed in this thesis: 1) the lack of conceptual and purposive analysis of the admissibility of evidence in international commercial arbitration; 2) the liberal approach towards the application of the rules of admissibility of evidence; and 3) the arbitrators' broad discretion to decide how the rules of admissibility of evidence should be applied.

The focus of this thesis is exclusively related to the admissibility of evidence in international commercial arbitration. Nevertheless, the following paragraphs explain three aspects which do not extend the scope of the object of this thesis itself but are unavoidable in order to achieve the aim and objectives of this thesis.

The first aspect is that this thesis focuses on and pays more attention to specific admissibility rules. This thesis provides an overview of various admissibility rules that are established in the main arbitration law sources (see **part 1.2.**). However, due to the ability of the parties to agree on the application of various admissibility rules and the broad discretion of arbitrators, a wide range of admissibility rules may apply in arbitration proceedings (see **part 1.2.4.**). Due to the limited scope of this thesis, it would simply be impossible to review all of the admissibility rules in detail. A detailed examination of every single admissibility rule that is enshrined in arbitration law sources is also practically impossible due to the limited access to usually confidential arbitral awards.

Hence, it was decided to focus this thesis on specific admissibility rules. As will be elaborated on and substantiated in the following parts of this thesis, the analysis of the admissibility of evidence allows three categories of admissibility rules in international commercial arbitration to be distinguished: 1) admissibility rules designed to improve fact-finding accuracy; 2) admissibility rules that exclude evidence because of its content; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law (see **part 1.2.4.1.**). Accordingly, this thesis does not focus on all possible admissibility rules but rather on a few rules that fall into one of these three categories. From the first category – this thesis focuses on the admissibility of the written testimony of a witness who is not examined in the arbitration hearing. From the second category – this thesis focuses on the admissibility of confidential evidence and the admissibility politically or institutionally sensitive evidence. From the third category – this thesis focuses on the admissibility of illegally obtained evidence and the admissibility of evidence submitted too late. The choice has been made to focus on these particular admissibility rules because of the relatively frequent application of these rules in arbitral case law (see **part 3.1.2.**).

A deliberate choice was also made to pay less attention to issues related to admissibility rules concerning legal privileges. The reason for this is both the existing comprehensive analysis of legal privileges in legal scholarship (*e.g.* Born, 2021, p. 2549–2563; Berger, 2006; Grégoire, 2016) and the very broad and complex nature of the issues surrounding these admissibility rules (see **part 1.2.3.1.**). Moreover, as explained below, the main problem with

legal privileges is not related to a liberal approach towards these rules or to the broad discretion of arbitrators but to the issues related to the choice of the applicable law with respect to legal privilege (see **part 1.2.3.1.**).

Despite the increased focus on certain rules of admissibility of evidence, the increased focus does not change or modify the main object of this thesis for the following three reasons.

*Firstly*, as mentioned, the conceptual and purposive analysis of the admissibility of evidence in international commercial arbitration provides an overview and description of all the admissibility rules set out in the relevant arbitration law sources, which are examined in this thesis (see **part 1.2.**).

*Secondly*, as discussed in detail below, all the admissibility rules are characterised by a dominant liberal approach towards their application (see **part 2.1.**). Thus, the critical assessment of this approach and the conclusions drawn in this respect are relevant not only in relation to the admissibility rules that are the focus of this thesis but also in relation to all admissibility rules in international commercial arbitration in general (see **parts 2.2., 2.3.**).

*Thirdly*, as will be explained in detail below, all the admissibility rules contained in the arbitration law sources are formulated as discretionary provisions (see **part 1.2.4.**). Hence, the criticisms and shortcomings of the broad discretion of arbitrators, which are analysed in this thesis, are relevant for all admissibility rules (see **part 3.1.**). In addition, the analysis of the main downsides of discretion is conducted not only in relation to the admissibility rules, which receive more attention in this thesis, but also in relation to other admissibility rules (see **parts 3.1.1.**, **3.1.2.**).

The second aspect – the concept and purpose of the admissibility of evidence in international commercial arbitration is analysed by exploring the admissibility of evidence in civil procedure law. The decision to compare the admissibility of evidence in international commercial arbitration and in civil procedure was determined by the fact that one of the main features of any conceptual analysis in social sciences is its differentiation which refers to the distinction between a concept and a neighbouring concept. In this sense, the concept can be defined with reference to its neighbouring concepts (Gerring, 2011, p. 127).

An excellent example of this differentiation is the research on the concept of law by H. L. A. Hart, one of the core issues of which is the relationship and differences between the concept of law and other regulators of social relations. As Hart himself asks: “How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from and how it is related to moral obligation?” (Hart, 2012, p. 13). The comparison of different concepts should not be surprising. As R. Wilburg well puts it: “Odd that a

thing is most itself when likened" (Wilbur, quoted Damaška, 1997, p. vii). Likewise, we can better understand the admissibility of evidence in international commercial arbitration when we analyse it together with the admissibility of evidence in other fields of law.

It is quite clear that international commercial arbitration has a fairly close relationship with civil proceedings. There are two reasons for comparing the admissibility of evidence in international commercial arbitration with the admissibility of evidence in civil procedure.

*Firstly*, international commercial arbitration historically had and still has a very strong connection with civil proceedings. This can be illustrated by looking at the historical evolution of the international commercial arbitration procedure itself. For example, the historical position in England was that arbitrators were required strictly to apply local English procedural and evidentiary rules. In 1989 two commentators from England wrote: "Arbitrators are bound by the law of England, and the rules regarding the admissibility of evidence are part of that law. Thus, if an arbitrator admits evidence which is inadmissible, he commits an error of law which may be appealed against" (Mustill, Boyd, 1989 quoted Born, 2021, p. 1720). This position ought to be considered outdated since modern arbitration tends to differentiate itself from the national procedural law (Poudret, Besson, 2007, p. 551; see also Gaillard, 2010, p. 104–109). However, civil procedure law, to some extent, still could be regarded as a source of inspiration in deciding on various evidentiary matters in arbitration. For example, legal scholars continue to analyse the issue of admissibility of evidence in arbitration together with national procedural laws (see, *e.g*. Waincymer, 2012, p. 795).

*Secondly*, the direct influence of civil procedure law on arbitration can be traced back to the statutory provisions of the law of the seat of arbitration, *i.e.* the *lex arbitri*. For example, in some countries, such as Belgium, France, Germany or Poland, the regulation of arbitration proceedings is an integral part of civil procedure law (see, *e.g*. Böckstiegel *et al*., 2015; Bensaude, 2015; Taelman, Severen, 2021, p. 197). In addition, legal scholarship indicates that the admissibility of evidence in international commercial arbitration is inevitably influenced by the universal rules of fair trial enshrined in national civil procedure law, which is one of the reasons why the most appropriate way to deal with the topic of admissibility in international arbitration is to first examine the concept of admissibility of evidence under national law (see Saleh, 1999, p. 141, 158)

Accordingly, civil procedure influences and has a direct link with various evidentiary issues in international commercial arbitration. This suggests that in order to properly explore and, more importantly, understand the

admissibility of evidence in international commercial arbitration, we, first of all, need to look at the most relevant neighbouring concept, *i.e.* the concept of admissibility of evidence in civil procedure law.

Nevertheless, the analysis of civil procedure law also does not extend the object of this thesis since this thesis uses civil procedure as a kind of starting point to better understand the admissibility of evidence in international commercial arbitration. As explained in more detail below, the admissibility of evidence in civil proceedings is not analysed on the basis of a specific jurisdiction. On the contrary, this thesis analyses civil procedure on the basis of the two legal traditions most relevant to international commercial arbitration, *i.e.* the common law tradition and the civil law tradition. This makes it possible not to go into various provisions of civil procedure law in detail but only to look at general aspects of the concept and purposes of admissibility of evidence (see **part 1.1.**).

The third important aspect is that this thesis is not limited to the case law of international commercial arbitration tribunals but, in some cases, analyses the case law of investment arbitration tribunals as well as that of other international tribunals, namely the case law of the International Court of Justice and the Iran-United States Claims Tribunal. There are practical reasons for not limiting this thesis exclusively to the case law of international commercial arbitration tribunals. Due to the confidential nature of the arbitration (see Born, 2021, p. 3001–3002), it is, in some instances, quite difficult to disclose the application of admissibility rules in international commercial arbitration. As the renowned arbitration law specialist P. Lalive observes: "The confidential character of arbitrations, together with their multiplicity and variety, constitutes a tremendous obstacle to a true knowledge of the subject. We must be aware of the fact that our experience is necessarily limited and our data partial." (Lalive, 1984 quoted Petrowski, 2006, p. 374).

In order to overcome the lack of legal sources and achieve the aim and objectives of this thesis as accurately as possible, the decisions of investment arbitration tribunals and other international tribunals have been used as supplementary sources of legal research. However, these additional sources do not broaden the object of this dissertation for the following two reasons.

*Firstly*, international commercial arbitration, investment arbitration and proceedings of other international courts are characterised by a virtually identical approach towards the admissibility of evidence. For example, like legal sources of international commercial arbitration (see **part 1.2.**), the rules of procedure of both investment arbitration tribunals and other international

tribunals essentially leave the question of the admissibility of evidence to the broad discretion of the arbitrators or judges.[3]

This similarity is also supported by the IBA Rules (IBA Rules on the Taking of Evidence in International Arbitration, 2020), which are of great importance for this thesis. In the 2010 version of the IBA Rules, the word "commercial" was deleted from the title so that the IBA Rules could be applied not only in international commercial arbitration but also in investment arbitration. Hence, the admissibility rules established in the IBA Rules apply in both commercial and investment arbitration.

*Secondly*, rules of procedure of the international courts are not only practically identical to the arbitration procedure rules analysed in this thesis but are directly inspired by the arbitration procedure rules analysed in this thesis. For example, the procedural rules of the Iran-United States Claims Tribunal were based on the UNCITRAL Arbitration Rules (UNCITRAL Arbitration Rules, 2010; see Caron, 1990, p. 105).

Therefore, neither the increased focus on specific admissibility rules nor the analysis of the admissibility of evidence in civil proceedings nor the analysis of decisions of arbitral tribunals in investment arbitration or international courts adjust or modify the object of this thesis, *i.e.* the admissibility of evidence in international commercial arbitration. As stated above, the research has chosen to use the latter aspects not only for practical reasons but also because of the need to reveal the object of this thesis in as much detail as possible.

**The main aim of this thesis**. The aim of this thesis is to reveal, analyse and critically evaluate the *status quo* of admissibility of evidence in international commercial arbitration. The dissertation uses legal methods to investigate and challenge the widely accepted opinions on the admissibility of evidence in the international arbitration community. As mentioned, these opinions are essentially manifested in three aspects: 1) the lack of focus on the admissibility of evidence, which results in the lack of a conceptual and purposive analysis of the admissibility of evidence; 2) the liberal approach

[3] For example, the Statute of the International Court of Justice and the Rules of Procedure do not contain detailed rules of evidence, and the admissibility of evidence is largely left to the discretion of the court (see, *e.g.* Chen, 2015). The investment arbitration process is also characterised by a wide discretion of arbitrators in deciding on the admissibility of evidence. Rule 36(1) of the ICSID Arbitration Rules sets out the provision which is repeatedly discussed in this thesis: "The Tribunal shall determine the admissibility and probative value of the evidence adduced." (ICSID Arbitration Rules, 2022).

towards the admissibility of evidence; and 3) the broad discretion of arbitrators to decide on the application of the admissibility rules.

The aim of this dissertation is not to analyse in detail a specific rule of admissibility of evidence in international commercial arbitration. A scholarly work devoted to a specific admissibility rule, such as, for example, the admissibility of illegally obtained evidence, while undoubtedly useful, is not capable of drawing general conclusions about the fundamental aspects linking all the admissibility rules in international commercial arbitration. Hence, this thesis does not set out to analyse individual admissibility rules in detail but to uncover, review, evaluate, and, if necessary, change the entire *status quo* of admissibility of evidence in international commercial arbitration.

**Dissertation objectives and legal methodology of their implementation**. Because of the main aim of this thesis, it is necessary to fulfil four objectives. The objectives of the dissertation are achieved by using a specific legal methodology explained in detail below. It should be noted that certain methodological aspects are disclosed in the introduction and at the beginning of each part of this thesis.

*Firstly*, to uncover and analyse both the conceptual and purposive approaches towards the admissibility of evidence in international commercial arbitration.

This thesis aims to identify and analyse the conceptual approach towards the admissibility of evidence in international commercial arbitration, *i.e.* to identify specific rules of admissibility of evidence that are embodied in legal sources of international commercial arbitration. However, the analysis does not end there. This thesis also seeks to reveal the purposive approach towards the admissibility of evidence in international commercial arbitration, *i.e.* to show the specific purposes of the admissibility rules and how the application of these rules achieves them.

The conceptual and purposive approaches towards the admissibility of evidence are analysed and revealed in part 1 of this thesis while using comparative, linguistic, systematic and teleological methods. The detailed methodology of this research objective is explained in the following paragraphs.

As already mentioned, the admissibility of evidence is analysed in part 1.1 of this thesis by analysing the "neighbouring" concept of admissibility of evidence in civil procedure. Unfortunately, the scope of this thesis, the traditions and specificities of different jurisdictions, and various language barriers do not allow for a jurisdiction-specific study. Hence, the analysis of the concept and purposes of admissibility of evidence is not based on specific jurisdictions but on different legal traditions. The two legal traditions chosen

for this analysis are the two most relevant traditions to the arbitral process: the common law tradition and the civil law tradition (see, *e.g*. Berger, 2019, p. 295; see **parts 1.1.1, 1.1.2.**).

Although, at first sight, the comparison between different legal traditions may seem too broad, in the context of this thesis, this approach is the most appropriate due to two reasons: 1) this thesis does not seek to examine the admissibility of evidence in civil procedure law of specific countries, but only to identify admissibility rules and to illustrate their purposes, which are common to both legal traditions. Hence, the analysis is heavily influenced by two international sources, which aim to harmonise different legal traditions. The first source is the ALI/UNIDROIT Principles (ALI/UNIDROIT Principles of Transnational Civil Procedure, 2006). The ALI/UNIDROIT Principles aim to reconcile differences among various national rules of civil procedure but also consider the peculiarities of transnational disputes compared to purely domestic ones. The second is the ELI/UNIDROIT Rules (ELI/UNIDROIT Model European Rules of Civil Procedure, 2020). The ELI/UNIDROIT Rules aim to provide more detailed rules, considering existing legal instruments at the European Union level, European legal traditions and various legal developments in Europe, in order to produce a framework of reference and source of inspiration for a broad range of actors; 2) it is a common practice to compare evidentiary issues in the light of different legal traditions in legal scholarship (see Damaška, 1997, p. 1–6; Taruffo, 2010). In this thesis, the research, to use M. Damaška's quotation, is "like the winter sun: emitting light but little warmth" (Damaška, 1986, p. 15). Accordingly, this thesis seeks only to illuminate the general features of legal traditions in the context of the admissibility of evidence and not to draw in-depth conclusions about specific jurisdictions.

Nevertheless, it is essential to note that part 1.1 of this thesis, in some instances, explores specific jurisdictions. In the analysis of the common law tradition, an emphasis is placed on the US federal civil procedure and the civil procedure of the law of England and Wales. The analysis of the civil law tradition focuses on Lithuanian civil procedure and, in some instances, also takes into account examples from the civil procedure law of Belgium, Germany, Austria, France and a couple of other continental European countries. However, as was already explained, this thesis does not attempt to analyse the civil procedure law of all these countries in detail. On the contrary, civil procedure law of different jurisdictions is used only to provide general examples in order to illustrate the main features of the common tradition or the civil law tradition in the context of the admissibility of evidence.

Thus, part 1.1. of this thesis, while comparing both the civil law tradition and the common law tradition by linguistic, systematic and teleological methods, seeks to identify the conceptual approach, *i.e.* the specific rules of admissibility of evidence applicable inherent in both legal traditions and purposive approach, *i.e.* the purposes behind these rules (see **parts 1.1.1., 1.1.2., 1.1.3.**). In addition, part 1.1. of this thesis also briefly highlights the historical reasons behind the emergence of the rules of admissibility of evidence in both the civil law tradition and the common law tradition (see **part 1.1.**).

Identification of the admissibility rules and their purposes in the civil tradition and the common law tradition is used as a starting point to explore both the conceptual and purposive approaches towards the admissibility of evidence in international commercial arbitration in part 1.2 of this thesis. The admissibility of evidence in international commercial arbitration is analysed by exploring three sources of arbitration law, which are explained in the following three paragraphs.

The admissibility of evidence is examined in the context of the Model Law (see **part 1.2.1.**). It is widely accepted that the key jurisdictional basis for an arbitrator's rights, duties and powers is to be found in the applicable arbitration law. This will usually be the arbitration law of the seat of the arbitration (*i.e.* the *lex arbitri*). When parties select the place of arbitration within a particular geographical location, this ought to mean that their intention is "that the arbitration is conducted within the framework of the law of arbitration of (that location)" (Waincymer, 2012, p. 67). As explained in more detail in the introduction below, one of the most famous and widely applied *lex arbitri* is undoubtedly the Model Law.

The admissibility of evidence is examined in the context of the rules of arbitration procedure (see **part 1.2.2.**). In many instances, national arbitration legislation provides only default, or "gap filling", rules regarding procedural matters, which apply in the absence of an agreement between the parties (Born, 2021, p. 1650). The *lex arbitri* will generally establish the parties' autonomy to select rules that govern the arbitration procedure (Waincymer, 2012, p. 192). Consequently, comprehensive research on the conceptual and purposive approaches towards the admissibility of evidence must analyse the arbitration procedure rules. As explained in more detail in the introduction below, this thesis analyses three arbitration rules that are widely accepted in the international arbitration community: the UNCITRAL Arbitration Rules, the ICC Arbitration Rules (Rules of Arbitration of the International Chamber of Commerce, 2021) and the LCIA Arbitration Rules (London Court of International Arbitration Rules, 2020).

The admissibility of evidence is also examined in the context of the widely applicable IBA Rules (see **part 1.2.3.**). As the research below will demonstrate, the arbitration procedure is not characterised by the detailed rules of evidence (see **parts 1.2.1., 1.2.2.**). The lack of these rules and different traditions, jurisdictions and, consequently, attitudes of the parties and arbitrators towards the evidentiary process led to the creation of the IBA Rules. The objective of the IBA Rules is both to provide a common ground for the production of evidence in international arbitration and to provide a bridge between the different legal traditions (Khodykin *et al*., 2019, p. 1). Because of the wide application of the IBA Rules in arbitration proceedings and their wide recognition in the international community, it is necessary to explore the IBA Rules.[4]

A linguistic and systematic analysis of these three sources of arbitration law seeks to identify the conceptual approach, *i.e.* the specific rules of admissibility of evidence applicable in international commercial arbitration (see **parts 1.2.1., 1.2.2., 1.2.3., 1.2.4.1.**). Meanwhile, by using a teleological method and considering the admissibility of evidence in civil procedure, this thesis also aims to identify the purposes behind these rules and to understand

[4] In this thesis, the research is limited to the IBA Rules. The dissertation deliberately does not analyse the Rules on the Efficient Conduct of Proceedings in International Arbitration (the so-called Prague Rules) (Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), 2018), which have recently received much attention in the arbitration community. The Prague Rules are not analysed in detail for several reasons: 1) compared to the IBA Rules, the Prague Rules do not extensively regulate the admissibility of evidence in international commercial arbitration. For example, the Prague Rules do not contain a separate article devoted exclusively to the admissibility of evidence; 2) the Prague Rules essentially follow the internationally accepted approach of leaving evidentiary issues to the discretion of the arbitral tribunals (see **part 3.1.**). For example, Art. 2.4.(e)(iv) of the Prague Rules establish: "The arbitral tribunal may at the case management conference or at any later stage of the arbitration, if it deems it appropriate, indicate to the parties: its preliminary views on: the weight and relevance of evidence submitted by the parties."; 3) at least the original focus on the Prague Rules is not on the whole international arbitration community but instead on a specific region. For example, the Note from the Working Group states: "These discussions also revealed that the Rules, initially intended to be used in disputes between companies from civil law countries, could in fact be used in any arbitration proceedings where the nature of the dispute or its amount justifies a more streamlined procedure actively driven by the tribunal, a practice which is generally welcomed by arbitration users." (Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), 2018, p. 2).

how these purposes are implemented in international commercial arbitration proceedings (see **part 1.2.4.2.**).

*Secondly*, to uncover, analyse and critically assess the prevailing liberal approach in the international arbitration community towards the application of the rules of admissibility of evidence in international commercial arbitration proceedings.

As will be shown in the following parts of this thesis, the formulation of the rules on the admissibility of evidence as discretionary provisions in the sources of arbitration law inevitably leads to the need to answer the question: how do arbitral tribunals exercise this discretion? (see **parts 1.2.4.2., 2.1.**) As already mentioned, arbitral tribunals tend to adopt a liberal approach towards the application of the rules on the admissibility of evidence. The liberal approach and the validity of its reasons are analysed and examined in part 2 of this thesis while using comparative, systematic, linguistic and teleological methods. The methodology of this objective is explained below.

Part 2 of this thesis analyses the following sources of law – the Model Law, the three rules of arbitration procedure, the IBA Rules, legal scholarship, and the case law of arbitration courts and national courts. These sources of law are used to identify and explain the liberal approach, the reasons for its emergence and its implications for the admissibility of evidence in international commercial arbitration (see **part 2.1.**).

After identifying and revealing the essence of the liberal approach, this thesis critically evaluated the rationales behind this approach in international commercial arbitration. The legal research on the validity of the liberal approach can take many forms, for example, by analysing whether arbitral tribunals have adequately applied the liberal approach in the specific cases. While useful, this research approach is very limited in the context of this thesis because of the aforementioned confidential nature of arbitration, which does not allow for gathering detailed information on the application of various admissibility rules in arbitration proceedings. Accordingly, it was decided to investigate the validity of the liberal approach by assessing the justification of its reasons, *i.e.* to pose and answer the question – do reasons for the liberal approach, as revealed in the various sources of arbitration law, justify the liberal approach towards admissibility of evidence?

However, it is not appropriate and impossible to single out and analyse in detail all possible reasons in the context of this thesis. This is due both to the multiplicity of reasons themselves and to the fact that some of the reasons are not related to the benefits of this approach but to simple objective circumstances. For example, one of the reasons for the adoption of the liberal approach relates to the fact that, quite simply, international court proceedings

were more likely to be conducted by lawyers from the civil law tradition, which is usually not characterised by a judicial process based on detailed rules of evidence (Sandifer, 1975 quoted Reisman, Freedman, 1982, p. 739).[5] Thus, this thesis does not analyse and evaluate all of the possible reasons for this approach but focuses on the most fundamental reasons, which are most often found in legal scholarship (see **part 2.2.**).

*Thirdly*, to identify, analyse and critically assess the shortcomings of the arbitral tribunals' discretion to apply the admissibility rules in international commercial arbitration.

As will be shown in detail below, the conceptual and purposive approaches towards the admissibility of evidence and the criticism of the liberal approach lead to the need to change the *status quo* of admissibility of evidence, which inevitably entails changes to the broad discretion of arbitrators to decide on the application of admissibility rules (see **part 3**). Thus, by using linguistic, systematic and teleological methods and analysing the Model Law, the rules of arbitration procedure, the IBA Rules, legal scholarship and the case law of the arbitral tribunals, part 3.1 of this thesis reveals, explains, and critically assesses the broad discretion of the arbitral tribunals in the context of the admissibility of evidence.

The scientific assessment of the arbitrators' discretion in the context of the admissibility of evidence can vary widely. Hence, in part 3.1 of this thesis, the arbitrators' discretion is assessed following a specific methodology. The analysis attempts to answer the question of whether the broad discretion and, accordingly, the whole *status quo* of admissibility of evidence is in line with the fundamental requirements of the inner morality of law as set out by the famous legal theorist L. L. Fuller in his work "The Morality of Law".

L. L. Fuller famously suggested replacing the question "What is the law?" with the question "What is the good law?" According to L. L. Fuller, all legal rules must meet eight minimum conditions to be good law. The law must be: 1) sufficiently general; 2) publicly promulgated, 3) prospective (*i.e.* applicable only to future behaviour, not past); 4) clear; 5) free of contradictions, 6) relatively constant, so that it does not continuously change from day to day; 7) possible to obey; and 8) administered in a way that does not wildly diverge from their obvious or apparent meaning (Fuller, 1964, p. 46–91; Lastauskienė *et al*., 2020, p. 26).

Accordingly, in part 3.1 of this thesis, the *status quo* of admissibility of evidence and its integral part, *i.e.* the arbitrators' discretion, are analysed from

[5] For more about the differences between the civil law tradition and the common law tradition in the context of evidence, see **part 1.1.**

the perspective of the "good law" requirements. However, before proceeding to the assessment of the *status quo* admissibility of evidence in the light of the L. L. Fuller criteria, it is of essence to identify and explain the main drawbacks caused by the broad discretion of the arbitral tribunals in the context of the admissibility of evidence. Thus, at first, this thesis identifies four main problems related to the discretion of arbitral tribunals: 1) the legal uncertainty (see **part 3.1.1**); 2) the contradictory practice of the arbitral tribunals (see **part 3.1.2.**); 3) the decision-making based on subjective beliefs (see **part 3.1.3**.); and 4) the inefficiency of the discretion (see **part 3.1.4**.). Furthermore, once these problems are identified, substantiated and addressed, part 3 turns to an assessment of the whole *status quo* admissibility of evidence in the light of Fuller's eight criteria (see **part 3.1.5.**).

*Fourthly*, to identify and justify more appropriate, effective and non-discretionary legal tools to address the admissibility of evidence in international commercial arbitration.

This thesis goes beyond a critique of the *status quo* of admissibility of evidence. After exposing fundamental problems of the liberal approach and the discretion of arbitral tribunals, part 3.2 of this thesis presents possible alternatives for changing the *status quo*. While using linguistic, systematic, teleological and comparative methods, part 3.2 of this thesis explores two essential questions. The first part focuses on the object of the amendment of the *status quo*, *i.e.*, what should be amended, or, in other words, which source of arbitration law should be changed (see **part 3.2.1.**). The second part analyses an equally important question: how this object should be changed (see **part 3.2.2.**). The second part proposes and evaluates two alternative ways of improving the existing framework of the admissibility of evidence in international commercial arbitration.

Part 3.2. does not set out to provide detailed changes to each specific admissibility rule found in international commercial arbitration. As mentioned, this thesis does not focus on analysing the application of specific admissibility rules in international commercial arbitration. On the contrary, this thesis seeks to provide an overview and a critical assessment of the general framework of the admissibility of evidence in international commercial arbitration. Moreover, the author of this thesis is not a legislator who has the power to prescribe how the legislation should be amended. In this respect, the aphorism attributed to Napoleon, "administration of justice is too serious a business to be left to the lawyers", sounds convincing. (Marriott, 2005).

Hence, the last part of this thesis only proposes a framework that would allow for future changes to the arbitration law sources. In other words, the

analysis provides both general criteria that must be taken into account when changing the sources of arbitration law in the future and possible ways of changing the general framework of the *status quo* of admissibility of evidence (see **part 3.2.**).

**Main statements defended in this thesis**. Both the aim and objectives of the dissertation lead to the following statements:

1. The admissibility of evidence in international commercial arbitration is illustrated by two approaches towards the admissibility of evidence, that allow identifying the specific rules on the admissibility of evidence, and the purposes of these rules:
    1.1. The first approach, *i.e.* the conceptual approach, allows us to identify three categories of rules of admissibility of evidence that reflect the rules of admissibility of evidence contained in sources of international commercial arbitration law: 1) admissibility rules designed to improve fact-finding accuracy; 2) admissibility rules that exclude evidence because of its content; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law.
    1.2. The second approach, *i.e.* the purposive approach, suggests that the admissibility rules give effect to the following fundamental principles and objectives: 1) the accuracy of fact-finding; 2) the fairness of proceedings; 3) the legitimacy of decisions; 4) the expeditiousness of proceedings; 5) the efficiency of proceedings, and 6) other legal values.
2. The liberal approach towards the admissibility of evidence is not justified and should be abandoned. The reasons supposedly justifying this approach have the opposite effect, *i.e.* they either create favourable procedural conditions for applying the rules on the admissibility of evidence or, in some instances, encourage arbitral tribunals to apply the rules on the admissibility of evidence in international commercial arbitration proceedings.
3. There are more appropriate means to address the issues of the admissibility of evidence in international commercial arbitration than the broad discretion of arbitrators. Discretion in the context of the admissibility of evidence is flawed in the following four ways: 1) it does not ensure one of the widely accepted values in the arbitration community – legal certainty; 2) it does not ensure a uniform case law of arbitral tribunals; 3) it leads to the subjective decision-making with regard to the application of the admissibility rules; 4) it does not ensure the effective prevention against the submission of inadmissible evidence and imposes

significant time and financial costs on both parties and arbitrators while dealing with admissibility issues. These shortcomings mean that the current *status quo* on the admissibility of evidence and its integral part – the broad discretion of arbitrators, do not comply with eight "good law" criteria identified by L. L. Fuller.

4. The conceptual and purposive approaches towards the admissibility of evidence, the criticism of the liberal approach and the shortcomings of the arbitrators' discretion lead to the need to change the *status quo* of admissibility of evidence in international commercial arbitration. The object of the change should not be arbitration laws or rules of arbitration procedure but a soft law instrument, preferably – the IBA Rules. There are two alternative ways of changing the *status quo* of admissibility of evidence: 1) the establishment of *ex ante* legal rules that would allow both parties and arbitrators to have a clear understanding of whether the submitted evidence is admissible; 2) the introduction of balancing tests with an exhaustive and *ex ante* established list of criteria, that allows both parties and arbitrators to know in advance which specific criteria are to be balanced when deciding on the admissibility of the submitted evidence.

**Relevance of the topic of this thesis**. The relevance of the problems addressed in this dissertation is determined by two reasons that led to a detailed examination of the admissibility of evidence in international commercial arbitration.

*Firstly*, the increase of issues related to the admissibility of evidence in arbitral practice and the growing interest of the international arbitration community in the admissibility of evidence.

The relevance of this topic is linked to the worldwide leakage of confidential documents. For example, in 2013, the Offshore Leaks scandal made public confidential information about more than 700,000 companies. In 2014, the Luxembourg Leaks led to the disclosure of confidential tax information related to 300 multinational companies. In 2015, the so-called Swiss Leaks scandal exposed confidential financial information about more than 100,000 legal entities. In 2016, the Panama Papers scandal made public 11.5 million confidential or privileged documents related to more than 214,000 companies. In 2017, the so-called Paradise Papers scandal made public 13.4 million confidential documents related to 120,000 natural and legal persons. Meanwhile, WikiLeaks leaked over 250,000 US diplomatic documents and 5.5 million internal documents (Bertrou, Alekhin, 2018, p. 12).

These leaked documents have been submitted as evidence both to court and arbitration proceedings. As noted in legal scholarship: "With the

prevalence of WikiLeaks and similar websites, there has been a marked increase in parties seeking to adduce evidence that has been illegally obtained." (Ashford, 2019, p. 377). The introduction of such documents in a case inevitably raises various issues of the admissibility of evidence. For example, can a party rely on illegally leaked evidence? Would the answer to this question change if the party providing the evidence had not contributed to obtaining that evidence by unlawful means? Should the arbitral tribunal accept and rely on confidential information? Would the answer change if confidentiality only binds a party not involved in the case?

The latter and related issues of admissibility of evidence have prompted the interest of the entire arbitration community towards the admissibility of evidence in international commercial arbitration. The world-famous Willem C. Vis International Commercial Arbitration Moot is a prime example of this. One of the main issues in the 2019 Willem C. Vis International Commercial Arbitration Moot was none other than the admissibility of illegally obtained evidence (see Žikovic, 2019). Moreover, the strong focus of the entire international arbitration community on the issue of admissibility of evidence is confirmed by recent amendments to the IBA Rules. As will be elaborated later in this thesis, in 2020, the IBA Rules have been supplemented with various aspects that are directly related to the admissibility of evidence (see **part 1.2.3.5.1**).

*Secondly*, the need to analyse the issue of the admissibility of evidence is compounded by the continuing debate in the legal community on the quality of the fact-finding process in the judicial context. The question of how to establish the facts of a case as accurately as possible is a long-standing and enduring issue. Since ancient times, various thinkers, starting with Plato, have been convinced that a philosopher should be concerned mostly with three things: goodness, beauty and the truth (Nekrašas, 1993, p. 126).

The determination of truth and the rules of evidence that help or hinder it are relevant not only for philosophers but also for lawyers who have to deal with a court or arbitration process. As noted in legal scholarship: "Evidentiary issues are of particular importance as the outcomes in most arbitrations are highly dependent of factual determination." (Waincymer, 2012, p. 743). In this respect, the admissibility rules are no exception. The exclusion of evidence submitted by a party will often have a direct impact on the parties' positions, on the arbitral tribunal's finding of fact and, ultimately, on the outcome of arbitral proceedings. Thus, reasonable regulation of the admissibility of evidence in international commercial arbitration proceedings ensures the quality of evidence and the accuracy of the arbitral tribunals' decisions.

Various interdisciplinary studies further strengthen the focus on decision-making in arbitration. This includes, in particular, various behavioural psychology studies that underpin various decision-making errors. The literature on this topic is more than abundant. In this respect, the research carried out in the 20th and 21st centuries by psychologists D. Kahneman, A. Tversky and others is worth mentioning. The research in this field has demonstrated various unconscious cognitive errors people make in decision-making (see, *e.g*. Kahneman, 2016, p. 549–591). Various studies supporting these findings have also been carried out in the context of the judges' or arbitrators' fact-finding process (see, *e.g*. Posner, 2008; Sussman, 2017).

All of these studies invite further analysis and development of rules of evidence applicable in the dispute resolution forums. The vital component of these rules is the admissibility rules. As legal scholarship points out, one of the ways to avoid various cognitive errors and thus improve fact-finding in arbitration is to review the admissibility rules (Sussman, 2017, p. 50). Accordingly, this thesis focuses on such a review and critical evaluation of the *status quo* of admissibility of evidence in international commercial arbitration.

**Scientific novelty and significance of this thesis**. Not only are the issues analysed in this thesis relevant, but the results are significant and novel. The following three aspects confirm the novelty and significance of this thesis.

*Firstly*, the dissertation reveals the conceptual and purposive approaches towards the admissibility of evidence in international commercial arbitration. As early as 1982, scholars W. M. Reisman and E. E. Freedman urged in their article "The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Arbitration" that scholars have to study and evaluate in detail the rules that are related to the admissibility of evidence in arbitration (Reisman, Freedman, 1982). Unfortunately, as already mentioned, more than 30 years later, legal scholarship still needs to provide a detailed analysis of the concept or purposes of the admissibility of evidence in international commercial arbitration.

This thesis fills this gap in legal scholarship. As already mentioned, part 1 of this thesis sheds a light on the conceptual and purposive approaches towards the admissibility of evidence: 1) the conceptual approach identifies specific categories of the admissibility rules established in arbitration law sources (see **part 1.2.4.1.**); 2) the purposive approach allows us to identify and understand the primary rationale behind the admissibility rules established in arbitration law sources (see **parts 1.1.3.2., 1.2.4.2.**). To my knowledge, to date, legal scholarship has not conducted a similar analysis of the admissibility of evidence in international commercial arbitration.

*Secondly*, this thesis critically assesses the liberal approach towards the admissibility of evidence that has to date, dominated the international commercial arbitration process. The criticism of specific rationales behind the liberal approach can be found in legal scholarship (see, *e.g*. Reisman, Freedman, 1982, p. 744–745). Nevertheless, to date, legal scholarship has not provided a comprehensive analysis of the liberal approach towards the admissibility of evidence in international commercial arbitration.

As detailed in this thesis, the liberal approach, which is often referred to as an established practice (see, *e.g*. Lew *et al*., 2003, p. 561), is not only unjustified, but on the contrary, the reasons behind the liberal approach create favourable conditions for the application of admissibility rules, and in some cases even encourage arbitral tribunals to apply these rules (see **parts 2.1., 2.2., 2.3.**). According to this thesis, the abandonment, which would be fully justified, of the liberal approach would lead to significant changes in the international commercial arbitration procedure.

*Thirdly*, the significance and novelty of this thesis are also manifested in the fact that the research reveals fundamental shortcomings of the arbitrators' discretion in the context of the admissibility of evidence. As will be shown in this thesis, the arbitrators' discretion is characterised by four flaws: the lack of legal certainty, the contradiction in the arbitral case law, subjective decision-making, and inefficiency. These shortcomings suggest that discretion should not be a preferred method of dealing with the admissibility of evidence in arbitral proceedings (see **part 3.1.**). Legal scholarship reveals some of the shortcomings of arbitrators' discretion (see, *e.g*. Park, 2003; Park, 2006). However, to my knowledge, the discretion and its shortcomings have not yet been considered in specific context of the admissibility of evidence. Moreover, the significance and novelty of this thesis are also manifested in the fact that this thesis also makes general observations and suggestions as to how the *status quo* of admissibility of evidence in international commercial arbitration could be changed (see **part 3.2.**).

**The degree of the research in Lithuania and abroad**. Lithuanian legal scholarship has yet to analyse the issue of the admissibility of evidence in international commercial arbitration in detail. In this respect, it is worth mentioning only the commentary on the Law on Commercial Arbitration of the Republic of Lithuania, in which V. Nekrošius, V. Mikelėnas and E. Zemlytė describe certain aspects of the admissibility of evidence in commercial arbitration (Mikelėnas *et al*., 2016, p. 122). Despite the latter source, Lithuanian legal scholarship lacks a more detailed conceptual and purposive analysis of the admissibility of evidence, the critical evaluation of

the liberal approach and the analysis of the alternative approach towards the *status quo* of admissibility of evidence in arbitration.

The situation is different in foreign legal scholarship. The admissibility of evidence is analysed in many sources of legal scholarship, which is devoted to the analysis of the arbitration process (see, *e.g.* Born, 2021; Redfern *et al*., 2015; Waincymer, 2012; Lew *et al*., 2003; Bantekas *et al*., 2020; Caron, Caplan, 2012; Webster, Bűhler, 2018; Richman *et al*., 2021). Particular attention is paid to the application of the admissibility rules established in the IBA Rules (Zuberbühler *et al*., 2022; Khodykin *et al*., 2019; O'Malley, 2019).

Concerning more specific issues of admissibility of evidence, legal scholarship contains research analysing both certain general aspects of the concept of admissibility of evidence and the application of the specific admissibility rules. In this respect, we should mention the scholarly works of S. A. Saleh (Saleh, 1999), K. Pilkov (Pilkov, 2014), co-authors G. Bertrou and S. Alekhin (Bertrou, Alekhin, 2018), P. Ashford (Ashford, 2019), co-authors W. M. Reisman and E. E. Freedman (Reisman, Freedman, 1982), K. P. Berger (Berger, 2006), R. Pietrowski (Pietrowski, 2006).

Despite various scholarly works, we will not find a detailed analysis of the conceptual or purposive approach towards the admissibility of evidence in international commercial arbitration or detailed research on the liberal approach towards the admissibility of evidence. Also, despite the works of W. W. Park (Park, 2003; Park, 2006), co-authors F Bachand and F Gélinas (Bachand, Gélinas, 2020) and other authors that expose certain shortcomings of the broad discretion of arbitrators, we will not be able to find a detailed analysis aimed at exposing legal problems caused by the broad discretion of arbitrators in the context of the admissibility of evidence. This thesis seeks to fill these gaps in legal scholarship.

**The overview of the sources and literature used**. The sources and literature central to this thesis can be divided into four categories, which are discussed in detail below.

*Firstly*, the admissibility of evidence in international commercial arbitration is analysed in accordance with three groups of legal acts.

The first group – the admissibility of evidence in international commercial arbitration is analysed in the context of the Model Law. The Model Law has been chosen in this thesis for the following three reasons: 1) the Model Law reflects the best practices in the field of international commercial arbitration. The Model Law is designed to assist various national jurisdictions in reforming their laws on the arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. Moreover, it reflects a consensus on the key aspects of

international arbitration practice within various countries of all regions and the different legal or economic systems of the world (Binder, 2019, p. 13); 2) the Model Law is a success story. From its adoption by the United Nations Commission on International Trade Law on 21 June 1985 up until now, the Model Law has been adopted in a total of 111 jurisdictions. The Model Law is, hence, a prime example of legal harmonisation, levelling the playing field for international commercial arbitration (Bantekas *et al*., 2020, p. xxxv); 3) both Belgium and Lithuania have adopted their respective arbitration laws in accordance with the Model Law. The Law on Commercial Arbitration of the Republic of Lithuania was drafted following the Model Law (Mikelėnas *et al*., 2016, p. 20). Similarly, the Belgian Arbitration Act was reformed in 2013 based on the Model Law (Bassiri, Draye, 2016, p. 2).

The second group is the rules of arbitration. This dissertation analyses three arbitration rules: the UNCITRAL Arbitration Rules, the ICC Arbitration Rules and the LCIA Arbitration Rules. The main criteria for selecting the UNCITRAL Arbitration Rules, the ICC Arbitration Rules and the LCIA Arbitration Rules were the international recognition, universality and leading nature of the institutions which adopted these rules. Generally, the UNCITRAL Arbitration Rules are regarded as the most influential set of rules and not only influential in terms of their direct use, but over the years, various versions of the UNCITRAL Arbitration Rules have formed a model when the individual institutions are considering their own set of procedural rules (see Waincymer, 2012, p. 193). Both the UNCITRAL Rules and ICC Rules are also considered universal, meaning that the rules are designed to apply regardless of the seat of proceedings and the nationality of the parties (Petrochilos, 2004, p. 182). Moreover, the ICC and LCIA are leading arbitral institutions (Redfern *et al*., 2015, p. 49). The international recognition of all these rules is confirmed by the fact that these rules are the most frequently chosen arbitration rules by the parties in international arbitration (see White&Case, 2021).

The third group is legal instruments that reflect the good practice in the context of the admissibility of evidence. The analysis of the admissibility of evidence in international commercial arbitration is not limited to the Model Law or the rules of arbitration procedure. The already mentioned IBA Rules are of great importance for this thesis. This thesis analyses the IBA Rules because of their wide application in arbitration practice and their recognition in the international community (Marghitola, 2015, p. 33; von Segesser, 2010, p. 736; see **part 1.2.3.**).

Other legal instruments that reflect the good practice of considerable relevance to the dissertation are the already mentioned international

instruments harmonising civil procedure law – the ALI/UNIDROIT Principles and the ELI/UNIDROIT Rules. These sources are used to reveal the common features of the admissibility of evidence in both the civil law tradition and the common law tradition.

*Secondly*, the case law of national courts is fundamental in this thesis. The case law of national courts is used to analyse the interpretation and application of the grounds for non-recognition and non-enforcement of arbitral awards set out in Art. V(1)(b) and (2)(b) of the New York Convention (United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958). As explained in other parts of this thesis, the grounds of Article V(1)(b) and (2)(b) of the New York Convention are one of the main reasons for the liberal approach (see **part 2.2.4.**). Hence, the interpretation and application of these grounds are of fundamental importance for this thesis.

The national courts' decisions in this thesis have been analysed according to two specific criteria: 1) specific source – this thesis analyses only those national court decisions published in the prestigious ICCA Yearbook Commercial Arbitration; 2) specific timeframe – this thesis only analyses those national court decisions that have been published in the ICCA Yearbook Commercial Arbitration during the period between 1976 and 2022. The year 1976 was chosen as a starting point since, in 1976, the ICCA Yearbook Commercial Arbitration was launched. The analysis of national court decisions in this thesis was carried out by reviewing all national court decisions that meet these two criteria. Accordingly, the observations and statements arising from the analysis are not based on a random selection of positions in national case law but are the result of an examination of all the national judgments, which satisfy both the publication source and the timeframe criteria.

*Thirdly*, both the aim and the objectives of this thesis inevitably require an analysis of arbitral tribunals' decisions. However, as already mentioned, many international commercial arbitration awards are confidential and inaccessible to most of the public. As with regard to national court decisions, the analysis of arbitral awards was carried out in accordance with two specific criteria: 1) specific sources – this thesis analyses only those commercial arbitral awards that are included in either the specific publication – the already mentioned ICCA Yearbook Commercial Arbitration, or in one of two prestigious and widely used databases, *i.e.* Kluwer Arbitration and Westlaw Classic; 2) specific timeframe – the dissertation analyses only those arbitral awards that have been published in the publication mentioned above or in one of the databases between 1976 and 2022.

Like with the decisions of national courts, this thesis analyses all arbitral awards meeting these two criteria. Thus, arguments and conclusions arising from this analysis are not based on a random selection of arbitral awards but on a detailed analysis of all arbitral awards.

*Fourthly*, one of the most important sources of this thesis is legal scholarship, which not only explains the application of the rules of admissibility of evidence in international commercial arbitration but also often fills in the gaps created by the hardly accessible arbitral case law. Legal scholarship in this thesis is divided into three groups which are explained in the following paragraphs.

The first group is sources of legal scholarship that analyse the admissibility rules established in the Model Law, the UNCITRAL Arbitration Rules, the ICC Arbitration Rules, the LCIA Arbitration Rules or in the IBA Rules. In this respect, scholarly works of co-authors H. M. Holtzmann, J. E. Neuhaus and C. A. Fleischhauer (Holtzmann *et* al., 1989), co-authors D. M. Caron and L. M. Caplan (Caron, Caplan, 2012), co-authors T. H. Webster and M. W. Bűhler (Webster, Bűhler, 2018), co-authors R. Khodykin, C. Mulcahy and N. Fletcher (Khodykin *et al*., 2019), N. D. O'Malley (O'Malley, 2019) were of particular importance.

The second group is sources of legal scholarship that explore general issues of evidence and the admissibility of evidence in court proceedings. Of particular importance in this respect was the research of M. Damaška (Damaška, 1997; Damaška, 1995), A. Stein (Stein, 2005), F. Schauer (Schauer, 2020) and R. Posner (Posner, 1999; Posner, 2008).

The third group is sources of legal scholarship that analyse various aspects of the admissibility of evidence in international arbitration. An important contribution to the research of this thesis was made by S. A. Saleh (Saleh, 1999), co-authors G. Bertrou and S. Alekhin (Bertrou, Alekhin, 2018), P. Ashford (Ashford, 2019), co-authors W. M. Reisman and E. E. Freedman (Reisman, Freedman, 1982), W. W. Park (Park, 2003), G. Born (Born, 2021), J. Waincymer (Waincymer, 2012) and other authors.

# 1. THE CONCEPTUAL AND PURPOSIVE APPROACHES TOWARDS THE ADMISSIBILITY OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

Concepts are of particular importance in law. This is borne out by the fact that the concept of law itself has been the subject of a perennial debate. As H. L. A. Hart has observed, there is no comprehensive literature dedicated to answering the questions "What is chemistry?" or "What is medicine?" as it is to the question "What is law?" (Hart, 2012, p. 1). The concepts and the explanation of concepts in arbitration law are inevitably relevant to arbitration itself. In fact, one of the advantages of concepts is that a concept helps to reveal specific rules. This revelation leads to a clearer understanding of the rules that constitute the concept and a more accurate application of them in practice. Accordingly, while exploring any legal concept, we need to uncover specific rules, *i.e.* the question "What are the rules?"

Nevertheless, we cannot limit ourselves to the question, "What are the rules?". While the legal rules provide important answers, for example, as to whether or not a particular piece of evidence is admissible, a particular rule inevitably relies on abstract ideas (Ginsburg, Stephanopoulos, 2017, p. 151). Thus, when analysing any legal concept, we need to uncover not only the concrete rules, *i.e.* the question "What are these legal rules?" but also their essence, *i.e.* the purpose behind these rules, in other words, we need to ask the complementary question "What is the purpose of these rules?"

Unfortunately, as explained in detail in the introduction of this thesis, neither the concept of admissibility of evidence nor purposes of the admissibility rules in international commercial arbitration have been analysed in detail. In other words, to date, legal scholarship does not provide a detailed analysis of the admissibility rules, *i.e.* does not answer the question – what are the rules of admissibility of evidence in international commercial arbitration? Legal scholarship also does not contain a detailed analysis of the purpose of these rules, *i.e.* does not provide an answer to the question – what is the purpose of the admissibility rules?

Part 1 of this thesis attempts to fill this gap and analyses both the conceptual and purposive approaches towards the admissibility of evidence in international commercial arbitration. As explained in detail in the introduction of this thesis, part 1 first analyses the 'neighbouring' concept, *i.e.* the admissibility of evidence in civil procedure law (see **part 1.1.**). The admissibility of evidence in civil procedure law is analysed in the context of the two most relevant and often conflicting legal traditions: the civil law

tradition (see **part 1.1.1.**) and the common law tradition (see **part 1.1.2.**). The analysis of the admissibility of evidence in civil procedure concludes with explaining both the conceptual approach and purposive approach towards the admissibility of evidence in civil procedure law (see **part 1.1.3.**). While using the findings of part 1.1 of this thesis, part 1 of this thesis moves on to the analysis of the admissibility of evidence in international commercial arbitration (see **part 1.2.**) As detailed in the introduction of this thesis, the admissibility of evidence in international commercial arbitration is analysed in the context of three groups of legal sources, *i.e.* the Model Law, three rules of arbitral procedure (the UNCITRAL Arbitration Rules, the ICC Arbitration Rules, and the LCIA Arbitration Rules), and the IBA Rules (see **parts 1.2.1., 1.2.2., 1.2.3.**). Finally, part 1.2. of this thesis provides concluding remarks concerning both the conceptual and purposive approaches towards the admissibility of evidence in international commercial arbitration (see **part 1.2.4.**).

## 1.1. The Admissibility of Evidence in Civil Procedure Law

In most general terms, the admissibility of evidence can be simply understood as it is provided in the Oxford Law Dictionary: "principles determining whether or not particular items of evidence may be received by the court" (Law, Martin, 2014). In other words, the admissibility of evidence can be considered a set of rules limiting the submission of specific evidence in civil procedure. This understanding makes it possible to distinguish the admissibility of evidence from the assessment of evidence since only after the admission the judge or arbitrator evaluates the probative value of each piece of evidence. The admission of evidence hence only demonstrates that the judge or arbitrator has received the evidence to weigh it (see Stirner, 2021, p. 419).

However, due to various historical reasons, the admissibility rules and their application differed in different historical periods. Accordingly, before proceeding to a more detailed analysis of the two legal traditions, the following paragraphs provide a brief overview of the historical reasons which have partly determined the somewhat different approach of the two legal traditions to the admissibility of evidence.

Since the oldest civilisations in our history, various admissibility rules can be found in judicial proceedings. For example, the Roman jurist Herennius Modestinus pointed out that a witness's honesty, credibility and other qualities should be tested during judicial proceedings and that witnesses who are

considered to be dishonest should not be heard in the trial (Kosaitė-Čypienė, 2008, p. 106).

The rules of admissibility of evidence gained even greater importance during the Middle Ages, *i.e.* 5th – 15th centuries, in Europe. Although specific rules differed in each European country, during the Middle Ages, the evidentiary rules in judicial proceedings were usually categorised as formal rules of evidence which imposed strict requirements as to the quantity, assessment and sufficiency of the evidence. The system of formal legal proof was a creation of the procedural law of tribunals of the Roman Catholic Church following the *Decretum Gratiani*[6] and the later papal decrees reforming the procedural law (Sladič, Uzelac, 2016, p. 109).

For example, the Roman-canon law, the widely applicable legal system in the vast part of Medieval Europe, imposed strict standards on the admissibility of witness statements. Many of these testimonial disqualifications were influenced by social, religious and cultural biases of a historical period. For example, "infamous people", such as heretics, infidels, and persons engaged in "dishonourable professions", for instance, prostitutes or pimps, could not testify in court proceedings. Moreover, servants could not testify in cases involving their masters or women in cases involving their husbands. Poor people could become competent witnesses only if the judge found that they lived honest lives and had a good reputation. Some admissibility rules were found directly enshrined in the papal decrees. For example, pope Clement V's legal treatise *Pastoralis cura* established that all "acts and evidence" are null and void if obtained in breach of procedural provisions based on natural law (Damaška, 2019, p. 93, 97).

The formal rules of evidence did not exist without a cause. Legal scholarship usually distinguishes the following two rationales behind the rules: 1) the rise of the centralised judicial organisation, which would be damaged by unregulated freedom to evaluate evidence. In other words, legal proof rules emanated from concerns about the unchecked exercise of judicial powers; 2) the safety of the soul – during the Middle Ages, physical and capital punishment were frequent sanctions. Hence, judges were constantly exposed to the risk of unjustified sentences with dire consequences, thereby earning God's displeasure. In order to eliminate this risk, theologians believed that judges should be protected from the consequences of their decisions by

[6] *Decretum Gratiani* is a collection of nearly 4000 texts touching on various areas of church discipline and regulation compiled by the Benedictine monk Gratian in the 11th century. It eventually became the main text on which canon law was lectured in European universities (see Ferreira, Sawicki, 1977, p. 327–338).

the pre-established rules of evidence, which allowed judges to establish the facts of the case that led to the imposition of the appropriate physical or even capital punishment (Damaška, 2019, p. 19–22; Ho, 2003–2004, p. 261).

The significance of these formal rules applicable during the Middle Ages began to decline from the 18th century onwards. One of the main reasons for the abandonment of formal rules was the introduction of the principle of free evaluation of evidence in court proceedings. This principle emerged in the context of the French Revolution as a response to the formal rules of evidence. Strict rules of evidence in a judicial trial during the Age of Enlightenment in the 18th century had become subject to criticism. Proponents of the principle of free evaluation of evidence argued that the judicial process should abandon the formal rules of evidence (Stein, 2005, p. 108–116).

In its pristine form, the principle of free proof was conceived so radical that it demanded freedom from all legal "chains" in evaluating evidence (Damaška, 1995, p. 21). Consequently, the standard of personal conviction (*conviction intime*), which did not pose any objective limitations to a fact-finder's decisions other than his personal conviction, became the dominant standard of proof in judicial proceedings. A good example is proceedings in the late 18th century when French judges would settle any dispute by answering the only question – how a reasonable man would settle such a dispute (Cordozo, 2018, p. 135). Due to a number of contradictory decisions that were inconsistent with the presented evidence, in some European countries, the personal conviction standard was eventually replaced by the less radical rational or reasonable conviction standard (*conviction raisonné*), which required the judge to give a rational explanation for why he or she considers the facts to be proven. Nevertheless, the free proof system of evidence remained relevant in various European jurisdictions due to the lack of precedents and laws establishing the rules of evidence (Damaška, 1995, p. 345).

Contrary to continental Europe, the common law tradition followed a different approach, and its judicial system up until now can be described as a system which is based on various evidentiary principles and rules. The reason behind it was and still is the existence of jury trials. In his treatise "A Preliminary Treatise on Evidence at the Common Law" James Bradley Thayer justified the application of the admissibility rules because of the likely failings of juries in the fact-finding process (Thayer, 1898 quoted Schauer, 2006, p. 170). Another legal scholar and J. Thayer's student John Henry Wigmore argued that contrary to well-educated judges, juries could not be trusted and thus needed rules of evidence to steer them in the right direction (Wigmore, 1983 quoted, Schauer, 2006, p. 171). Accordingly, due to the influence of the

free evaluation of evidence in continental Europe and the existence of a jury in the common law tradition, it is usually assumed that, in contrast to the common law tradition, many continental European countries have not developed detailed and clear rules on the admissibility of evidence (Damaška, 1997, p. 22).

This short historical perspective gives a brief understanding of the main causes for the introduction of the admissibility rules in different legal traditions. It is necessary to be aware of these historical aspects since it still greatly influences the application of the rules on the admissibility of evidence. As will be seen below, the historical reasons can explain why we can find in the common law tradition admissibility rules that are absent in the civil law tradition.

Therefore, the historical reasons outlined in the paragraphs above have caused a different status of the admissibility of evidence in the common law tradition and the civil law tradition. These differences imply that the *status quo* of admissibility rules will be researched, first of all, in the context of the common law tradition (see **part 1.1.1.**) and, secondly, in the context of the civil law tradition (see **part 1.1.2.**).

### 1.1.1. The Admissibility of Evidence in the Common Law Tradition

As already mentioned above, the common law judicial system, in terms of evidentiary matters, is often classified as a rule-based system which distinguishes itself with various evidentiary rules, including the rules of admissibility of evidence.[7] There are various possible classifications of the evidentiary rules in the common law systems (see, *e.g.* Twining, 2006, p. 192–227; Murphy, 2003, p. 13–14). However, in most general terms, the admissibility rules can be classified into two categories: 1) the rules that improve fact-finding accuracy (see **part 1.1.1.1.**); 2) the rules that serve functions extrinsic to the fact-finding process (see **part 1.1.1.2.**). These two categories are described in the following parts.

[7] In common law jurisdictions, admissibility rules are often described as exclusionary rules (see Montrose, 1954, p. 357, 361). This thesis uses the terms "admissibility rules" and "exclusionary rules" as synonyms.

#### 1.1.1.1. The Admissibility Rules that Improve Fact-finding Accuracy

These admissibility rules are generally aimed at the goal of increasing the accuracy of the fact-finding process. According to J. B. Thayer, J. H. Wigmore, and their successors, such admissibility rules increase the accuracy of the fact-finding process by withholding evidence that is likely to be misunderstood or misevaluated by the fact-finder (Schauer, 2020, p. 12). Before analysis of some of the most common admissibility rules in the common law tradition, this part of the thesis will begin with an important clarification of the relationship between the admissibility rules that improve fact-finding accuracy and the so-called rule of relevance.

According to the rule of relevance, evidence is only admissible when it is relevant to the case at hand. Federal evidence law in the United States establishes the rule of relevance in Rule 401 of the FRE: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." (Federal Rules of Evidence, 1975). The civil procedure of the law of England and Wales follows a similar approach and considers that the evidence is relevant when "[…] it is logically probative or disapprobative of some matter which requires proof. It is sufficient to say […] that relevant (*i.e.* logically probative or disapprobative) evidence is evidence which makes the matter which requires proof more or less probable" (DPP v. Kilbourne…).

The rule of relevance serves as a rule of admissibility of evidence since it excludes certain evidence from proceedings. Nevertheless, the rule of relevance is understood not as an admissibility rule *per se* (see Zuckerman, 2006, p. 765). Evidence is rejected as irrelevant because it does not "prove" the fact due to the lack of a natural, "historical" connection between the submitted evidence and that fact. On the other hand, evidence is inadmissible if it is rejected for some reason other than irrelevance (Montrose, 1954, p. 357, 361). Consequently, at least in a narrow sense, the concept of admissibility of evidence does not contain the rule of relevance. According to P. Roberts and A. Zuckerman, the inquiry of the admissibility (in a broad sense) can be broken down into two questions: "1. Is the evidence relevant? 2. Is the evidence subject to any applicable exclusionary rules?" (Roberts, Zuckerman, 2010, p. 10). The first question is related to matters of fact, while the second question contains matters of law since it excludes evidence for reasons unrelated to the relevancy. Given that the rule of relevance is not, at least *stricto sensu*, considered to be a rule of admissibility, only specific rules of admissibility involved in the second question raised by P. Roberts and A. Zuckerman will be analysed in the rest of this part of this thesis. Thus, the

remainder of this part provides a general overview of four admissibility rules that improve fact-finding accuracy in the common law tradition.

*Firstly*, one of the admissibility rules designed to improve fact-finding accuracy is the exclusion of opinion evidence. Rule 701 of the FRE provides the following: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialised knowledge within the scope of Rule 702."[8] Section 3(2) of the Civil Evidence Act of England and Wales establishes a similar rule: "It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived." (Civil Evidence Act, 1972).

The admissibility of opinion evidence is confined to matters only within the general competence and experience of people, which they can appreciate by the process of observation of commonplace facts, and which require no process of conscious deduction (Glover, Murphy, 2013, p. 431). In other words, a layperson may testify to their "opinion" in circumstances where they testify to their state of mind at a particular point in time, based upon "relevant historical or narrative facts that the witness has perceived" (Radvany, 2016, p. 491). As explained by the US Court of International Trade: "A statement of a witness, which is based solely upon his own opinion, and which is merely a conclusion of an ultimate fact in issue, has no probative value" (Schott Optical Glass, Inc. v. United States…). The primary rationale behind this rule is that the admission of opinion evidence might mislead the fact-finder (Cross, Tapper, 2004, p. 558).

*Secondly*, another admissibility rule is the exclusion of evidence related to the person's character. Rule 404(1) of FRE provides the following: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character

[8] Rule 702 of the FRE provides: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

or trait." The rationale behind this rule is related to the fear that the fact-finder will overweight it (Schauer, 2020, p. 13). As it is explained in legal scholarship, arguments establishing a connection between a person's acts and his or her character almost invariably fail since sometimes people act in conformity with their characters, and sometimes they do not, and thus, there is no way of examining the proposition that the individual acted in conformity with his or her character in the event on trial (Stein, 2005, p. 227).

*Thirdly*, another admissibility rule is the rule that establishes the admissibility conditions for the expert witness testimony. The Supreme Court of the US, in the *Daubert* case, formulated specific criteria which ought to be applied for the expert opinion to be admissible (Daubert v. Merrell Dow Pharmaceuticals…). As of this moment, the *Daubert* standard is enshrined in Rule 702 of the FRE: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialised knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." The purpose of Rule 702 is to protect fact-finders from misleading, dubious, incompetent and unqualified expert evidence (see Radvany, 2016, p. 491).

Admissibility conditions for the expert evidence can also be found in the civil procedure law of England and Wales. Criteria which ought to be evaluated while deciding on the admissibility of expert evidence in civil procedure are the following: 1) there is an acknowledged "body of expertise" in the sense of a field governed by established principles and rules; 2) the court considers that expert evidence would assist the determination; and 3) a witness is competent to give expert evidence only if the court is satisfied that the witness is adequately qualified (Zuckerman, 2006, p. 714–716).

*Fourthly*, another important admissibility rule is the hearsay rule. A hearsay is an out-of-court statement offered in a court to prove the truth of whatever the statement asserts. Hearsay most classically occurs when a person is testifying in a court to establish a fact that he or she knows only because another person told him or her about that fact (see Radvany, 2016, p. 481). Under Rule 801 of the FRE, the hearsay rule applies not only to oral but also to written statements and nonverbal conduct. The prohibition on hearsay evidence can be found in the FRE. However, Rule 802 of the FRE provides for more than 20 exceptions to the hearsay rule. For example, 1) present sense impression, *i.e.* a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it (Rule 801(a) of the

FRE); 2) excited utterance, *i.e.* a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused (Rule 801(b) of the FRE); 3) public records of vital statistics, *i.e.* a record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty (Rule 801(9) of the FRE).

To some extent, these exceptions are so overwhelming that some authors, in a somewhat sarcastic way, considered the hearsay rule not as a rule of exclusion but as an exception itself (Allen, 1992, p. 799). Similarly, some positions support the abolition of this rule in general. For example, in the *United States v. Boyce*, Judge Posner called for the elimination of the hearsay rule: "The "hearsay rule" is too complex, as well as being archaic. Trials would go better with a simpler rule, the core of which would be the proposition (essentially a simplification of Rule 807) that hearsay evidence should be admissible when it is reliable, when the jury can understand its strengths and limitations, and when it will materially enhance the likelihood of a correct outcome" (United States of America v. Darnell Boyce…).

Some common law jurisdictions eliminated the hearsay rule in civil trials. For example, provision 1(1) of the Civil Evidence Act of England and Wales provides the following: "In civil proceedings evidence shall not be excluded on the ground that it is hearsay." (Civil Evidence Act, 1995). However, provision 2(1) of the Civil Evidence Act sets certain safeguards in case one of the parties tries to rely on the hearsay evidence: "A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings: (a) such notice (if any) of that fact, and (b) on request, such particulars of or relating to the evidence."

Despite the discussion about the effectiveness of the hearsay rule, the traditional rationale behind the existence of the hearsay rule is twofold: 1) the hearsay cannot be tested by the cross-examination of its author. While relying on hearsay, it is impossible to go beyond taking the word of the original speaker for the fact of whatever the statement asserts. In other words, the hearsay is undesirable because whether or not the statement is reliable cannot be determined in the declarant's absence (Radvany, 2016, p. 481–482); 2) the general assumption that the hearsay evidence is considered unreliable and thus could be overvalued by the fact-finder (see Schauer, 2020, p. 14).

*Fifthly*, in the common law tradition, we can find additional rules of a similar nature. For example, without going into details, Rule 403 of the FRE provides that the court may exclude evidence if its probative value is substantially outweighed by *inter alia* a danger of unfair prejudice, confusing the issues related to the factual circumstances of the case or misleading the

jury. In this context, "unfair prejudice" means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one (Legal Information Institute…).

Moreover, certain admissibility rules can be enshrined not only in specific legal acts but may be introduced as a direct result of judicial decisions. For example, provision 32.1(2) of the Civil Procedure Rules (Civil Procedure Rules of England and Wales, 1998) give courts the broad discretion to exclude evidence that would otherwise be admissible. As explained by A. Zuckerman, Rule 32.1 of the Civil Procedure Rules "provides the court with ample powers to respond to the need of the case as they emerge. […] If it transpires from the witness statements or from expert reports, that the witness is not divided on certain points, then the court may dispense with testimony on those points." (Zuckerman, 2006, p. 769).

Therefore, various rules of admissibility found in the common law tradition show that one of the essential categories of admissibility rules in the common law tradition is the rules of admissibility that aim to improve the quality of fact-finding.

#### 1.1.1.2. The Admissibility Rules that Serve Functions Extrinsic to the Fact-Finding Process

The admissibility rules that serve functions extrinsic to fact-finding do not improve fact-finding accuracy but, quite the contrary, exclude evidence due to various other policy objectives that are deemed more important than establishing the truth in the judicial process. In the common law tradition, we can distinguish two groups of these admissibility rules: 1) legal privileges or immunities; 2) rules that determine the admissibility of illegally obtained, submitted, presented or evaluated evidence. These two groups of admissibility rules are discussed below. However, it is important to note that the common law tradition is not limited to these two groups of admissibility rules. Thus, part 1.1.1.2 also discusses other rules of the admissibility of evidence that serve functions extrinsic to the fact-finding process found in the common law.

*Firstly*, legal privileges and immunities are the first group of admissibility rules that serve functions extrinsic to the fact-finding process. Legal privileges and immunities protect certain sensitive information from disclosure in judicial proceedings, even if such information is considered probative to the case at hand. In other words, rules of privilege or immunities are premised on the idea that, in order to further certain interests,

confidentiality or non-disclosure is considered more important than the value of the evidence (Ginsburg, Mosk, 2013, p. 345).

The approach of the English and Welsh civil procedure law towards legal privileges is to provide a few absolute privileges and to accord substantial discretion to the court to determine whether the public policy weighs in favour of non-disclosure in individual cases. Meanwhile, the US Supreme Court proposed a specific codification of privileges in the FRE. The Congress, however, rejected these proposals and instead adopted Rule 501[9] of the FRE, which preserves existing common law privileges and allows the development of new privileges in accordance with common law principles. Many individual states in the US have specified privileges by statutes (Ginsburg, Mosk, 2013, p. 347–348).

One of the universal legal privileges which receive special protection in every developed legal system is the legal professional privilege. Legal scholarship distinguishes three types of communications that are protected under this privilege: 1) the communication between the client and the lawyer to obtain and give legal advice (legal advice privilege); 2) communications between the client and the lawyer or between the client or his lawyer and third parties, to prepare for pending or contemplated legal proceedings (litigation privilege); 3) items enclosed with, or referred to, in advice or litigation communications, if they were created to obtain advice or in connection with preparation for litigation (Zuckerman, 2006, p. 612). The rationale behind the inadmissibility of information containing legal advice privilege is giving the person an opportunity to consult a lawyer and tell him the whole truth while knowing that what he or she reveals in confidence cannot be disclosed without his or her consent (Loughlin, Gerlis, 2004, p. 441). The litigation privilege rationale is the full access to legal representation, which would be infringed if the party had access to communications between the other party and the other party's legal representatives in relation to a particular case (see Zuckerman, 2006, p. 616).

Another widely applicable legal privilege in civil proceedings is the privilege against self-incrimination. This privilege is usually associated with criminal procedure. Nevertheless, it is also applicable to civil procedure. For example, the US Supreme Court did establish that the Fifth Amendment of the Constitution, which contains the privilege against self-incrimination, applies similarly to civil and criminal proceedings, wherever the answer might tend to subject the person who is answering the question to criminal responsibility

[9] Rule 501 of the FRE provides: "But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

(McCarthy v. Arndstein…). The civil procedure law of England and Wales also recognises that a person generally is immune from being asked under compulsion of law to provide answers to or to produce material in response to questions which might incriminate him or her (see Andrews, 2003, p. 674).

The third privilege, which usually also receives a lot of attention, is the privilege of "without prejudice" communications. Correspondence between the parties, which is intended to reach an agreement, known as communication "without prejudice", is privileged and therefore inadmissible in court. The rationale behind this rule is quite clear since it enables opposing parties to negotiate in order to prevent litigation. In interpreting the nature of this rule, Lord Hope stated: "the guiding principle is that parties should be encouraged so far as possible to resolve their dispute without resort to litigation and that they should not be discouraged by the knowledge that anything that is said in the course of such negotiations may be used to their prejudice in the course of the proceedings." (Andrews, 2019, p. 302).

This approach also has an economic rationale. It not only prevents possible litigation costs of the parties, but it also prevents litigation costs which the judicial system would incur in case of a dispute. The privilege of "without prejudice" communications has its exceptions, however. Generally, this rule means that "without prejudice" communication cannot be revealed at any stage of proceedings, except 1) with the consent (or by waiver) of both parties; or 2) to prove that a settlement has been reached if this is disputed (Loughlin, Gerlis, 2004, p. 439).

Other privileges or immunities found in the common law jurisdictions are the medical privilege, the journalists' privilege, the clergy-penitent privilege, the business secrets privilege, the privileges for Government information, *etc.* (Ginsburg, Mosk, 2013, p. 353–367). Due to the scope of these privileges, this thesis will not analyse the circumstances related to their application. In this respect, it is enough to stress that one of the most important parts of the rules of admissibility of evidence in the common law tradition is legal privileges that exclude certain evidence on various political, legal and other grounds, such as the full access to legal representation, prevention of litigation, *etc*. These values are considered to be more important than the purpose of establishing the facts in proceedings.

*Secondly*, the second part of the admissibility rules that serve functions extrinsic to the fact-finding process is the admissibility of illegally obtained, submitted, presented or evaluated evidence. Albeit the notion of illegally obtained, submitted, presented or evaluated evidence can contain a variety of situations, it is possible to assume that this notion essentially consists of two possible situations: 1) the admissibility of evidence that was obtained,

submitted, presented or evaluated contrary to procedural law; 2) the admissibility of evidence that was obtained, submitted, presented or evaluated contrary to substantive law. Both of these possible situations are discussed in the following paragraphs.

With regard to possible examples of breaches of procedural law, W. Twining argues that since the beginning of the 20th century, one of the parts of the common law rules of evidence is rules regulating the manner of giving evidence. For example, in general, a witness must give evidence under oath, or the examination of a witness cannot be conducted by using leading questions (Twining, 2006, p. 207). Failure to comply with these procedural rules may render evidence inadmissible. Similar procedural rules can be found in the case of the expert evidence. For example, the civil procedure law of England and Wales, besides other formal requirements applicable to the expert evidence, establishes that the admissible expert report must contain a statement of truth (Zuckerman, 2006, p. 737).

Another prominent example of the rules determining the admissibility of evidence in case of a breach of procedural law is the admissibility of evidence submitted too late in the trial. For example, the admissibility of new evidence in the appellate court. Under the civil procedure law of England and Wales, the court will not consider new evidence that was clearly or reasonably available during the trial. However, this rule is not absolute since possible guiding principles for admission of such evidence are the following: 1) the evidence could not have been obtained with a reasonable diligence for use at the trial; 2) the new evidence would "probably have an important influence on the result of the case, though it needs to be decisive"; and 3) the new evidence must also be "credible, though it need not be incontrovertible" (Andrews, 2019, p. 424).

The rules that determine the admissibility of evidence in case of a breach of procedural law, such as the inadmissibility of witness testimony in the absence of oath or lack of statement of truth by an expert, may give the impression that the purpose of these rules is related to fact-finding accuracy. For this reason, some of these rules could be classified under the first category of the admissibility rules in the common law tradition, *i.e.* the admissibility rules that improve fact-finding accuracy. However, these rules are placed in the second category because of their more important purpose, *i.e.* the enforcement of the requirement to comply with the procedural rules. The evidence should, in certain cases, be declared inadmissible not because its admissibility will undermine fact-finding but because a party has not complied with a pre-established procedural order in obtaining, collecting or presenting the evidence.

Regarding the evidence obtained, submitted, presented or evaluated contrary to substantive law, the question of the admissibility of such evidence would arise in cases when evidence has been stolen, audio-recorded, forged or obtained by any other unlawful means. Some common law jurisdictions generally do not limit the admissibility of illegally obtained evidence in civil trials. For example, in criminal trials, the United States has a long history of excluding evidence obtained by unlawful governmental action. However, these exclusionary rules are not applicable in civil trials. Legal scholarship takes the position that the rule of admitting illegally obtained evidence in civil proceedings is determined by the objective of establishing the truth, which is considered to be more important than possible violations of privacy or judicial integrity (Taylor, 2003, p. 626–627, 667).

Nevertheless, the civil procedure law of England and Wales does follow a different approach towards the evidence that is obtained contrary to substantive law. The judge's discretion to declare such evidence inadmissible stems from the already mentioned provision 32.1(2) of the Civil Procedure Rules: "The court may use its power under this rule to exclude evidence that would otherwise be admissible."

Historically judges did not have such power. In 1980 in the case *Helliwell v. Piggott-Sims*, Lord Denning stated: "I know that in criminal cases the judge may have a discretion. […]. But so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning" (Helliwell v. Piggott-Sims, 1980 quoted Breda, Vricella, 2013, p. 6).

This one-way approach gradually has changed due to 1) entrusting judges with a series of 'case management' prerogatives (one of the examples is the already mentioned provision 32.1(2) of the Civil Procedure Rules); and 2) the influence of the ECHR (the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950) within the British legal system. One of the examples of such influence is section 3 of the Human Rights Act of 1998, which provides that the Act of Parliament, including the Civil Evidence Act, should be "read and given effect in a way which is compatible with the Convention rights" (see Breda, Vricella, 2013, p. 7).

The leading case which set the admissibility rule for unlawful evidence is *Jones v. University of Warwick*. The issue in the appeal was whether, and if so when, a defendant to a personal injury claim is entitled to use a video of the claimant which was obtained by filming the claimant in her home without her knowledge after the person taking the film had obtained access to the claimant's home by deception. The England and Wales Court of Appeal held

that in deciding on the admissibility of illegally obtained evidence, the court must balance two conflicting public interests: 1) discouraging the unlawful obtaining of evidence and 2) establishing the truth in the judicial process. The Court of Appeal held that: "The court must try to give effect to what are here the two conflicting public interests. The weight to be attached to each will vary according to the circumstances. The significance of the evidence will differ as will the gravity of the breach of Article 8, according to the facts of the particular case. The decision will depend on all the circumstances. Here, the court cannot ignore the reality of the situation. This is not a case where the conduct of the defendant's insurers is so outrageous that the defence should be struck out." (Jones v. University of Warwick…).

The balancing test was confirmed and explained in other cases. For example, in *Imerman v. Tchenguiz*, the Court of Appeal of England and Wales dealt with the admissibility of Mr Imerman's confidential financial information, which was unlawfully extracted from the office computer service. Lord Neuberger MR stated the following: "in a case of this type, the decision whether to admit or exclude evidence involves weighing one party's (in this case, the wife's) article 6 right to a fair trial with all the available evidence, against the other party's (the husband's) article 8 right to respect for privacy. (It may also involve the wife's right under article 10 to say what she wants to say, and the husband's article 6 right, on the basis that he might say the trial was unfair if it extended to evidence which had been wrongly, even illegally, obtained from him)." (R. Tchenguiz *et al*. v. V. Imerman…).

To some extent, the rule of admissibility of illegally obtained evidence could also be regarded as a rule meant to improve fact-finding accuracy in a judicial process. This is evident when one thinks of the exclusion of evidence obtained by torture. One rationale behind excluding evidence obtained by torture is that such evidence is unreliable *per se* (see, *e.g.* Cwik v. Poland…). However, more essential rationales are the court's duty to ensure a fair trial and the legitimacy of the court's decision. Both of these rationales will be discussed in more detail in other parts of this thesis (see **parts 1.1.3.2.2., 1.1.3.2.3.**).

*Thirdly*, besides legal privileges and admissibility rules dealing with illegally obtained, submitted, presented or evaluated evidence, we can also find a variety of additional admissibility rules that serve functions extrinsic to fact-finding accuracy in the common law tradition. For example, one of the more interesting examples is the so-called apology laws. Thirty-six states of the US have laws that prohibit the admissibility of certain expressions related to sympathy or apology. The rationale behind such rules is that it encourages apology which in turn encourages the injured party to release a grievance or

grant forgiveness (Minow, 2015, p. 1621). However, as mentioned in the introduction of this thesis, the objective of this thesis is not to go into the practical analysis of the various admissibility rules within the common law tradition. Quite the contrary, part 1.1.1 of this thesis aims only to identify general features of the common law tradition in the context of the admissibility of evidence.

Therefore, to conclude part 1.1.1 of this thesis, despite the various possible differences between jurisdictions, the analysis in part 1.1.1 allows us to show that the common law tradition can be characterised by two major categories of the admissibility rules in the civil procedure: 1) the admissibility rules that improve fact-finding accuracy; 2) the admissibility rules that serve functions extrinsic to the fact-finding process.

### 1.1.2. The Admissibility of Evidence in the Civil Law Tradition

Given that each jurisdiction of the civil law tradition has its own system of civil procedure, this part of the thesis does not explore the specificities of civil proceedings in each jurisdiction which belongs to the civil law tradition. As explained in the introduction of this thesis, the analysis of the admissibility of evidence in the civil law tradition focuses on the admissibility of evidence in Lithuanian civil proceedings, while the analysis is also supplemented by general examples from other civil law jurisdictions.

Traditionally Lithuanian civil procedure regards the admissibility of evidence as one of the features of evidence. Lithuanian legal scholarship identifies four features of evidence in civil proceedings: 1) factual information; 2) relevance; 3) admissibility; 4) legality. Hence, for any type of information to be considered as evidence, it has to be factual information which is relevant, admissible, and it must be lawfully obtained, submitted, presented and evaluated (Mikelėnas *et al.*, 2020, p. 391–393).

As in the common law tradition, in Lithuanian civil procedure, the rule of relevance is perceived as a separate rule and not part of the admissibility of evidence. According to Art. 180 of the LCPC: "A court shall accept for hearing only such evidence that confirms or denies circumstances relevant to the case." (Civil Procedure Code of the Republic of Lithuania, 2003). The Supreme Court of Lithuania has clarified that "the relevance of evidence refers to the logical connection between the content of the evidence and the subject matter of the particular case, *i.e.* the information (factual data) constituting the content of the evidence must confirm or contradict the circumstances which are relevant in a particular civil case." (ruling of the Supreme Court of

Lithuania of 16 July 2020 in a civil case). The Supreme Court of Lithuania has repeatedly emphasised the different aspects of the relevance and admissibility of evidence: "The relevance of evidence is a matter of the substance of the evidence. The admissibility of evidence is generally related to the procedural form of evidence." (Resolution of the Senate of the Supreme Court…).

A similar approach can be also found in the comparative analysis of other European countries. The admissibility of evidence is usually perceived as a second of the two basic criteria, the first one being the relevance of evidence. This means that every item of relevant evidence should be considered on the basis of admissibility since the relevant evidence may nonetheless be excluded for admissibility reasons (Taruffo, 2010, p. 26).

The same cannot be said about the fourth feature of evidence, *i.e.* the legality of evidence. Some representatives of Lithuanian legal scholarship distinguish the legality of evidence as a distinct feature of evidence (Driukas, Valančius, 2006, p. 606). This approach is not correct. The legality of evidence ought to be considered as an integral part of the admissibility of evidence. In support of this view, the following paragraphs present three arguments.

*Firstly*, contrary to some positions in legal scholarship, the Supreme Court of Lithuania has repeatedly emphasised that the concept of admissibility includes the legality of the evidence, *i.e.* the requirement that the evidence must be obtained, submitted, presented and evaluated in accordance with not only procedural but also substantive law (see, *e.g.* Resolution of the Senate of the Supreme Court…).

*Secondly*, not only the Supreme Court of Lithuania but also legal scholars consider the legality of evidence as a part of the admissibility of evidence. For example, V. Nekrošius analyses the problem of relying on unlawful evidence in the civil procedure law in the context of the admissibility of evidence (Nekrošius, 2021). A similar approach is found in other jurisdictions. As mentioned in part 1.1.1.2 of this thesis, the common law tradition also addresses the issue of illegally obtained evidence in the context of the admissibility of evidence (Schauer, 2020, p. 10). The same approach can also be found in the civil law tradition, where, for example, issues of illegally obtained evidence within the various continental European countries are also analysed in the context of the admissibility of evidence (Nunner-Kautgasser, Anzenberger, 2016).

*Thirdly*, in various historical contexts, the illegally obtained, submitted, presented and evaluated evidence has been and continues to be analysed in the context of the admissibility of evidence. For example, in his analysis of the

admissibility of evidence in the Roman-canon law, M. Damaška refers to the provision of Clement V's legal treatise *Pastoralis cura*: "acts and evidence" are null and void if obtained in breach of procedural provisions based on natural law (Damaška, 2019, p. 97). Similarly, J. Machovenko, who analyses the admissibility of evidence in the law of the Grand Duchy of Lithuania, points out that "the gathering of evidence by lawful means […] was ensured by the presence of the aforementioned official." (Machovenko, 2005, p. 63).

Therefore, the legality of evidence, unlike the rule of relevance, is an integral part of the admissibility of evidence. Accordingly, analysis of the admissibility of evidence in the civil law tradition inevitably has to contain issues related to the admissibility of illegally obtained, submitted, presented or evaluated evidence. As will be shown in the following parts, the civil law tradition can be characterised by three categories of admissibility rules: 1) admissibility rules that exclude certain means of proof (see **part 1.1.2.1.**); 2) admissibility rules that exclude evidence due to its content (see **part 1.1.2.2.**); 3) admissibility rules that exclude illegally obtained, submitted, presented or evaluated evidence (see **part 1.1.2.3.**).

#### 1.1.2.1. The Admissibility Rules that Exclude Certain Means of Proof

The first category of the admissibility rules found in the civil law tradition consists of the rules of admissibility that exclude certain means of proof. In Lithuanian civil procedure, this category contains two admissibility rules: 1) the prohibition to use certain means of proof; 2) the proof by the necessary means of proof (Mikelėnas *et al.*, 2020, p. 392–393). Both of these rules relate to the limitations on the procedural form of evidence, *i.e.* exclude certain procedural means of proof (such as witness statements, expert reports, *etc*.) in civil proceedings.

Historically, Lithuanian civil procedure had more restrictions on the procedural form of evidence. Until the LCPC amendments of 2011, Art. 177(2) and (3) established an exhaustive list of the means of proof. Art. 177(2) provided: "The following means shall be used to establish facts: explanations of the parties and third parties (directly or through representatives), testimonies of witnesses, written evidence, physical evidence, inspection reports and expert reports." Art. 177(3) added the following means of proof: "Photographs, video and audio recordings, made in accordance with the law, may also be used as evidence." At the time, Lithuanian legal literature took the position that only factual evidence contained in the list of means of proof could be admissible (Laužikas *et al*., 2003, p. 453–458). The case law of the

Supreme Court of Lithuania followed the same approach. For example, the Supreme Court of Lithuania declared the statement by a company board member addressed directly to the court inadmissible since that statement did not constitute the means of proof set out in Art. 177(2) or (3) of the LCPC (ruling of the Supreme Court of Lithuania of 18 December 2006 in a civil case).

The 2011 amendments to the LCPC abolished the exhaustiveness of the list. As of now, Art. 177(2) of the LCPC provides: "Factual evidence shall be established by the following means: explanations by the parties and third parties (directly or through representatives), witness statements, documentary evidence, physical evidence, inspection reports, expert reports, photographs, video and audio recordings made in accordance with the law and any other means of proof."

The Supreme Court of Lithuania did react to this amendment: "The wording of Art. 177 of the LCPC, which entered into force on 1st October 2011, does not contain an exhaustive list of the means of proof used in civil proceedings, unlike the previous legal provision, and thus the rule of admissibility has acquired new features. The court is entitled to evaluate any information which is expressed in an objective form unless the law specifically limits the means of proof." (ruling of the Supreme Court of Lithuania of 27 September 2012 in a civil case). These amendments provided for a more flexible approach since, in subsequent case law, the Supreme Court of Lithuania did declare electronic correspondence, a snapshot of a screen and similar types of evidence admissible evidence (see, *e.g.* ruling of the Supreme Court of Lithuania of 27 May 2022 in a civil case; ruling of the Supreme Court of Lithuania of 22 October 2013 in a civil case).

A similar approach can also be found in other continental European countries. For example, in the civil procedure law of the Netherlands: "As in most modern systems of civil procedure, evidence can be administered by all means […]" (van Rhee, 2015, p. 10). The civil procedure code of Austria lists five means of proof: documents, witnesses, expert opinions, evidence by inspection and examination of the parties. According to the prevailing opinion, the aforementioned list is not exhaustive. Instead, any source of information can be admitted as evidence. Any means of evidence are admissible even if they do not fit into one of the explicitly named categories (Nunner-Kautgasser, Anzenberger, 2015, p. 12).

Despite the abolition of limitations on the exhaustiveness of the list of means of proof in certain jurisdictions, we can still find admissibility rules that exclude certain means of proof in the civil law tradition. Two of these admissibility rules, *i.e.* the prohibition of the use of certain means of proof and

the proof by the necessary means of proof, are discussed in the following paragraphs in more detail.

*Firstly*, in the civil law tradition, we can find admissibility rules that prohibit the use of certain means of proof. A quite common example is the prohibition of witness statements. For example, Art. 1.93(2) of the LCC provides: "Where any dispute arises upon the fact of forming or performance of a transaction which fails to meet the necessary requirements for its ordinary written form, the parties lose the right to use the testimony of witnesses as evidence to prove the facts indicated above […]" (Civil Code of the Republic of Lithuania, 2000).

Another similar example which is enshrined directly in the LCPC is the prohibition of relying on a witness testimony to challenge the circumstances established by the official written evidence. Art. 197(2) of the LCPC provides: "Documents issued by state and municipal authorities, certified by other persons authorised by the state within the scope of their competence and in accordance with the form requirements for the documents concerned, are considered official written evidence and have greater probative value. Facts stated in official documentary evidence shall be considered as fully proven until they are contradicted by other evidence in the case, except for the testimony of witnesses."

The admissibility rules outlined in Art. 1.93(2) of the LCC and Art. 197(2) of the LCPC declare inadmissible only the specific mean of proof, *i.e.* the testimony of a witnesses. However, other means of proof, such as explanations of the parties and third parties, are considered admissible to contradict the facts stated in an official written document (ruling of the Supreme Court of Lithuania of 30 September 2016 in a civil case).

Rules that prohibit witness testimony are not common in all continental European countries. In Germany, for instance, no evidence is excluded just because written evidence of the contract is exclusively required (Taruffo, 2010, p. 32). The situation, however, is different in Belgium. According to Art. 8.9(1) of the Civil Code of Belgium, albeit with notable exceptions, oral evidence is not admissible in claims with an economic value of EUR 3,500 (Taelman, Severen, 2021, p. 164).

Some of the abovementioned admissibility rules are not absolute. For example, Art. 1.93(6) of the LCC provides for significant exceptions to the admissibility rule that excludes witness statements to prove the fact of forming

or performance of a transaction which fails to meet the necessary requirements for its ordinary written form.[10]

In Italian civil procedure, the exclusion of witness statements is also not absolute since the law grants the court a discretionary power to allow the testimony, in light of the nature of the parties and the content of the contract to be proved (Silvestri, 2015, p. 11). Exceptions can also be related to the nature of the procedure itself. For example, the admissibility rule set forth in Art. 8.9(1) of the Civil Code of Belgium does not apply to evidence against and between businesses. All legal means can be used as evidence between and against businesses irrespective of the economic value of the dispute (Taelman, Severen, 2021, p. 165).

*Secondly*, in the civil law tradition, we can find admissibility rules that require proof by the necessary means of proof. These admissibility rules require that certain factual circumstances of the case must be proven only by a specific means of proof. Rules regarding the proof by the necessary means of proof and rules on the prohibition to use certain means of proof are to some extent similar since both of them limit the usage of the means of proof in proceedings. The main difference between these admissibility rules is that the latter rule excludes the use of specific means of proof, while the former rule explicitly requires using certain means of proof to prove specific facts of the dispute.

Examples of proof by the necessary means of proof can be found in various continental European countries. Art. 2.118(1) of the LCC provides that upon satisfaction of a claim of the forced sale of shares, interest or contributions, the court shall have to appoint experts to set the price of shares, interest or contributions. Art. 466(1) of the LCPC provides that the mental state of a natural person can only be established by a forensic psychiatric examination. The civil procedure law of Germany also seldom stipulates obligatory forms of evidence. For example, an exception exists for claims

[10] Art. 1.93(6) of the LCC provides: The provisions established in paragraph 2 of this Article may not be applied by a court if they contradict the principles of good faith, justice and reasonableness, in particular, where: 1) there exists other written evidence, even though indirect, that proves the forming of the transaction; 2) written evidence to prove the fact of transaction forming has been lost not through the fault of the party; 3) taking into consideration the circumstances in which the transaction was formed, it was objectively impossible to form that transaction in writing; 4) taking into consideration the interrelations between the parties, the nature of the transaction, and other circumstances of importance to the proceedings, prohibition against invoking testimonies of witnesses would contradict to the principles of good faith, justice and reasonableness.

arising out of a cheque or bill of exchange. In such proceedings, the claim may only be supported by documentary evidence or by the examination of the other party (Wolf, Zeibig, 2015, p. 28).

The rationale behind these rules lies in the specific nature of certain facts since, generally, these facts are more difficult to prove. In order to improve the accuracy of fact-finding, the law requires to use of more reliable means of proof, and if the court does not rely on the required means of proof, the fact cannot be considered as established.

The classification of these rules as falling within the admissibility rules is only conditional since these rules do not prescribe the inadmissibility of evidence but only require the use of certain means of proof. The requirement to rely on the required means of proof does not render the other means of proof inadmissible. According to Lithuanian legal scholarship, in the case of an establishment of the mental state of a natural person, in addition to an expert's report, other evidence may also be used as a means of proof. In such instances, the other evidence is merely additional to the necessary evidence (Laužikas, *et al*., 2003, p. 458). However, the rule of proof by the necessary means of proof is still regarded as an admissibility rule due to two reasons: 1) in cases where the necessary means of proof are not submitted by either party, other means of proof, albeit proving the same facts, will be deemed inadmissible; 2) the rules of proof by the necessary means of proof have the positive aspect of the admissibility, *i.e.* rules oblige the use of a particular means of proof, hence, a particular means of proof must be admissible for the facts to be established in a judicial process.

#### 1.1.2.2. The Admissibility Rules that Exclude Evidence due to its Content

The second category of admissibility rules in the civil law tradition is the admissibility rules that exclude evidence due to its content. This important category of admissibility rules is reviewed in the following paragraphs.

For a long time, the civil procedure of Lithuania did not consider the rules excluding evidence due to its content as a part of the admissibility rules. Until recently, the analysis of the admissibility of evidence focused more on the procedural limitations of the evidence. The reasons can be traced back to the 1996 ruling of the Constitutional Court of the Republic of Lithuania, which stated that the admissibility of evidence is related to the procedural form of evidence and not to its content (resolution of the Constitutional Court of Lithuania of 14 April 1996). The Supreme Court of Lithuania follows a similar sequence: "The admissibility of evidence is generally linked to the procedural

form of the evidence" (ruling of the Supreme Court of Lithuania of 9 December 2008 in a civil case). Moreover, in Lithuanian legal scholarship, the admissibility rules that exclude evidence due to its content are not distinguished even as a separate category of the rules of admissibility of evidence (Mikelėnas *et al*., 2020, p. 392–393).

Lithuanian legal scholarship's approach is incorrect. As will be mentioned below, both the civil procedure law of Lithuania and other continental European countries have detailed admissibility rules that exclude evidence because of its content. The Supreme Court of Lithuania indicated that the rules of admissibility of evidence also limit certain content of evidence (Resolution of the Senate of the Supreme Court…). For example, the Supreme Court of Lithuania has explained that factual data constituting a state secret, or an official secret is inadmissible because of the content of evidence: "Art. 177(4) of the LCPC imposes a limitation on proof which relates only to the content of the evidence. The information which constitutes a state or official secret cannot in itself be evidence in civil proceedings, regardless of the means of proof in which it is embodied: neither the explanations of the parties or third parties nor the testimony of witnesses nor written or physical evidence nor any other means of proof are admissible if the information contained therein constitutes a state or official secret." (ruling of the Supreme Court of Lithuania of 6 June 2014 in a civil case).

One of the essential admissibility rules that excludes evidence because of its content is directly enshrined in the LCPC. For example, as already mentioned, Art. 177(4) of the LCPC provides: "Factual data constituting a state secret, or an official secret cannot normally be used as evidence in civil proceedings until they have been declassified in accordance with the law." Art. 177(5) of the LCPC establishes another admissibility rule: "Data obtained during mediation may not be used as evidence in civil proceedings, except in cases provided for in the Law on Mediation of the Republic of Lithuania."

The LCPC also recognises the privilege against self-incrimination. Art. 191(2) of the LCPC provides: "Refusal to testify is allowed if the witness's testimony would mean testifying against himself or herself, members of his or her family or close relatives." (see also Art. 188 of the LCPC). Persons do not have an obligation to submit any written documents containing factual circumstances which could incriminate him or her, members of his or her family or close relatives (Art. 199(3) of the CPC).

Both Art. 189(2) and 199(3) of the LCPC exclude the testimony of a witness or the requested documentary evidence due to its privileged content: 1) representatives in civil, administrative or administrative offence proceedings, or defence counsels in criminal proceedings, of circumstances

which have come to their knowledge in their capacity as representative or defence counsel; 2) clergy – about circumstances which they have learned during the confession of a believer; 3) medical practitioners – about circumstances constituting their professional secrecy; 4) mediators – about the circumstances which they have learned in the course of mediation, *etc*.

Similar admissibility rules can also be found in civil procedure laws of other countries that belong to the civil law tradition. The civil procedure law of Austria singles out several restrictions regarding the content of evidence. For example, priests are not allowed to provide testimony which consists of the secrecy of confession. Mediators are not allowed to provide testimony which consists of facts their clients entrusted to them. In addition, the civil procedure law of Austria also recognises the privilege against self-incrimination – a witness has the right not to answer questions if the answer would be disgraceful or holds the risk of criminal prosecution for the witness or his or her close relatives (Nunner-Kautgasser, Anzenberger, 2015, p. 27, 45).

In the civil procedure law of France, testimonies of priests, medical practitioners and attorneys are usually considered inadmissible. A specific rule stipulates that the mediator's findings may not be produced nor cited in the subsequent proceeding without the parties' consent (Oudin, 2015, p. 31).

Similar rules are also found in the civil procedure law of the Netherlands. The Civil Procedure Code provides that the witness testimony of certain groups of persons is inadmissible. This group include certain family members, including previous spouses and registered partners, and those who need to keep information secret due to their office or profession (*e.g.* lawyers, medical doctors, priests, *etc*.). However, people can only refuse to provide information if it relates to the information given to them in the context of their profession (van Rhee, 2015, p. 22). These rules exclude not the means of proof in general, *e.g.* a witness testimony, but only the privileged part of the testimony.

All the above mentioned rules resonate with rules of privilege found in the common law tradition (see **part 1.1.1.2.**). In fact, some of the admissibility rules are found in both the common and the civil law tradition, for example, the legal professional privileges, the medical privilege, the clergy-penitent privilege, the privilege against self-incrimination, *etc*. As in the common law tradition, the effect of these admissibility rules is to "suppress the truth" (Taruffo, 2010, p. 30) since the law recognises that the confidentiality of certain information outweighs the objective of establishing the truth.

### 1.1.2.3. The Admissibility Rules that Exclude Illegally Obtained, Submitted, Presented or Evaluated Evidence

The third category of the admissibility rules in the civil law tradition is the admissibility of illegal evidence, *i.e.* the requirement that the evidence must be obtained, submitted, presented and evaluated in accordance with procedural law and substantive law requirements. As in the common law tradition, this category will be explored from two perspectives: 1) admissibility rules that determine the admissibility of evidence which was obtained, submitted, presented or evaluated contrary to procedural law; 2) admissibility rules that determine the admissibility of evidence which was obtained, submitted, presented or evaluated contrary to substantive law.

*Firstly*, procedural law in various countries from the civil law tradition set out that for evidence to be admissible, the evidence must be obtained, submitted, presented and evaluated in accordance with procedural law.

Various examples of these admissibility rules can be found in the civil procedure law of Lithuania. Art. 212 of the LCPC sets imperative procedural requirements concerning the appointment of an expert. The expert opinion will be deemed inadmissible if such requirements are not followed. Procedural requirements are also established with regard to the witness testimony. According to the Supreme Court of Lithuania, witness testimony is considered to be inadmissible if the procedure for collecting and examining such evidence has been substantially violated, *e.g.* the witness did not appear at the hearing and only sent the written testimony, the witness was present in the courtroom prior to the examination (Art. 192(1) of the LCPC), the witness did not take an oath in accordance with the procedure laid down in Art. 192(4) of the LCPC, *etc.* (Resolution of the Senate of the Supreme Court…).

Important examples of these rules are the rules that determine the admissibility of new evidence. Limitations on submitting new evidence can be found both within the context of proceedings in the first instance and in the appellate courts. Art. 181(2) of the LCPC provides the general rule: "The court has the right to refuse to admit evidence if it could have been submitted earlier and its submission later would delay the proceedings." According to the Supreme Court of Lithuania, the prompt submission of evidence ensures that both the other party and the court have access to it as soon as possible. The rationale behind the court's right to exclude new evidence is aimed at the earliest possible presentation of evidence in a case, thus, ensuring the principles of procedural efficiency and economy (ruling of the Supreme Court of Lithuania of 21 June 2013 in a civil case). However, the limitation of new evidence is not absolute. The court still has the discretion to declare new

evidence admissible, especially when the probative value of new evidence is material to the dispute at hand (see, *e.g*. ruling of the Supreme Court of Lithuania of 21 June 2013 in a civil case).

A familiar provision is also enshrined with regard to new evidence in appellate court. Art. 314 of the LCPC provides: "The court of appeal shall refuse to admit new evidence which could have been submitted at first instance, unless the court of the first instance unreasonably refused to admit it, or unless the need to submit such evidence arose subsequently." The Supreme Court of Lithuania has indicated that the inadmissibility of new evidence in the appellate trial directly manifests the limited appeal in Lithuanian civil procedure. The limited appeal is one of the possible forms of the appeal when the appellate court does not re-examine the merits of the case but instead reviews the legality and reasonableness of the judgment of the court of the first instance only in the light of the grounds of appeal (ruling of the Supreme Court of Lithuania of 7 October 2019 in a civil case).

The refusal to admit new evidence in appellate proceedings is also not absolute. The Supreme Court of Lithuania has ruled that the appellate court must always consider 1) whether the new evidence could have been submitted to the court of the first instance, 2) whether the subsequent submission of the evidence would delay the proceedings; and 3) whether new evidence sought to be admitted would have a negative influence on the parties' dispute (ruling of the Supreme Court of Lithuania of 27 June 2019 in a civil case). Moreover, the Supreme Court of Lithuania has also stated that the possibility of admitting new evidence in an appeal is linked to the court's duty to do justice, *i.e.* to investigate all the circumstances relevant to the case and to give a fair decision. Nevertheless, this obligation must not be interpreted as obliging the appellate court to admit new evidence in all cases where new evidence could be used to prove legally relevant circumstances of the case (ruling of the Supreme Court of Lithuania of 2 December 2020 in a civil case).

Rules of the inadmissibility of evidence due to procedural law infringements can also be found in other jurisdictions that belong to the civil law tradition. For example, the civil procedure law of Austria excludes evidence when the method of taking the evidence is contrary not only to substantive law but also to procedural law. In those cases, the court must not use such evidence since any use of such evidence is a ground for an appeal or even an annulment of the proceedings (Nunner-Kautgasser, Anzenberger, 2015, p. 46). The Civil Procedure Code of Austria is also familiar with rules regarding the admissibility of new evidence. In principle, the parties are allowed to produce new evidence and facts until the closing of oral proceedings of the first instance court. The court can reject later submission if

new evidence was not introduced earlier solely through gross negligence and if the treatment of new evidence would considerably delay the closing of proceedings (Nunner-Kautgasser, Anzenberger, 2015, p. 19–20).

The civil procedure law of Germany also is no stranger to such admissibility rules. For example, if the court does not inform the witness of his or her right to refuse to testify and this results in the witness giving testimony despite such a right, according to the leading opinion in scholarly writing and the case law, the court may not use the said testimony in its final decision (Wolf, Zeibig, 2015, p. 53). The testimony in that particular instance would be inadmissible not because of the legal privilege which might have been invoked but due to the disregard of procedural rules by the judge.

Despite some notable exceptions, the rules on the admissibility of new evidence can also be found in Italy and France (Silvestri, 2015, p. 4; Oudin, 2015, p. 1, 8).

*Secondly*, in the civil law tradition, we can find admissibility rules that exclude evidence due to infringements of not only procedural law but also substantive law. As in the common law tradition, these rules deal with instances when evidence has been stolen, audio-taped, forged or obtained by any other unlawful means. Illegally obtained evidence has recently received a great deal of attention in the legal literature which manifested in various comparative studies on the admissibility of such evidence in continental Europe (see, *e.g.* Nunner-Kautgasser, Anzenberger, 2016). These studies allow us to identify three approaches towards the illegally obtained evidence: 1) illegally obtained evidence is *per se* inadmissible evidence in civil proceedings; 2) illegally obtained evidence is admissible evidence in civil proceedings; 3) the balancing test. All these three approaches are discussed in the following paragraphs.

The first approach – illegally obtained evidence is *per se* inadmissible evidence in civil proceedings. For example, amendments to the Constitution of Croatia in 2000 established the general rule that illegally obtained evidence cannot be considered evidence (Rijavec, Keresteš, 2015, p. 89). In 2001 amendments to the Constitution of Greece similarly established that evidence obtained in violation of the constitutional provisions protecting the privacy and secrecy of correspondence cannot be admissible (Giannoulopoulos, 2019, p. 31). The Supreme Court of Greece has ruled that audio recordings obtained without the consent of the person being recorded violate the freedom of communication of the individual and are inadmissible (Rijavec, Keresteš, 2015, p. 90). In French law, the question of unlawful evidence is usually analysed in the light of the principle "loyauté de la preuve", *i.e.* loyalty or fairness of evidence. According to the principle of fairness, evidence is not

admissible in court if it was obtained unfairly (Oudin, 2015, p. 44). The application of this principle can be illustrated by the *Cour de Cassation* decision, in which unlawful recording of a conversation is considered to be an unfair practice which renders such evidence inadmissible (Nunner-Kautgasser; Anzenberger, 2016, p. 203).

Generally, the first approach is based on the legal principle "ex injuria non oritur jus". In legal scholarship, we can find various arguments which support this approach: 1) the "unified legal system" argument, the proponents of which argue that the law cannot tolerate the unlawful use of evidence in the procedural law when the obtaining of evidence is declared unlawful in the substantive law; 2) the court's duty to respect the Constitution, which is ignored by the court when the court relies on evidence which is gathered in violation of constitutional provisions; 3) the prevention of unlawful conduct by the litigants since the admissibility of illegally obtained, submitted, presented or evaluated evidence may encourage parties to gather evidence illegally (Nunner-Kautgasser, Anzenberger, 2016, p. 197–200).

The second and opposed to the first approach is that unlawful evidence should be admissible. The quote of Judge Crompton well expresses this view: "it doesn't matter how you got it: even if you stole it, the evidence is admissible" (Pradel, 2001, p. 395). To some extent, this approach is accepted in the civil procedure of the Netherlands, where the judge can rely on any available evidence and, therefore, for example, rely on the unlawfully recorded audio recording (Rijavec; Keresteš, 2015, p. 99).

This approach is based on an absolute realisation of the principle of free proof, which is manifested both in the rejection of the rules of admissibility of evidence and in the broad discretionary power given to the judge to decide on the weight to be given to the presented evidence (Stein, 2005, p. 108–109). This approach establishes the most appropriate conditions for the court to determine all the relevant facts and reach a decision most consistent with the substantive truth. Nevertheless, the second approach also raises serious doubts, particularly in light of the arguments put forward in the analysis of the first approach. Dutch legal scholarship recognises that courts must be able to declare the unlawful evidence inadmissible and that the duty to establish the truth in proceedings must be equated with the parties' duty to observe the principle of fairness in proceedings. Moreover, even the case law of some Dutch courts seems to take a stricter approach towards the admissibility of illegally obtained evidence (van Rhee, 2015, p. 12–13).

The third approach is the balancing test. When confronted with illegally obtained evidence, the judge has the discretion to decide on its admissibility by balancing various factors. This test is well reflected in A. Barak's definition

of discretion: "as the power given to a judge to choose between two or more alternatives, when each of the alternatives is lawful" (Barak, 2005a, p. 22).

The balancing test is recognised in Austria, Germany and Switzerland. For example, the Supreme Court of Austria has repeatedly recognised the application of the balancing test when deciding on the admissibility of unlawfully recorded audio recordings. The balancing test imposes a balancing of the individual right to privacy on the one hand and the ability of the party that made the audio recording to effectively defend his or her rights in the absence of such evidence on the other hand (Nunner-Kautgasser, Anzenberger, 2016, p. 207–209). In Switzerland, the balancing test is directly enshrined in the law. Art. 152(2) of the Swiss Federal Code of Civil Procedure provides: "illegally collected evidence shall only be evaluated if there is an overriding interest in discovering the truth" (Rijavec; Keresteš, 2015, p. 93). By the same token, the German *Bundesgerichtshof* has held that the illegally obtained dashcam recordings may be used as evidence in civil proceedings provided that the interest of the claimant in using the recordings overrides the interest of the defendant as to the protection of his or her personal rights (Stürner, 2020, p. 213).

In essence, the balancing test approach is also followed in the civil procedure law of Lithuania. The LCPC does not directly regulate the admissibility of illegally obtained, submitted, presented or evaluated evidence. However, the balancing test can be detected in the case law of the Supreme Court of Lithuania. For example, the balancing test is used in the Supreme Court's case law, which deals with the admissibility of unlawfully made audio recordings. The Supreme Court of Lithuania balances and evaluates such factors as 1) the purpose of the audio recording (whether it was made to violate a person's right to privacy or to prove the truth in judicial proceedings); 2) the timing of the audio recording; 3) the possibility for the opposing party to comment on the audio recording, *etc*. (Bartkus, 2021a, p. 40–42).[11]

[11] On the other hand, the Supreme Court of Lithuania case law in this respect is not uniform. For example, in the case of admissibility of audio recordings, the Supreme Court has clarified that circumstances of a civil dispute between two private parties are not to be regarded as circumstances of the private life of those parties (ruling of the Supreme Court of Lithuania of 25 October 2010 in a civil case). Hence, this interpretation leads to the *per se* admissibility of such evidence rather than the balancing test's application (see Nekrošius, 2021, p. 9–10).

Regardless of how civil procedure law deals with the issue of illegally obtained evidence, the important point is that the civil law tradition, albeit with some exceptions, can be essentially characterised by the admissibility rules that may exclude evidence due to infringements of not only procedural law but also substantive law.

Therefore, to conclude part 1.1.2 of this thesis, the analysis shows that the admissibility rules in the civil law tradition, albeit with some exceptions in different jurisdictions, can be characterised by three major categories of the admissibility rules: 1) admissibility rules that exclude certain means of proof; 2) admissibility rules that exclude evidence due to its content; 3) admissibility rules that exclude illegally obtained, submitted, presented or evaluated evidence.

### 1.1.3. Two Approaches towards the Admissibility of Evidence in Civil Procedure

The analysis in parts 1.1.1 and 1.1.2 of this thesis allows us to distinguish various admissibility rules that characterise the common law tradition and the civil law tradition. However, as indicated in the introduction of this thesis, the objective of part 1 is to identify and understand the conceptual and purposive approaches towards the admissibility of evidence in international commercial arbitration. As will be shown in the following parts, the analysis of the civil law tradition and the common law tradition allows us to identify and explain two approaches towards the admissibility of evidence in civil procedure: 1) the conceptual approach (see **part 1.1.1.3.1.**); 2) the purposive approach (see **part 1.1.3.2.**). Both of these approaches are explained in the following parts.

#### 1.1.3.1. The Conceptual Approach towards the Admissibility of Evidence in Civil Procedure

Any legal concept is normally dealt within the context of legal rules, and the task of identifying legal concepts cannot be separated from the identification of legal rules which are reflected in the specific concept. Accordingly, the legal system reveals the concepts embedded in the system by embedding them in certain legal rules (Sartor, 2009, p. 35). The international nature of commercial arbitration obliges us to find common aspects of both traditions in the context of the admissibility of evidence. The common aspects would serve as a guiding point to analyse the admissibility of evidence in

international commercial arbitration. Hence, in order to clearly identify the concept of the admissibility of evidence, part 1.1.3.1 of this thesis seeks to identify specific rules of admissibility of evidence which are found in both legal traditions. This would lead to the first approach towards the admissibility of evidence, *i.e.* the conceptual approach.

As described in part 1.1.1. of this thesis, the analysis of jurisdictions that belong to the common law tradition showed that the rules of admissibility of evidence essentially consist of two categories of rules: 1) the rules of admissibility of evidence that declare evidence inadmissible because of the belief that the submitted evidence may impede the pursuit of truth; and 2) the rules of admissibility of evidence that declare evidence inadmissible for reasons extraneous to the truth-finding considerations (see **part 1.1.1.**).

The research of the rules of admissibility of evidence in the civil law tradition has led to the discovery of three categories of admissibility rules: 1) the rules of admissibility of evidence that limit the admissibility of certain means of proof; 2) the rules of admissibility of evidence that exclude evidence due to its content; and 3) the rules of admissibility of evidence that exclude evidence due to infringements of procedural law or substantive law (see **part 1.1.2.**).

Finding common aspects in these seemingly different rules is quite a difficult task. The difficulty is largely confirmed by the views often expressed in the legal literature on the fundamental differences between the admissibility rules in both traditions. For example, some authors argue that the exclusionary rules are a feature of the US law that is unique and lacks any similar comparison in other countries (Wilkey, 1978, p. 216). Others, while comparing the US federal and German civil procedure law, also noted that a large part of the rules of admissibility found in the federal civil procedure law of the US is simply not reflected in German civil procedure (Kaplan *et al*., 1958, p. 1238). Finally, we can also find general observations that, in contrast to the common law tradition, the civil law tradition views the legal rules governing the evidence, including the rules dealing with the admissibility of evidence, with suspicion (Damaška, 1997, p. 22).

Indeed in the civil law tradition, we will usually not find some of the rules of admissibility of evidence that are typical only to the common law tradition, such as the prohibition of hearsay, opinion, character evidence, *etc*. These differences complicate any attempt to find common rules of admissibility that apply equally or at least similarly in both traditions.

Nevertheless, while the analysis does not lead us to the identification of identical admissibility rules in both traditions, it allows us to distinguish three common categories of the admissibility rules, which consequently include the

rules found in both the common law tradition and the civil law tradition: 1) admissibility rules designed to improve fact-finding accuracy; 2) admissibility rules that exclude evidence because of its content; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law. These three categories are briefly outlined and explained in the following paragraphs.

*Firstly*, the first category is the admissibility rules designed to improve fact-finding accuracy. As mentioned, the civil law tradition is unaware of the rules which exclude hearsay, opinion or character evidence. However, civil procedure laws of various continental European countries do contain admissibility rules that are aimed at improving fact-finding accuracy. A good example of such rules is the admissibility rules that exclude certain means of proof: 1) the prohibition to use certain means of proof; and 2) the proof by the necessary means of proof.

For example, the rule that determines the admissibility of the witness testimony to prove an oral transaction or a transaction of a certain value. According to the Supreme Court of Lithuania, one of the main rationales of the rule that determines the admissibility of the witness testimony to prove an oral transaction or a transaction of a specific value is to facilitate the settlement of disputes (ruling of the Supreme Court of Lithuania of 18 June 2013 in a civil case). The admissibility of witness testimony in order to prove an oral contract not only opens the door to possible abuse of process but also undermines the overall accuracy of the fact-finding process, as the witness testimony carries with it a number of negative aspects. In this regard, the Supreme Court of Lithuania has stated that the written evidence is usually regarded as clearer and more reliable than the witness testimonies. The content of written evidence, unlike that of the witness testimony, is not affected by the circumstances in which the content was recorded, preserved, reproduced and communicated, while the witness testimony is inevitably influenced by the time factor, the subjective circumstances such as the witness's attitude towards the events or facts about which he or she is giving the evidence (ruling of the Supreme Court of Lithuania of 29 March 2017 in a civil case).[12]

The same fact-finding accuracy rationale lies within the admissibility rules that require proof by the necessary means of proof, such as the requirement to appoint experts to set the price of shares, interest or contributions (Art. 2.118(1) of the LCC) or the requirement that the mental

[12] Other jurisdictions which belong to the civil law tradition also tend to follow the similar approach that written evidence is considered to be more reliable means of proof (Kubalczyk, 2015, p. 93).

state of a natural person can only be established by a forensic psychiatric examination (Art. 466(1) of the LCPC). As mentioned in part 1.1.2.1 of this thesis, the legislator establishes that certain factual circumstances have to be proved by specific means of proof not only because of the public interest in a particular case but also because of the factual complexity of the circumstances which have to be proven.

*Secondly*, the second category common to both traditions is the admissibility rules that exclude evidence due to its content. These admissibility rules exclude certain information due to its importance, confidentiality or other reasons unrelated to the maximisation of accuracy in the fact-finding process. As mentioned, these rules are mainly characterised by legal privileges and immunities, *e.g.* the legal professional privilege, the privilege against self-incrimination, the medical privilege, the journalists' privilege, the clergy-penitent privilege, the business secrets privilege, *etc.* (see **parts 1.1.1.2., 1.1.2.2.**). The application of these admissibility rules does differ from country to country. Nevertheless, legal privileges and immunities are an essential part of the admissibility rules in both legal traditions.

International instruments also confirm the fact that legal privileges are common to both legal traditions. For example, the ALI/UNIDROIT Principles contain provisions directly dealing with the legal privileges in civil litigation. Art. 18(1) of the ALI/UNIDROIT Principles provides a general rule: "Effect should be given to privileges, immunities, and similar protections of a party or nonparty concerning disclosure of evidence or other information." The official commentary of Art. 18(1) of the ALI/UNIDROIT Principles provides the following: "All legal systems recognise various privileges and immunities against being compelled to give evidence, such as protection from self-incrimination, confidentiality of professional communication, rights of privacy, and privileges of a spouse or family member. Privileges protect important interests, but they can impair establishment of the facts." (The American Law Institute and UNIDROIT, 2006).

*Thirdly*, the third category of the admissibility rules is the admissibility rules that determine the admissibility of evidence obtained, submitted, presented and evaluated contrary to procedural or substantive law requirements.

It is true that, as shown above, the admissibility rules that determine the admissibility of illegal evidence vary according to different jurisdictions. However, both the common law tradition and the civil law tradition are no strangers to various admissibility rules that exclude evidence due to infringements of either procedural or substantive law provisions (see **parts 1.1.1.2., 1.1.2.3**).

International instruments also confirm the international recognition of the third category of the admissibility rules. For example, both the ALI/UNIDROIT Principles and the ELI/UNIDROIT Rules contain provisions related to the admissibility of evidence submitted too late in the civil trial. Rule 27(1) of the ELI/UNIDROIT Rules provides the following: "The court shall disregard […] offers of evidence that are introduced later than permitted by these rules or by court orders […]." Principle 17 of the ALI/UNIDROIT Principles also allows the court to impose sanctions, including the inadmissibility of late evidence, on the parties, the lawyers, and the third persons for a failure or a refusal to comply with obligations concerning the proceeding.

Therefore, to conclude part 1.1.3.1, all three categories of the admissibility rules allow us to identify common and very important aspects of the concept of admissibility of evidence in civil procedure within both the common law tradition and the civil law tradition. Of course, the scope and conditions of the application of specific admissibility rules vary from one jurisdiction to another.[13] However, as mentioned previously, the aim of this thesis is not to analyse the peculiarities of applying admissibility rules within the national civil procedure law. The identification of these categories of rules makes it possible to take the second step and to ask not what the rules of admissibility of evidence are but why these rules exist, *i.e.* try to identify their purpose.

### 1.1.3.2. The Purposive Approach towards the Admissibility of Evidence in Civil Procedure

As demonstrated in part 1.1.3.1 of this thesis, the admissibility of evidence is characterised by three categories, which encompass different admissibility rules. However, as mentioned, we cannot limit ourselves exclusively to the question, "What are the rules?". An equally or even more important question is, "What are the purpose of these rules?". This second approach is called the

[13] For example, some countries (such as the US) do not have admissibility rules dealing with the admissibility of illegally obtained evidence in civil proceedings (Fallah, 2020, p. 168). The ALI/UNIDROIT Principles also recognise different approaches taken towards the application of legal privileges or immunities within various jurisdictions. The commentary of the ALI/UNIDROIT Principles provides the following: "The conceptual and technical bases of these protections differ from one system to another, as do the legal consequences of giving them recognition." (The American Law Institute and UNIDROIT, 2006).

purposive approach. This approach is examined in detail in the following paragraphs. At the same time, firstly, this part of the thesis explains the main essence behind the purposive approach towards the admissibility rules and, secondly, identifies and analyses specific purposes of the admissibility rules (see **parts 1.1.3.2.1., 1.1.3.2.2., 1.1.3.2.3., 1.1.3.2.4., 1.1.3.2.5.**).

Unlike the rules of relevance, which raise questions of facts, the admissibility rules raise questions of law. In this regard, the admissibility rules, as rules of law, are subject to legal interpretation. Any law statute and, consequently, any legal rule has a purpose since it serves some end or congeries of related ends (see Fuller, 1964, p. 145). In order to clearly outline the purposes behind the admissibility rules, one has to invoke the purposive interpretation of the legal rule inevitably. The object of such interpretation is to identify the goal that the legal rule is designed to realise. Accordingly, interpretation is purposive because its goal is to achieve the purpose that the legal rule is designed to achieve (Barak, 2005b, p. 88).

Purposive legal interpretation may be used to determine the correct way of applying the legal rule in practice since understanding the purpose behind the rule leads to the correct legal meaning and, consequently, the correct application of the rule. However, in this part of the thesis, the rules of admissibility are not analysed on a case-by-case basis by trying to understand how one or another admissibility rule should be applied in practice. This part only focuses on the identification and justification of the purposes of the admissibility rules.

The purpose of the admissibility of evidence lies in the imperfect nature of judges, as any other human beings. One of the main actors in judicial proceedings, the judge, is confronted with various factors that can lead to errors in the course of proceedings. Unfortunately, judges cannot know and understand everything: famous saying of Socrates, “I know that I know nothing”, applies equally to lawyers. Judges are intelligent, observant, and insightful, but they are still human beings and hence are still prone to various epistemic mistakes (see Schauer, 2020, p. 15).

Additionally, R. Posner argues that in a variety of cases, a court’s final conclusion does not depend on the received factual information but on factors such as the allocation of the burden of proof, various court’s biases and preconceptions on certain issues (Posner, 2004, p. 174). Mistakes by judges are also evident when we analyse this issue in a tandem with various aspects of judicial decision-making. For example, once a judge or a court clerk has convinced himself or herself of the correctness of a conclusion, he or she will unconsciously try to throw out all the facts that support the opposite conclusion (Posner, 2004, p. 178). Posner also argues that judging itself is

very personal. Judges' personal attributes, including background characteristics, such as race and sex, personality traits, political views, professional and life experiences, such as having been a prosecutor or having grown up in turbulent times, influence judges in the decision-making process (Posner, 2008, p. 369–370).

A judge is unduly influenced in the course of proceedings not only by his or her prejudices, political views or background but also by his or her personal mood or even by such factors as hunger. For example, famous psychologist D. Kahneman describes a study on judges' decision-making which found that judges were significantly more likely to grant parole applications after the lunch break, *i.e.* after a meal, than before the lunch (Kahneman, 2016, p. 65).

These mistakes in judicial decision-making determine the constant threat of legal and factual fallacy in judicial proceedings. As is argued by some authors, there is indeed no cure for all of the above-mentioned problems. Even if judges wanted to forswear any legislative or political role and be merely the "oracles" of the law, they could not do so in the conditions in which they find themselves (Posner, 2008, p. 372).

Nevertheless, judges are not alone in this fight. Legal scholarship identifies a number of safeguards that both limit the subjectivity of judging and, more generally, attempt to help judges in the decision-making process. These safeguards can vary widely. For example, 1) the social environment and previous training of judges. The decision-makers do not live in isolation but are influenced by their social environment, where various social norms play an essential role. According to R. Dworkin, in almost every situation, a person experiences the importance of the standards of rationality, fairness and efficiency; 2) the procedure for the appointment of judges, which ensures that only competent lawyers are nominated to the highest positions in the judiciary; 3) the court system which prescribes that the decisions of the lower courts are reviewed by the appellate courts, which in turn are subject to review by the supreme courts (Gumbis, 2018, p. 205–208).

One of the most important safeguards is procedural safeguards which the judges must follow during the procedure. For example, one of the procedural safeguards is the requirement that the judge must treat the parties equally, giving them an equal opportunity to present their arguments during the trial (Barak, 1989, p. 22).

An equally important procedural safeguard, which is unfortunately not emphasised a lot in legal scholarship, is the rules on the admissibility of evidence. As will be shown below, the admissibility rules play an important role in protecting against the shortcomings and errors that are sometimes inevitable in judicial decision-making. Moreover, the admissibility rules not

only protect the entire judicial process from various errors but also help judges to prevent such errors during proceedings in advance. The following parts of this thesis describe more than five specific purposes of the admissibility rules.

#### 1.1.3.2.1. The Improvement of Fact-finding Accuracy in the Judicial Process

The first purpose of the admissibility rules is to ensure the quality of fact-finding. The rules that ensure fact-finding accuracy in the judicial process, such as hearsay evidence or admissibility rules that exclude certain means of proof, have already been analysed on several occasions (see **parts 1.1.1.1., 1.1.2.1., 1.1.2.3., 1.1.3.1.**). Hence, the following paragraphs are limited to a few additional observations.

The common law tradition can be characterised by various admissibility rules aimed at establishing facts more accurately, *e.g.* hearsay, opinion, character evidence rules. The historical purpose of the latter rules was to prevent information from reaching those without legal training (Wigmore, 1983 quoted, Schauer, 2006, p. 171). Despite this historical purpose, the admissibility rules can and should be applied equally to both the jury and the legally trained judge. Two arguments could be made in support of this position: 1) it has already been pointed out that a judge, like any other human being, is not immune from various cognitive and often even unconscious errors in decision-making. In other words, like the rest of us, judges use heuristics that can produce systematic errors in their judgment (Guthrie *et al*., 2001, p. 821); 2) people, especially professionals, have a tendency to overestimate their abilities. Judges are no exception. Judges tend to overestimate their ability to assess the facts and their ability to avoid the mistakes made by people without legal training (Schauer, 2006, p. 189).

Accordingly, judges, like jurors, may also overestimate the value of the hearsay or opinion evidence and, as a result, make an unreasonable decision in a case. Thus, the establishment of these admissibility rules and their application in civil procedure helps the judge to reduce the likelihood of error in the evidentiary process. Moreover, these rules also guide the parties of the dispute. A pre-established admissibility rule allows the parties to know what evidence is admissible at the outset. In this way, the rules on the admissibility of evidence prevent misleading information, which could improperly influence the determination of the facts of the case, from reaching the judge.

As mentioned in part 1.1.2.1 of this thesis, the admissibility rules that are designed to improve fact-finding accuracy in the judicial process can also be

found in the civil law tradition. Although these rules are not uniformly applied in all continental European countries, in the context of this thesis, it is important that these rules provide the court with an assistance in the process of proof.

Therefore, one of the essential purposes of the admissibility rules is to assist the judge and the parties in the evidentiary process. This assistance ensures that only probative, non-misleading and reliable evidence is presented in the case. The admissibility rules that attempt to limit the likelihood of a judge's mistakes are the same as any other procedural safeguards, which, if followed, ensure that it is more likely that the correct decision is made (see Gumbis, 2018, p. 208).

#### 1.1.3.2.2. Ensuring the Fair Proceeding

The second purpose of the admissibility rules is also aimed at limiting mistakes made by the judge. However, this purpose is not about helping the judge to determine the facts more accurately but about helping the judge to uphold one of the fundamental values of civil procedure, namely the fairness of judicial proceedings.

Civil procedure law cannot be limited to the sole purpose of establishing the truth in judicial proceedings. The view that establishing the truth is the overriding objective of civil proceedings is no longer widely held today. This view was strongly influenced by the development of human rights after the Second World War when the view that evidence could not be admitted at any cost in judicial proceedings began to prevail (Nekrošius, 2021, p. 10).

The objective of establishing the truth naturally loses its priority because of various procedural aspects which do not allow the judge to reach the objective truth but oblige him or her to confine himself or herself to the formal truth. In civil proceedings, we can find various aspects that inevitably lead to a purely formal determination of the truth: 1) the unavailability of evidence, which simply does not allow all the facts to be established; 2) the requirement of efficient proceedings that often prevents the determination of all possible facts related to the dispute; 3) various other legal provisions concerning the use of evidence in the judicial process impose various limitations regarding the time, means and procedures used for the search of truth (Summers, 1999, p. 501–510; Taruffo, 2010, p. 8).

These ideas are directly enshrined in the civil procedure laws of various countries. For example, Art. 2 of the LCPC, which sets out the objectives of Lithuanian civil procedure, does not even mention the objective of

establishing the truth. Other jurisdictions of the civil law tradition also reconcile the purpose of establishing the truth with other procedural values (for example, for the civil procedure in Germany, see Wolf, Zeibig, 2015, p. 22; for the civil procedure in Austria, see Nunner-Krautgasser, Anzenberger 2015, p. 10; for the civil procedure in France, see Oudin, 2015, p. 12).

The same approach can be found in the common law tradition. For example, the so-called "overriding objective" of the Civil Procedure Rules is not solely based on the establishment of truth but imposes on the English civil courts' wide-ranging obligations to promote the values or aims of proportionality, procedural equality, speediness and efficiency (Andrews, 2019, p. 11; for the US see Marcus, 2012, p. 169–173).

Once we recognise that the objective of establishing the truth cannot be regarded as a sole priority in civil procedure law, a number of other issues arise. Which and when should other objectives be considered more important than the establishment of the truth? How can these objectives be implemented? This is where the rules of admissibility become essential since they also ensure and protect values unrelated to the more precise establishment of facts. The admissibility rules not only help to give effect to the procedural values that are not related to the establishment of truth but also indicate in which instances these values should be protected. In other words, the admissibility rules show a judge how various procedural values should be protected and implemented.

The value which is protected and ensured by the admissibility rule is fair proceedings. The principle of fairness in civil proceedings manifests itself in various ways, including in procedural obligations that both the parties and the court are required to comply with. In the context of the admissibility of evidence, the principle of fairness is most clearly manifested in the application of admissibility rules that exclude evidence due to infringements of either procedural law or substantive law. These rules seek to ensure the fair trial imperative by excluding, when appropriate, illegally obtained, submitted, presented or evaluated evidence. The relationship between the fair process and the admissibility rules is not accidental. It is enough only to pose a rhetorical question: can proceedings be considered fair if the court relies on evidence which was obtained, submitted, presented or evaluated in a manner which is contrary to procedural law or substantive law?

The idea that justice cannot be done when procedural rules are not respected finds support in various works of prominent philosophers and lawyers. For example, C. Beccaria, I. Kant, Montesquieu, and Aristotle believed that procedural formalities were indispensable to the administration of justice (Giannoulopoulos, 2019, p. 216; Harcourt, 2013, p. 11). Nowadays,

we can also find positions that stress the importance of procedural formalism in civil procedure. For example, according to the Dutch scholar C. van Rhee, the rule that the parties to a legal proceeding must be summoned and heard is an example of a formal requirement, *i.e.* a formality. A coherent totality of such formalities that regulate legal proceedings from the beginning to the end is what he defines as procedural law in the narrower sense (van Rhee, 2000, p. 589). Compliance with these formalities is required, among other things, by the principle of formalism found in civil procedural law (see, *e.g.* Nekrošius, 2017, p. 9). Accordingly, the disregard of procedural formalities, especially in the context of the evidentiary process, cannot be considered a desirable norm of civil procedure.

The relationship between the admissibility of evidence and a fair trial is even more evident when we are dealing not only with the protection of procedural values but also with the protection of fundamental values. For example, the prohibition on relying on evidence obtained in violation of human rights is based on a duty on the part of the court to both respects and ensure the protection of human rights in civil procedure law. This is the fulfilment of R. Dworkin's approach to "taking rights seriously", which is well reflected in his statement: "A government will not restore respect for the law if it does nothing to make the law worthy of respect. […] If the government does not take rights seriously, it does not take the law seriously." (Dworkin, 2004, p. 290). Finally, the exclusion of illegally obtained, submitted, presented or evaluated evidence gives effect to the universally accepted legal principle "ex injuria non oritur jus" which is clearly violated when the judge grants a right to rely on the unlawfully obtained evidence.

The reference to various authoritative legal documents can further substantiate the relationship between the admissibility of evidence and fair proceedings. The ECtHR has repeatedly stated that the admissibility of evidence is primarily a matter of national law (Garcia Ruiz v. Spain...). Nevertheless, the ECtHR has also pointed out that the ECtHR's task under the ECHR is to ascertain whether the proceedings as a whole were fair, including the way in which evidence was taken (Elsholz v. Germany…). The ECtHR must therefore establish whether the evidence was presented in such a way as to guarantee a fair trial (Blücher v. the Czech Republic...). These issues include the (in)admissibility of evidence in terms of procedural and substantive non-compliance. For example, the ECtHR, while interpreting the right to a fair trial enshrined in Art. 6 of the ECHR[14], has stated that the

[14] Art. 6(1) of the ECHR provides: "In determining of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing

observance of the formalised rules of civil procedure is valuable and important as it is capable of limiting discretion, securing equality of arms, preventing arbitrariness, securing the effective determination of a dispute and adjudication within a reasonable time, and ensuring legal certainty and respect for the court (Zubac v. Croatia…).

As regards the violations of the substantive law, in recent decision, *Cwik v. Poland*, the ECtHR held that the admissibility of evidence which private individuals obtained by means contrary to Art. 3 of the ECHR[15] is contrary to the right of a fair trial enshrined in Art. 6 of the ECHR (Cwik v. Poland…).

Other international instruments can also demonstrate the relationship between admissibility rules and a fair process. For example, Rule 11 "Obligations of the Parties and Lawyers" of the ALI/UNIDROIT Principles, establishes the general principle of fairness: "11.2 The parties share with the court the responsibility to promote a fair, efficient, and reasonably speedy resolution of the proceeding. The parties must refrain from procedural abuse, such as interference with witnesses or destruction of evidence." Similarly, Rule 2 of the ELI/UNIDROIT Rules provides the general obligation of fairness for all the participants of the civil trial: "Parties, their lawyers and the court must co-operate to promote the fair, efficient and speedy resolution of the dispute." In the official commentary of the ELI/UNIDROIT Rules, it is suggested that the duty to co-operate fairly includes the duty to exclude illegally obtained evidence in appropriate cases (The European Law Institute and UNIDROIT, 2021, p. 39). Rule 90 of the ELI/UNIDROIT Rules provides: "90.1. Except where Rule 90(2) applies, illegally obtained evidence must be excluded from the proceedings; 90.2. Exceptionally, the court may admit illegally obtained evidence if it is the only way to establish the facts. In exercising its discretion to admit such evidence, the court must take into account the behaviour of the other party or of non-parties and the gravity of the infringement." The rationale behind Rule 90 lies within the general principle of fairness. Thus, when deciding on the admission of illegally

within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[15] Art. 3 of the ECHR provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

obtained evidence, the court must consider the good faith and the fair play of the parties (Stürner, 2020, p. 213).

Moreover, the proper application of the admissibility rules not only preserves the imperative of the principle of fairness in civil proceedings but also has a preventive function closely linked to the parties' obligation to act in a good faith. In civil cases where the amount of the claim is significant, parties may not only rely on evidence of uncertain probative value but also may have an incentive to gather evidence by unlawful means. However, when the parties are aware in advance that illegally obtained evidence would be considered inadmissible, the propensity of the parties to gather evidence illegally would be reduced. Such prevention preserves the violation of the principle of fairness in judicial proceedings.

Therefore, the admissibility rules help the judge to ensure the fairness of civil proceedings since it set a clear objective for the judge and for other participants in civil proceedings. The proper use of these rules not only gives effect to the principles of fairness, which, in the absence of these rules, might in some cases be simply overlooked but also imposes a preventive obligation on the court and the parties to respect the principle of fairness.

#### 1.1.3.2.3. Ensuring the Legitimacy of the Court and its Decision

The third purpose of the admissibility rules, that is closely linked to the principle of fairness is the purpose of ensuring the legitimacy of the court and its decision.

The judiciary is constantly confronted with the question of legitimacy. It is enough to recall a famous event when US President Andrew Jackson refused to give effect to the judgment handed down by the Chief Justice John Marshall of the Supreme Court in March 1832: "Well: John Marshall has made his decision: now let him enforce it!" (Miles, 1973, p. 519).

The legitimacy of the courts depends not only on the ability to understand the political or social environment in which the court operates (Weill, 2020, p. 228) but also on many other safeguards of the legitimacy. For example, the legitimacy of a court depends on the prestige of individual judges. If judges are highly respected, the public is more likely to view a court's decision as impartial and legally correct. Moreover, important features such as greater publicity and transparency also contribute to the general legitimacy of the courts. Making judicial decisions, hearings, and the parties' pleadings available to the public can feed into a broader public discourse on the justifications behind the results of the decisions (von Staden, 2012, p. 1032).

Other important safeguards which contribute to the court's legitimacy are related to the court's behaviour during judicial proceedings. Such safeguards include the adoption of well-reasoned decisions (Dothan, 2015, p. 457). It should not be surprising that various authoritative legal sources require the courts to justify their decisions. For example, the guarantees enshrined in Art. 6(1) of the ECHR includes the obligation of the courts to give sufficient reasons for their decisions (H. v. Belgium…). A reasoned decision shows the parties that their case has truly been heard and thus contributes to a greater acceptance of the decision (Magnin v. France…). The universal recognition of this obligation is confirmed both by its affirmation in Principle 23.3 of the ALI/UNIDROIT Principles: "The judgment should be accompanied by a reasoned explanation of the essential factual, legal, and evidentiary basis of the decision." and Rule 12(1) of the ELI/UNIDROIT Rules: "In reaching any decision in proceedings the court must consider all factual, evidential, and legal issues advanced by the parties. Court decisions must specifically set out their reasoning concerning substantial issues."

Another important safeguard of the court's legitimacy is the obligation to rely on clear and transparent evidence (see, *e.g.* Dzehtsiarou, 2015, p. 143). A court that relies on uncertain, unreliable, questionable evidence not only jeopardises the factual accuracy of the decision but also contributes to the parties' reluctance to accept the decisions based on questionable evidence. Such reliance may undermine not only the legitimacy of the court's decision itself but also the legitimacy of the whole judiciary branch.

A similar and, in the context of this thesis, very important safeguard that helps to mitigate risks related to the legitimacy of the court's decisions is the admissibility rules. A judge is inevitably confronted with several difficulties during proceedings because of the uncertainty of the applicable law or the impossibility of knowing when all the relevant circumstances have been determined (Mikelėnienė, Mikelėnas, 1999, p. 132). Justice J. M. Harlan of the US Supreme Court explains this uncertainty: "in a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact-finder cannot acquire unassailably accurate knowledge of what happened." (In re Winship, 397…). In this context, the admissibility rules help to compensate for these shortcomings. The admissibility rules act as a kind of filter that prevents misleading and unreliable information from reaching the mind of a judge and, in turn, ensure not only the accuracy of the decision but also the legitimacy of the decision by pre-empting the possibility of relying on unreliable or misleading information.

However, the main aspect that ensures the legitimacy of the court decisions, both in the eyes of the parties and in the eyes of society as a whole,

is somewhat different. In this instance, it is again necessary to turn to the admissibility of illegally obtained, submitted, presented or evaluated evidence. As Justice L. Brandeis famously proclaimed in his dissenting opinion in the case *Olmstead v. United States*: "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." (Olmstead v. United States...). The courts are one of the most important parts of any democratic government. In the absence of rules prohibiting the use of illegally obtained evidence, the judges by admitting such evidence inevitably compromise the entire process while setting an example which is entirely contrary to the timeless legal principle of "ex iniuria ius non oritur". Unsurprisingly, this undermines the legitimacy of the court and the judiciary itself.

The purpose of the admissibility rules, *i.e.* ensuring of the legitimacy of judicial decisions, is first and foremost manifested in the criminal procedure. One of the pioneers of this approach is A. Zuckerman, whose work rests on "the special moral dimension" of the criminal trial. He argues that the trial is concerned with "the determination of moral blame, as well as of legal liability" and the willingness of the public to accept the verdicts, hence, "depends on the extent to which the public believes in the moral legitimacy of the system." However, such public acceptance of the verdict is conditioned upon the criminal justice system setting the example and rejecting an "ends justify the means" approach. The criminal justice system could not endorse the use of immoral – illegal, unconstitutional or unfair – methods of taking evidence and their fruits, on the one hand, and command respect for its determinations of the moral responsibility of the individuals entering the system on the other (Zuckerman, 1987, p. 55–56; see also Giannoulopoulos, 2019, p. 208).

Civil and criminal procedures have obvious distinguishing features. However, similar moral or legal legitimacy standards could be applied to civil procedure law. As mentioned above, various jurisdictions from both the common law tradition and the civil law tradition establish admissibility rules that exclude illegally obtained, submitted, presented or evaluated evidence from civil proceedings (see **parts 1.1.1.2., 1.1.2.3.**). The proper application of these rules in court proceedings ensures not only the fairness of proceedings but also the legitimacy of decisions and of the court itself. Whether it is civil or criminal proceedings, a court decision based on illegally obtained, submitted, presented or evaluated evidence undermines the court's authority. As in criminal procedure, a court in civil procedure cannot, on the one hand,

expect its decisions to be respected when the court's decision is based on illegally obtained, submitted, presented or evaluated evidence.

Therefore, the admissibility rules allow the preservation of the legitimacy of the court's decisions and of the court itself. As with the purpose of ensuring a fair trial, the admissibility rules act as a guide that reminds the judge about and allows the realisation of one of the objectives of the process, *i.e.* the process must not be a process that in itself compromises the legitimacy of one of the main actors in the process – the court.

#### 1.1.3.2.4. Ensuring the Expedient and Efficient Proceedings

The admissibility rules also ensure additional fundamental procedural values, *i.e.* the expedient and efficient resolution of the civil dispute. Western democracies attach great significance to expedient and efficient dispute resolution. The cost-effectiveness of proceeding as well as its expediency (or achieving results in what would be considered to be within a reasonable time), can be seen as umbrella values which are one of the building blocks of procedural law (Ng, 2008, p. 114). Part 1.1.3.2.4 of this thesis, firstly, describes how the admissibility of evidence ensures expedient procedure and, secondly, how it ensures efficient procedure.

*Firstly*, the admissibility rules ensure expedient civil proceedings. Legal scholar F. Klein stated that "the speedy and fair disposal of every civil case is an unquestionable principle of civil procedure." (Nekrošius, 2002, p. 11). The principle of the expedient procedure is also enshrined in various legal sources. For example, Rule 2 of the ELI/UNIDROIT Rules provides that the parties, their lawyers and the court must co-operate to promote not only a fair but also a speedy resolution of the dispute. As it is provided in the official commentary of the ELI/UNIDROIT Rules: "In so far as the speedy resolution of proceedings is concerned, the court must monitor party, and their lawyers', compliance with the various obligations in these Rules to carry out procedural obligations and responsibilities timeously." (The European Law Institute and UNIDROIT, 2021, p. 37).

A similar procedural value is enshrined in the ALI/UNIDROIT Principles. Principle 7 "Prompt Rendition of Justice" provides the following: "7.1 The court should resolve the dispute within a reasonable time. […]." Official commentary of Principle 7 of the ALI/UNIDROIT Principles states that "In all legal systems the court has a responsibility to move the adjudication forward. It is a universally recognised axiom that "justice delayed is justice denied."" (The American Law Institute and UNIDROIT, 2006).

The principle of expedient procedeedings is also established in ECHR. Art. 6(1) of the ECHR provides: "In determination of his civil rights and obligations of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The ECtHR has explained that even the principle that the procedural initiative lies with the parties does not absolve the courts from the obligation to ensure an expeditious trial (Sürmeli v. Germany…; Pafitis and Others v. Greece…; Tierce v. San Marino…). Art. 6(1) of the ECHR imposes a duty to organise legal systems in such a way that the courts can meet each of the requirements of Art. 6(1), including the obligation to hear cases within a reasonable time (Muti v. Italy…).

The implementation of the principle of expediency in civil procedure law can take many forms, for example, by choosing to deal with cases in a particular order or avoiding the repeated changes of judges during the civil trial (Zimmermann and Steiner v. Switzerland...; Lechner and Hess v. Austria....). One of the tools used to implement the principle of expediency is the admissibility rules, more specifically, the admissibility rules that determine the admissibility of evidence which is submitted too late.

As described in detail above, in the common law tradition and the civil law tradition, we can find admissibility rules that govern the admissibility of late evidence (see **parts 1.1.1.2., 1.1.2.3.**). The precise conditions of the application of these rules may vary. However, they all share the common objective of ensuring expeditious proceedings. The positive impact of the refusal to accept late evidence on the expeditious handling of a case has already been detailed by V. Nekrošius (Nekrošius, 2002, p. 92–103). In the same respect, we can mention the interpretation of these admissibility rules by the Supreme Court of Lithuania: "The expedient submission of evidence ensures that both the other party and the court have access to it as soon as possible and that the proceedings run smoothly. In order to optimise the proceedings, it is laid down that the court of the first instance has the right to refuse to admit evidence if it could have been submitted earlier and if its late submission would delay the proceedings (Art. 181(2) of the LCPC)." (ruling of the Supreme Court of Lithuania of 21 June 2013 in a civil case).

The universality of the connection between these admissibility rules and the expedient procedure can be illustrated by the ELI/UNIDROIT Rules that contain various rules declaring new evidence inadmissible due to the parties' failure to follow and respect the principle of expedient proceedings. For example, Rule 27(1) provides the court's right to impose a sanction, *i.e.* to declare evidence inadmissible, when the party does not comply with the principle of expediency: "The court shall disregard […] offers of evidence that

are introduced later than permitted by these rules or by court orders […].” The official commentary of the ELI/UNIDROIT Rules links the admissibility rule and the principle of expediency and explains the nature and reasons for such a sanction: “The most common form of non-compliance is late compliance with an obligation (see Rule 27(1)). Late compliance may arise where a party either fails to conduct proceedings consistently with the general obligation to conduct proceedings in a speedy and careful manner (see Rules 2 and 47) or fails to comply with a requirement to carry out a procedural act by a specified time (see Rules 49(4) and 50). An effective albeit often excessive sanction for non-compliance is for the court to refuse to permit such a party to rely upon facts or evidence submitted late or to refuse to permit a late amendment to be made.” (The European Law Institute and UNIDROIT, 2021, p. 105). Similar sanctions are also enshrined in Principle 17 of the ALI/UNIDROIT Principles.

*Secondly*, the admissibility rules ensure the efficiency of civil proceedings. The universality of the principle of efficiency (sometimes referred to as the principle of economy) in civil procedure law is supported by the same international instruments. Rule 2 of the ELI/UNIDROIT Rules calls for the parties, their lawyers and the court to co-operate and promote the efficient resolution of the dispute. The official commentary of the ELI/UNIDROIT Rules provides for the following explanation: “In so far as the efficient prosecution of proceedings is concerned, the court has a number of duties that give effect to its general duty of co-operation, the most important of which require it to suggest amendments to proceedings where parties fail to fulfil their responsibilities correctly and completely […] and to respect the parties’ right to be heard in order to further and maintain the dialogue between court and parties […].” (The European Law Institute and UNIDROIT, 2021, p. 37).

Similarly, Principle 11.2 of the ALI/UNIDROIT Principles outlines that the parties share with the court a responsibility to ensure the efficient resolution of the dispute. Principle 14.1 of the ALI/UNIDROIT Principles also provides that the court should actively manage the proceeding to achieve the efficient resolution of the dispute.

The principle of efficiency is also enshrined in other legal sources. For example, the ECHR guarantees efficient and economic proceedings. On several occasions, the ECtHR has stated that the national authorities must take into account the objective of efficiency in the context of civil procedure law and that this objective justifies certain restrictions on the extent and the manner of participation to which the parties are entitled (see Settem, 2016, p. 85).

As it can be seen from various legal sources, efficiency is a universal value of the civil procedure. By using as few resources, in terms of money, work, and facilities, as possible in any given case, the total caseload of the courts may be dealt with both more efficiently and satisfactorily (Settem, 2016, p. 86). Generally, it is believed that the judge is in a better position than the parties to assure that proceedings are managed in such a way that justice is done not only within a reasonable time but also within a reasonable price (Verkerk, 2008, p. 47). Civil procedure law provides judges with various case management tools, for example, wherever possible, the elimination of any element of surprise at the trial or a general right of the court to control and supervise the progress of proceedings (Ng, 2008, p. 118). One of these procedural tools is the admissibility rules.

Ensuring efficient proceedings is directly linked to the admissibility rules that prohibit the late submission of evidence. The efficiency of civil proceedings depends on the parties providing the court with all necessary and relevant information in a timely manner. Effective management requires the court and the parties to ensure that various material is presented at an appropriate time so the court can manage its overall caseload effectively (The European Law Institute and UNIDROIT, 2021, p. 129).

The admissibility rules that limit the late submission of evidence serve two functions which ensure the efficiency of proceedings: 1) the very establishment of the rule of admissibility of evidence allows the avoidance of late submission of evidence as a preventive measure and thus orients the parties towards an efficient resolution of the dispute. The parties, knowing and understanding the risk of exclusion of late evidence, will have a greater incentive to submit evidence as early as possible; 2) the admissibility rules allow the court to avoid being burdened with evaluating new evidence at the final stages of proceedings and do not oblige the court to re-examine newly submitted evidence. Otherwise, the courts would not be able to refrain from examining late evidence, which would lead to the redundant examination of evidence at any stage of the dispute.

The principle of efficiency is also ensured by applying other admissibility rules, mainly: 1) the prohibition against using certain means of proof; and 2) the proof by the necessary means of proof (see **part 1.1.2.1**.). These admissibility rules also have an economic rationale since they allow the court to avoid costly proceedings. For example, disputes in which the parties rely solely on the witnesses' testimony, also known as the "word against word cases", in which the fact-finder has no other evidence other than conflicting accounts of the claimant and of the defendant, are notoriously difficult to solve. In many such cases, the claimant's testimony fails to generate the

required standard of proof. However, to reach this conclusion, the fact-finders must undergo an expensive trial process and deliberations (Stein, 2005, p. 137). The prohibition on using certain means of proof allows the court to avoid such situations. For example, by limiting the testimony of witnesses in certain cases, the parties are obliged to rely on documentary and other forms of evidence. This prohibition ensures the production of more reliable evidence and, consequently, a more cost-effective process.

The proof by the necessary means of proof also ensures the efficiency of the civil procedure since it obliges the parties to provide more reliable evidence, for example, an expert report, to establish specific facts. Otherwise, proving these specific facts with other evidence, such as witness testimonies, would unduly prolong the proceedings and make proceedings significantly more expensive.

Therefore, the abovementioned arguments allow us to identify another essential purpose of the admissibility rules, *i.e.* ensuring expedient and efficient proceedings. The admissibility rules and their proper application not only establish this clear value of the procedural law but also make it possible to achieve this objective.

#### 1.1.3.2.5. Ensuring the Protection of Other Values

The analysis reveals that the purposive approach towards the admissibility of evidence allows us to identify the main rationales and the ideas behind the admissibility rules. The admissibility rules help and simultaneously oblige both the court and the parties in proceedings to strive for a better quality of the evidentiary process and maintain a certain standard of values throughout proceedings. In addition to all of the abovementioned purposes, the admissibility rules fulfil another objective in civil procedure law: the admissibility rules give effect to and protect a wide range of other values which are recognised in the legal system.

This purpose is exclusively related to legal privileges and immunities. As mentioned above, legal privileges and immunities are recognised in both the common law tradition and the civil law tradition (see **parts 1.1.1.2., 1.1.2.2**). Moreover, both the ELI/UNIDROIT Rules and the ALI/UNIDROIT Principles require the protection of legal privileges and immunities. Rule 91(1) of the ELI/UNIDROIT Rules provides: “Effect should be given to privileges, immunities, and similar protections for all persons who are heard in order to provide information in a case or concerning the production of evidence or other information.” Rule 91(2) lists specific privileges which

should be applicable in the civil litigation: "(a) the right of a spouse, partner equal to a spouse or close relative of a party to refuse testimony; (b) the right of a person not to incriminate themselves; (c) legal professional privilege, any other professional privilege, confidence, trade secrets and other similar interests as provided by law; (d) confidentiality of communications in settlement negotiations unless the negotiations have occurred in a public hearing or overriding public interests so require; (e) national security interests, State secrets or other equivalent public interest issues."

In the same regard Principle 18(1) of the ALI/UNIDROIT Principles states the following: "Effect should be given to privileges, immunities, and similar protections of a party or nonparty concerning disclosure of evidence or other information." A Reporters' Study of the ALI/UNIDROIT Principles, which is meant to provide a greater detail and illustrate concrete fulfilment of the ALI/UNIDROIT Principles, specifies the following legal privileges: "27.1 Evidence may not be elicited in violation of: 27.1.1 The legal profession privilege of confidentiality under forum law, including choice-of-law; 27.1.2 Confidentiality of communications in settlement negotiations […]." (Joint ALI/UNIDROIT Working Group on Principles…, 2005, p. 60).

Behind every legal privilege there is a rationale which requires to protect the said privilege: 1) the legal professional privilege – giving the person an opportunity to consult a lawyer and tell him the whole truth, while knowing that what he reveals in confidence cannot be disclosed without his consent; 2) the confidentiality of communications during settlement negotiations – enables the opposing parties to negotiate in order to prevent the civil case while it also contains an economic rationale – it does not only prevent the litigation costs of the parties, but also prevent the costs which would be incurred by the judicial system in case of a dispute; 3) the privilege against self-incrimination – designed both to provide a decent respect a government must accord to the dignity and the integrity of its citizens while upholding the general idea that a man should not be compelled to give answers exposing himself to the risk of criminal punishment and to encourage people to testify freely since they might not be prepared to come forward as a witnesses in absence of the privilege against self-incrimination; 4) the medical privilege is designed to foster open communications between the patients and the medical personnel; 5) the journalists privilege is based on the public policy that a compulsory disclosure would hinder the media's ability to carry out investigative tasks essential for the free communication in an open society, *etc.* (Loughlin, Gerlis, 2004, p. 441; Wolfson, 1984, p. 785; Cross, 1979, p. 277; Ginsburg, Mosk, 2013, p. 353, 355).

All of these rationales are extrinsic to the litigation since they prevent the discovery and the presentation of possibly relevant evidence (Taruffo, 2010, p. 30). The main reason behind these admissibility rules is that due to the abovementioned rationales, the legal system acknowledges the need to protect interests or values despite the importance of establishing the truth in the judicial process. In other words, the legal system identifies certain values (such as the confidentiality of lawyer-client communications, *etc*.) that are considered more important than the establishment of truth in judicial proceedings. Thus, the admissibility rules, firstly, allow the identification of the value to be protected by the court and, secondly, protect it by excluding the protected information from proceedings.

Therefore, the admissibility rules, namely legal privileges and immunities, safeguard many other values acknowledged by the legal system. The admissibility rules, accordingly, allow both the judge and the parties to know which values should be protected and provide for a procedural instrument which excludes the protected information while at the same time enforces the protection of those values.

### 1.1.4. The Admissibility of Evidence in Civil Procedure: Concluding Remarks

The analysis in parts 1.1.1, 1.1.2, 1.1.3 of this thesis reveals specific rules of admissibility of evidence in the common law tradition and the civil law tradition, as well as the purposive approach, which allows us to reveal the main functions of these admissibility rules. As mentioned in the introduction of this thesis, the aim of part 1.1 is not to provide a detailed comparative analysis of the admissibility rules or their application in different jurisdictions. On the contrary, the aim of part 1.1 is to provide only general features of the admissibility of evidence which could serve as a basic starting point for the following analysis of the admissibility of evidence in international commercial arbitration. Hence, the analysis in part 1.1 of this thesis allows us to distinguish two main approaches towards the admissibility of evidence in the so-called "neighbouring" concept.

*Firstly*, the first approach towards the admissibility of evidence is the conceptual approach. This approach regards the admissibility rules as specific legal provisions that determine what evidence is inadmissible in civil proceedings. In general terms, the research has led to the identification of the following three categories of the admissibility rules characteristic to both the common law tradition and the civil law tradition: 1) admissibility rules

designed to improve fact-finding accuracy; 2) admissibility rules that exclude evidence because of its content; 3) admissibility rules that exclude evidence due to infringements of procedural law or substantive law.

*Secondly*, the second approach towards the admissibility of evidence is the purposive approach, which is based primarily on the idea that, like any human beings, judges are not perfect. This imperfection can lead to an overvaluation of unreliable or biased evidence and, for various reasons, a failure to uphold various procedural values in civil proceedings. The admissibility rules, both in assisting the judge or the parties in the fact-finding process and in guiding the compliance of the whole procedure with various procedural values, have the following purposes: 1) to improve fact-finding accuracy in judicial proceedings; 2) to ensure fair proceedings; 3) to ensure the legitimacy of the court and its decision; 4) to ensure expedient and efficient proceedings; 5) to ensure the protection of other values recognised in the legal system. Of course, finding out how these purposes are specifically manifested and implemented would require a detailed analysis of individual jurisdictions. Nevertheless, as already mentioned in the introduction of this thesis, this thesis does not analyse how these objectives are specifically implemented in different jurisdictions since the admissibility of evidence in civil procedure law is used only as a starting point to better understand the admissibility of evidence in international commercial arbitration.

Therefore, the two approaches towards the admissibility of evidence allow us to answer the essential questions about the admissibility of evidence – not only what specific admissibility rules fall under the concept of admissibility of evidence, but also, what are the underlying purposes behind the admissibility rules. This answer allows us to develop the research further and move on to a more specific analysis of international commercial arbitration.

## 1.2. The Admissibility of Evidence in International Commercial Arbitration

Having elaborated on the admissibility of evidence in civil procedure law in part 1.1, it is time to turn to the analysis of the admissibility of evidence in international commercial arbitration. As already mentioned, the admissibility of evidence in international commercial arbitration is examined in light of three main sources of arbitration law. This part of the thesis, firstly, analyses the admissibility of evidence in the context of the Model Law (see **part 1.2.1.**). Secondly, it explores the admissibility of evidence in the context of three arbitration procedure rules (see **part 1.2.2.**). Thirdly, it explores the

admissibility of evidence in the context of the IBA Rules (see **part 1.2.3.**). Lastly, this part also ends with the identification and explanation of the conceptual approach and purposive approach towards the admissibility of evidence in international commercial arbitration (see **part 1.2.4.**).

### 1.2.1. The Admissibility of Evidence in the UNCITRAL Model Law on International Commercial Arbitration

Chapter V "Conduct of Arbitral Proceedings" of the Model Law establishes the rules of evidence in arbitration proceedings. The most relevant provision in the context of the admissibility of evidence is Art. 19 of the Model Law. The UNCITRAL Secretariat observed that Art. 19 is one of the provisions which constitute the "Magna Carta of Arbitral Procedure" and, thus, might be regarded as "the most important provision[s] of the model law" (Holtzmann, Neuhaus, 1989, p. 564).

Art. 19(1) of the Model Law establishes the principle of party autonomy in the arbitration and provides that "Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings." This right includes, among other things, the possibility to agree on the application of specific admissibility rules. For example, the parties may agree that certain means of proof are not admissible or that certain facts can only be proved by specific means of proof *etc*. (Mikelėnas *et al*., 2016, p. 122; Holtzmann, Neuhaus, 1989, p. 566).

Accordingly, given the possibility for the parties to agree on the application of various admissibility rules, the admissibility of evidence can take very different forms. In one proceeding, the parties may agree to limit the evidence due to its content. In another proceeding, the parties may decide to apply the admissibility rules related to the admissibility of illegally obtained evidence, *etc*.

Nevertheless, the parties may often not even think about the agreement on specific admissibility rules in the arbitration. When drafting commercial contracts, the parties or their representatives, who usually specialise in various areas of substantive law, such as contract law and corporate law, often do not even think about various aspects of the arbitration process itself, let alone the admissibility rules that may be applicable during the dispute. Meanwhile, once a dispute has arisen and been referred to an arbitral tribunal, the parties are generally reluctant to talk, discuss or negotiate about the application of specific rules of arbitral procedure, including the admissibility rules (see, *e.g.* Park, 2003, p. 289).

In such instances, Art. 19(2) of the Model Law, which provides the most important rule concerning evidentiary issues, becomes relevant: "Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

The said article of the Model Law confers a wide discretion to the arbitral tribunal with regard to evidentiary issues, including the application of admissibility rules. Art. 19(2) of the Model Law, which grants the broad discretion to the arbitral tribunal to decide on the admissibility of evidence, stems from the need to allow the tribunal to tailor the conduct of proceedings to specific features of the case without being hindered by any restraint that may stem from the traditional local law, including any domestic rules on evidence. Moreover, it provides grounds for displaying initiative in solving any procedural question not regulated in the arbitration agreement or the Model Law (UNCITRAL Secretariat, 2008, p. 32).

The legislative history of the Model Law also provides us with more detailed explanations of the nature of Art. 19 of the Model Law. The Working Group's Report of the Model Law indicates that there was a general agreement that the arbitral tribunal should be empowered to conduct the arbitration as it considered appropriate, subject to the instructions of the parties provided that the parties were treated with equality and that at every stage of proceedings, each party was given a full opportunity to present its case. This empowerment to conduct the arbitration also contains empowerment to adopt its own rules of evidence, including the rules of admissibility, subject to contrary agreement by the parties. Moreover, any suggestions with regards to the supplementary rules that would restrict the arbitral tribunal's power to adopt its own rules of evidence were disregarded by the Working Group since 1) such restrictions were undesirable, for example, as indicated by Howard M. Holtzmann, the representative of the US: "one reason why the parties chose arbitration was to be free of the technical rules of evidence […]. The aim of the model law was precisely to avoid the application of the technical rules of evidence." (330$^{th}$ Meeting of the Working Group…, p. 500); and 2) it was also difficult to envisage detailed rules on evidence in view of the great disparity between the legal systems (Report of the UNCITRAL Working Group…, para. 60).

Besides granting broad discretion to the arbitral tribunal, the Model Law provides only one additional admissibility rule. Art. 23(2) of the Model Law stipulates: "Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment

having regard to the delay in making it." The latter provision gives the arbitral tribunal the power to prevent the parties from supplementing or amending the statement of claim or defence, including the power to exclude new evidence that supplements or modifies the statements of the parties. Both the rule itself and its purpose essentially mirror the admissibility rules that determine the admissibility of new evidence in civil procedure law (see **parts 1.1.1.2., 1.1.2.3, 1.1.3.1.**).

Art. 23(2) of the Model Law establishes the main criteria for the inadmissibility of late evidence: 1) the agreement between the parties, which may, for example, provide that late evidence is inadmissible *per se*; and 2) the arbitral tribunal considers that the delay in submitting the new evidence is not inappropriate. The first criterion is sufficiently clear and derives from the general right of the parties to decide on the procedural rules, while the second criterion requires further clarification. Art. 23(2) does not guide with respect to what constitutes an appropriate delay. Legal scholars seek to provide some guidance and emphasise that in deciding whether or not an amendment to the statement of claim or defence should be allowed, the arbitral tribunal will likely consider the extent of and reasons for the delay. For example, a legitimate amendment might concern difficulties in adducing evidence within a short period of time due to the complexity of the dispute. Moreover, the arbitral tribunal should also strike a balance between the parties' 'right to be heard' and the arbitral tribunal's duty to prevent dilatory tactics. Frivolous amendments or supplements that are clearly aimed at delaying and obstructing justice may not be permitted. Notwithstanding the provided guidance, same legal scholars recognise that Art. 23(2) of the Model Law does not lay down a clear rule as to when the arbitral tribunal should consider the admissibility of late evidence appropriate (Bantekas *et al*., 2020, p. 653).

As can be seen, Art. 19(2) of the Model Law does not lay down any specific rules on the admissibility of evidence, nor does it specify how the arbitral tribunal should decide on the admissibility of evidence. Art. 19(2) of the Model Law only provides for the exclusive right of the arbitral tribunal to decide on the admissibility of evidence in arbitration proceedings. In the absence of an agreement between the parties, the only rule set out in the Model Law is the rule on the admissibility of late evidence (Art. 23(2) of the Model Law), which also provides arbitrators with sufficiently broad discretion to decide on the admissibility of such evidence. Hence, the admissibility of evidence is a matter of the broad discretion of arbitrators. However, it should be borne in mind that the discretion of arbitral tribunals is not unlimited under the Model Law. Two essential limitations to the discretion of arbitral tribunals are explained below.

*Firstly*, the Model Law provides that the discretion of arbitral tribunals may be limited by the parties themselves (Art. 19(1) of the Model Law). As already mentioned in this part, the parties are free to agree on specific rules of admissibility of evidence that would be binding on the arbitral tribunal in the course of arbitration proceedings.

*Secondly*, the Model Law establishes certain procedural imperatives that the arbitral tribunal must respect when exercising its discretion (Binder, 2005, p. 186). Art. 19(2) of the Model Law explicitly states that "[…] the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate [...]." Since the Model Law itself does not provide specific rules on the admissibility of evidence that would limit the arbitral tribunal's discretion, the provision in Art. 19(2) "subject to the provisions of this Law" refers to the general principles of the arbitral procedure set out in the Model Law, which the arbitral tribunal must follow in dealing with various evidentiary issues. These principles are fairness, efficiency and equal treatment of the parties. The Explanatory Note of the UNCITRAL Secretariat reveals that Chapter V of the Model Law provides the legal framework for the fair and effective conduct of arbitral proceedings (UNCITRAL Secretariat, 2008, p. 31), while Art. 18 of the Model Law provides: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

Before summarising the *status quo* of admissibility of evidence in the context of the Model Law, it is necessary to clarify two procedural aspects that may, in some cases, imply a broader and more detailed application of the admissibility rules in arbitral proceedings. As will be shown below, these two implications are not justified.

*Firstly*, the rules on the admissibility of evidence may be directly applicable because of the parties' choice of substantive law. It has been mentioned that some admissibility rules may be laid down in substantive law rather than procedural law. For example, Art. 1.93(2) of the LCC provides: "Where any dispute arises upon the fact of forming or performance of a transaction which fails to meet the necessary requirements for its ordinary written form, the parties lose the right to use the testimony of witnesses as evidence to prove the facts indicated above […]."[16] It could be argued that Art. 1.93(2) of the LCC should be applied in arbitration proceedings if the

[16] In other countries, various admissibility rules are also enshrined in substantive law (for example, in Italy or Belgium (see Silvestri, 2015, p. 1; Taelman, Severen, 2021, p. 159)).

parties, in accordance with Art. 28(1) of the Model Law[17], have opted for the application of the law of the Republic of Lithuania to the merits of the dispute. Some legal scholars support this position. For example, the commentary of the Law on the Commercial Arbitration of the Republic of Lithuania provides that the parties may not modify the admissibility rules that are often imperatively established in the substantive law and if the content of the parties' agreement is in breach of these rules, the agreement should be considered as null and void and should not be relied on by the arbitrators (Mikelėnas *et al*., 2016, p. 122).

This position is neither in line with the Model Law nor with the prevailing approach of international commercial arbitration. During the deliberations on Art. 19(2) of the Model Law, one of the raised issues was the issue of the conflict between the arbitral tribunals' broad discretion to decide on the admissibility of evidence and the admissibility rules that are embedded in the substantive law chosen by the parties. The representative of the UNCITRAL International Trade Branch stated his view, which was subsequently accepted, on the matter: "Regarding the compatibility within the Model Law itself between article 19(2) and article 28, it was secretariat's view that if the Model Law was adopted as it stood, admissibility and other issues mentioned in article 19(2) would be decided upon the discretion of the arbitral tribunal, unless otherwise agreed by the parties, and would not be affected by the choice of substantive law to be made under article 28." (316$^{th}$ Meeting of the Working Group…, p. 445).

Moreover, the position expressed during the deliberations on Art. 19(2) of the Model Law is generally accepted in the prevailing legal scholarship. For example, H. M. Holtzmann and J. E. Neuhaus argue that this result is sound. As a matter of interpretation, specific provisions in Art. 19(2) should prevail over the general one in Art. 28 of the Model Law since, as a matter of policy, the arbitration should avoid applying technical rules of evidence where possible (Holtzmann, Neuhaus, 1989, p. 567). This view is further supported by the fact that this position is also shared by some jurisdictions whose arbitration laws are based on the Model Law. For example, Belgian legal scholarship provides: "in the author's view, the consequence of the legislator's conscious choice to fully adopt Art. 19 of the UNCITRAL Model Law for

[17] Art. 28(1) of the Model Law provides the following: "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules."

international and domestic arbitration alike, must lead to the conclusion that also domestic arbitral tribunals may freely assess the admissibility of evidence, without being bound by the abovementioned substantive provisions restricting evidence in civil cases." (Bassiri, Draye, 2016, p. 302).

Accordingly, the rules governing the admissibility of evidence in international commercial arbitration should be classified as a part of procedural law rather than substantive law. Otherwise, the parties' choice of substantive law would also lead to the application of the rules on the admissibility of evidence. Such an interpretation would, as mentioned above, be contrary to the Model Law.[18] The classification of admissibility rules as a part of arbitration procedural law presupposes that the basic principle enshrined in Art. 19(2) of the Model Law, *i.e.* the broad discretion of arbitral tribunals to decide on the application of the admissibility rules, is preserved.

*Secondly*, the admissibility rules may be directly applicable because of the assistance of national courts. The arbitral tribunal's jurisdiction originates not from the state authority but from the agreement between the parties. As a result, the arbitral tribunal often lacks the power to compel discovery by calling or compelling the attendance of a witness, requiring the production of documents, or ordering the inspections of goods. Hence, some national laws expressly allow the arbitral tribunal to seek courts' assistance in taking evidence (Bantekas *et al*., 2020, p. 718). The Model Law adopts similar provisions. Art. 27 of the Model Law provides: "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."

The assistance of national courts can take many forms, such as questioning the witnesses, inspecting the physical evidence, or otherwise helping to gather the evidence. The involvement of the national court in the taking of evidence in an arbitration proceeding may also give relevance to the various admissibility rules that apply to the taking of evidence in national court proceedings. For example, when examining a witness, the national court may apply admissibility rules that exclude the testimony due to a legal privilege or immunity (see **parts 1.1.1.2., 1.1.2.2.**).

Nevertheless, the wording of the second sentence of Art. 27 of the Model Law establishes the right and not the obligation of courts to apply the national

[18] The view that the rules of evidence, including the admissibility rules, belong to the domain of procedural law, has also traditionally prevailed in the common law tradition. Nevertheless, it must be noted that there have been interesting developments in this field (see Garnett, 2012, p. 189, 191–192).

rules of evidence: "The court may execute the request within its competence and according to its rules on taking evidence." Legal scholarship provides that the use of the word "may" indicates the courts' discretion in executing such a request (Binder, 2005, p. 228). Since Art. 27 of the Model Law leaves the discretion to the national court, national jurisdictions implement Art. 27 in very different ways. For example, Art. 38 of the Law on Commercial Arbitration of the Republic of Lithuania stipulates: "An arbitral tribunal or a party, with the approval of the arbitral tribunal, shall be entitled to request from Vilnius Regional Court assistance in collecting evidence. Evidence shall be collected at court *mutatis mutandis* in accordance with the provisions of […] the Code of Civil Procedure." (Law on Commercial Arbitration of the Republic of Lithuania, 1996).

Meanwhile, the Belgian Arbitration Act takes a different approach. Art. 1708 provides: "With the approval of the arbitral tribunal, a party may apply to the President of the Court of First Instance ruling as in summary proceedings to order all necessary measures for the taking of evidence in accordance with Article 1680, § 4." (Belgian Arbitration Act, 2013). Art. 1708 adopts Art. 27 of the Model Law with essential changes. One of these changes is that the Belgian legislator deliberately removed the provision in the Model Law that the court "may execute the request […] according to its rules on taking evidence." The Belgian Arbitration Act provides that the President of the Court of First Instance may order the taking of "any" necessary measures. Hence, the President of the Court of First Instance is not constrained by the strict rules on the taking of evidence that apply to proceedings of Belgian national courts (Bassiri, Draye, 2016, p. 382–383).

Notwithstanding the discretion conferred by Art. 27 of the Model Law, the admissibility rules that a national court may apply should not be regarded as constituting a part of the concept of admissibility of evidence in international commercial arbitration. A fairly simple explanation supports this statement. Even if national rules of evidence should apply, these rules do not apply to the arbitral tribunal but, rather, to the national court. It is precisely because of the involvement of a different subject, *i.e.* the national court, that the application of admissibility rules within national proceedings could hardly be attributed to the evidentiary procedure of the arbitral process.[19]

[19] The decisions of national courts further support this view. For example, the US Supreme Court, in its decision of 13 June, held that an arbitral tribunal, as a private dispute resolution forum, does not qualify as a "foreign or international tribunal" under Article 1782 of the US Statute, which empowers US courts to compel a person to give testimony or provide other information that would then be used in a "foreign

Therefore, the analysis of the Model Law sheds some light on certain aspects of the admissibility of evidence in international commercial arbitration: 1) the admissibility of evidence in international commercial arbitration depends essentially on the will of the parties. Art. 19(1) of the Model Law gives the possibility to agree on a wide variety of admissibility rules that are in the best interests of the parties; 2) failing such agreement, Art. 19(2) of the Model Law becomes relevant. Art. 19(2) of the Model Law provides for the arbitral tribunals' broad discretion to decide on the admissibility of evidence, which is limited only by the general principles of arbitral procedure; 3) the only article of the Model Law that directly establishes the admissibility rule is Art. 23(2) which empowers the arbitral tribunal to limit the admissibility of late evidence; 4) neither the admissibility rules laid down in the substantive law chosen by the parties nor national rules that may be applied by a national court while assisting the arbitral tribunal in the taking of evidence should be regarded as a part of the concept of admissibility of evidence in international commercial arbitration.

### 1.2.2. The Admissibility of Evidence in the Arbitration Procedure Rules

The arbitration process is generally not governed solely by the *lex arbitri*. As mentioned in part 1.2.1 of this thesis, Art. 19(1) of the Model Law allows the parties to agree on specific arbitration rules. Thus, this part of this thesis will examine the most commonly used rules of arbitration procedure: 1) the UNCITRAL Arbitration Rules (see **part 1.2.2.1.**); 2) the ICC Arbitration Rules (see **part 1.2.2.2.**); 3) the LCIA Arbitration Rules (see **part 1.2.2.3.**).

#### 1.2.2.1. The UNCITRAL Arbitration Rules

The UNCITRAL Arbitration Rules are applicable only if the parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not, shall be referred to arbitration under the UNCITRAL Arbitration Rules (see Art. 1 of the UNCITRAL Arbitration Rules). Section III of the UNCITRAL Arbitration Rules regulates various matters of the arbitral procedure. Art. 27(4) of the UNCITRAL Arbitration Rules follows the same approach as the Model Law and provides the main

or international tribunal" (ZF Automotive U. S., Inc…). The US Supreme Court has drawn a clear line between the evidentiary process in international arbitration proceedings and the evidentiary process in national or international courts.

provision dealing with the admissibility of evidence: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." This provision also establishes a wide discretion of the arbitral tribunal to deal with the admissibility of evidence.

Art. 27 of the UNCITRAL Arbitration Rules is usually described as a cornerstone evidentiary rule (Caron, Caplan, 2012, p. 571). This rule appears identical in the 1976, 2010 and 2013 UNCITRAL Arbitration Rules. The legislative history of the UNCITRAL Arbitration Rules indicates that the rationale behind the said rule is identical to the rationale behind Art. 19(2) of the Model Law: "in making rulings on the evidence, arbitrators should enjoy the greatest possible freedom and they are therefore freed from having to observe strict legal rules of evidence." (Report of the Secretary-General…, 1974, p. 176).

Like the Model Law, the UNCITRAL Arbitration Rules also provide additional admissibility rules. Art. 22 of the UNCITRAL Arbitration Rules provides the following: "During the course of the arbitral proceedings, a party may amend or supplement its claim or defence, including a counterclaim or a claim for the purpose of a set-off, unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement having regard to the delay in making it or prejudice to other parties or any other circumstances." Art. 27(3) of the UNCITRAL Rules stipulates: "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine."

Art. 22 of the UNCITRAL Arbitration Rules reflects Art. 23(2) of the Model Law by providing the arbitral tribunal with the power to declare late evidence inadmissible. As explained in legal scholarship, the arbitral tribunal must be able to exercise control over the parties' ability to amend or change the claim or defence in order to ensure that the parties do not interfere with the orderly conduct of the arbitration process by frequently changing their position or submitting intrusive amendments (Paulsson, Petrochilos, 2018, p. 178–179). As with regards to the Model Law, the determination of inappropriateness is left to the discretion of arbitral tribunals. The text of the article itself provides three instances when the amendment could be considered inappropriate: 1) the delay; 2) the prejudice; 3) any other circumstances. Whether the delay can be accepted depends, in part, on the reasons why the amendment was not submitted earlier. However, the establishment of delay alone itself is not enough since it must also be weighted in terms of the possible prejudice to the other party, *e.g.* the amendment prejudices the other party when it is raised so late as to deprive that party of

the opportunity to defend (Caron, Caplan, 2012, p. 471–472; Paulsson, Petrochilos, 2018, p. 184). Meanwhile, any other circumstances are circumstances that would justify declaring the amendment inappropriate.

Art. 27(3) of the UNCITRAL Arbitration Rules, although not directly, provides another closely related admissibility rule. As Art. 22 of the UNCITRAL Arbitration Rules, Art. 27(3) restricts late submission of evidence and thus not only ensures fair, efficient and expeditious proceedings but also prevents ambush tactics during the course of proceedings. During the discussions to revise the UNCITRAL Arbitration Rules, the Working Group considered including an additional sentence in Art. 27(4) of the UNCITRAL Arbitration Rules to clarify that the arbitral tribunal has the authority to declare late-submitted evidence inadmissible: "The arbitral tribunal may disregard evidence that is submitted too late." However, the drafters declined to add specific language authorising the tribunal to exclude evidence, deeming this power to be subsumed under the authority to set time limits for the production of evidence under Art. 27(3) of the UNCITRAL Arbitration Rules (see Castello, 2015, p. 239).

Accordingly, like the Model Law, the UNCITRAL Arbitration Rules leave the admissibility of evidence to the broad discretion of arbitral tribunals in the absence of an agreement to the contrary. The explicit admissibility rules set out in Art. 22 and 27(3) of the UNCITRAL Rules also leave the broad discretion to the arbitral tribunal, which, after assessing various circumstances, may decide on the exclusion of late evidence.

Nevertheless, as in the case of the Model Law, the discretion of arbitral tribunals is not unlimited. There are three essential limitations on discretion, which are discussed in the following paragraphs.

*Firstly*, the arbitral tribunals' discretion may be limited by the parties' agreement. As stated in Art. 1(1) of the UNCITRAL Arbitration Rules: "Where parties have agreed that disputes between them […] shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree."

*Secondly*, the arbitral tribunals' discretion is constrained by the fundamental principles of the arbitral process set out in Art. 17(1) of the UNCITRAL Arbitration Rules: 1) the fairness; 2) the efficiency and expeditiousness; and 3) the equality between the parties.[20]

[20] Art. 17(1) of the UNCITRAL Rules establishes: "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 proceedings each party is given

*Thirdly*, some scholarly writings point out that the discretion of arbitral tribunals in relation to the admissibility rules in the UNCITRAL Arbitration Rules is also limited by the mandatory provisions of the seat of arbitration (Paulsson, Petrochilos, 2018, p. 240). Art. 1(3) of the UNCITRAL Rules requires the arbitral tribunal to abide by the rules of domestic law applicable to the arbitration, namely *lex arbitri*, from which the parties cannot derogate: "These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." However, it is questionable whether Art. 1(3) of the UNCITRAL Rules would result in the application of additional admissibility rules. As noted by legal scholarship, there are relatively few procedural provisions of arbitration laws that are mandatory (Castello, 2015, p. 181). Moreover, as was explained in detail while analysing the Model Law, the Model Law, as *lex arbitri*, which reflects the best practice of international arbitration, does not lay down a single mandatory rule on the admissibility of evidence.

After all, even when the domestic arbitration laws do not follow the Model Law, most of the arbitration laws give the arbitrators a wide discretion to apply the procedural rules that they consider most appropriate, irrespective of the national laws (Draetta, 2015, p. 330).[21] This means that, as a general rule, Art. 1(3) of the UNCITRAL Rules does not determine the application of additional rules of admissibility of evidence in arbitral proceedings.

Therefore, the UNCITRAL Arbitration Rules follow the Model Law and leave a wide discretion to the arbitral tribunal to decide on the admissibility of evidence. Art. 22 and 27(3) of the UNCITRAL Rules, which lay down specific admissibility rules, do not prescribe mandatory instances in which the tribunal would be obliged to exclude evidence. As legal scholarship summarises it, Art. 27(4) of the UNCITRAL Arbitration Rules allows an arbitral tribunal to both exercise a liberal policy in the area of admissibility of evidence, but also

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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."

[21] For example, additionally, see Art. 1509 of the Code of Civil Procedure of France: "Unless the arbitration agreement provides otherwise, the arbitral tribunal shall define the procedure as required, either directly or by reference to arbitration rules or to procedural rules." (Code of Civil Procedure of France, 2011); Art 33(1)(b) of the English Arbitration Act: "The tribunal shall adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined" (English Arbitration Act, 1996).

nothing prevents the arbitral tribunal from following the formal rules of evidence of a national system familiar to both parties (Caron, Caplan, 2012, p. 572).

#### 1.2.2.2. The ICC Arbitration Rules

The ICC Arbitration Rules also allow the parties to agree on various rules applicable to the proceedings. Art. 19 of the ICC Arbitration Rules provides: "The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules that the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration." Such an agreement may include the agreement on the application or non-application of specific admissibility rules.

As already mentioned, it is very rare for the parties to agree on the applicable admissibility rules, which makes other provisions of the ICC Arbitration Rules relevant. Art. 25(1) of the ICC Arbitration Rules provides a basic rule regarding the admissibility of evidence: "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." The term "all appropriate means" gives the arbitrators a wide discretionary power to decide on various fact-finding issues in the arbitration procedure. As explained by the ICC Secretariat, Art. 25(1) of the ICC Arbitration Rules gives the arbitral tribunal broad discretion to determine the rules governing the fact-finding process, which will depend on the manner in which the case is conducted and on the parties' and individuals arbitrators' preference (Fry *et al*., 2012, p. 268). The admissibility rules are among these various fact-finding matters (see Derains, Schwartz, 2005, p. 272). Accordingly, as in the UNCITRAL Arbitration Rules, the application of the admissibility rules is governed not by specific rules but by the discretion of arbitral tribunals.

As is the case with the Model Law and the UNCITRAL Arbitration Rules, the only admissibility rule directly contained in the ICC Arbitration Rules relates to the admissibility of late evidence. This admissibility rule derives from the requirement for the arbitral tribunal "to proceed within as short time as possible [...]." The ICC Secretariat does note that the arbitral tribunal has the power not to allow additional documentary evidence to be filed outside the time limits that the arbitral tribunal has fixed. However, this right should be exercised only in exceptional circumstances (Fry *et al*., 2012, p. 270). In addition, Art. 27 of the ICC Arbitration Rules establishes a specific

admissibility rule that prohibits the late submission of evidence after the closing of proceedings: "After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorised by the arbitral tribunal." The ICC Secretariat notes that there may be times when a party files additional evidence after the proceedings have been declared closed, and an arbitral tribunal will normally disallow and ignore such submissions. If it decides otherwise, the other side will likely need an opportunity to respond (Fry *et al*., 2012, p. 288). Again, as can be seen from the position of the ICC Secretariat and the text of provisions of the ICC Arbitration Rules, the application of the admissibility rules is left to the broad discretion of arbitral tribunals. Thus, while deciding on the admissibility issue, the arbitral tribunal may consider various criteria, such as the reasons for the delay in submitting late evidence, the probative value of the evidence, *etc*. (see Webster, Bűhler, 2018, p. 443).

Under the ICC Arbitration Rules, the arbitral tribunal's discretion on procedural matters, including the admissibility of evidence, is not unlimited. As with regard to the UNCITRAL Arbitration Rules, there are three important limitations on the discretion, which are discussed in the following paragraphs.

*Firstly*, the arbitral tribunals' discretion may be limited by the parties' agreement (Art. 19 of the ICC Arbitration Rules).

*Secondly*, the arbitral tribunal must take into account the fundamental procedural principles enshrined in Art. 22 of the ICC Arbitration Rules: 1) the fairness; 2) the impartiality of the arbitral tribunal; 3) the efficiency and expeditiousness; 4) the equality between the parties.[22] As confirmed by the sources of arbitral procedure analysed above, the principles of fairness, expedition, efficiency and equality of arms are generally accepted procedural principles that make up the "arbitral due process". These principles can be applied at any stage of the ICC arbitration process, and the arbitrator should ensure that they are respected in all procedural stages: the submission of documents, the taking of evidence, the examination of witnesses, *etc*. (Craig *et al*., 2000, p. 424).

*Thirdly*, Art. 42 of the ICC Arbitration Rules obliges the arbitral tribunal also to take into account the mandatory provisions of the law of the place of

[22] Art. 22 of the ICC Arbitration Rules provides: "1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.; […] 3) In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

arbitration (the *lex arbitri*): "In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law." This limitation has a minor importance since, as already mentioned in the context of the UNCITRAL Arbitration Rules, the national arbitration laws, in most cases, do not lay down any mandatory rules on the admissibility of evidence (see **part 1.2.2.1**.).[23]

Therefore, the ICC Arbitration Rules follow essentially the same approach as both the Model Law and the UNCITRAL Arbitration Rules. In the absence of an agreement between the parties, the arbitral tribunal has the broad discretion to decide on the admissibility of evidence. Meanwhile, the only directly enshrined rules on the admissibility of late evidence also provide the arbitral tribunal with the broad discretion in determining the admissibility of such evidence.

#### 1.2.2.3. The LCIA Arbitration Rules

The LCIA Arbitration Rules establish the same principle as all of the sources of arbitration law researched so far. Art. 22(1)(vi) of the LCIA Arbitration Rules provides: "The Arbitral Tribunal shall have the power, upon the application of any party or […] upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide: to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal."

Legal scholarship states that Art. 22 "Additional Powers" of the LCIA Arbitration Rules is a distinctive feature of the LCIA Arbitration Rules (Richman *et al.*, 2021, p. 284). However, it contains the same principle as

[23] Moreover, it is also important to note that the substantive law chosen by the parties will also not affect the admissibility of evidence. As it is established in ICC arbitration case No. 5029, the fact that the parties have chosen one system of law to govern the substance of their dispute does not mean that they have chosen the same system of law or, more specifically, any other system of law to govern the procedure (French contractor v. Egyptian employer…).

other rules of arbitral procedure, *i.e.* the broad powers of arbitral tribunals to decide on the application of admissibility rules.

As can be seen from the *chapéu* of Art. 22(1) of the LCIA Arbitration Rules: "The Arbitral Tribunal […] only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) […]", the LCIA Arbitration Rules oblige the arbitral tribunal to take into account and at least hear the views of the parties on the powers of the arbitral tribunal. Accordingly, the parties may agree and express their intent to apply various rules on the admissibility of evidence in arbitration proceedings. If the parties do not agree on the application of specific admissibility rules, the arbitral tribunal is unbound by the rules of evidence applicable to the national courts of the place of arbitration and has full control over the admissibility of evidence (see Tuner, Mohtashami, 2009, p. 146).

The broad discretion of arbitral tribunals is also reflected in other provisions of the LCIA Arbitration Rules. For example, Art. 20(4) of the LCIA Arbitration Rules provides: "The Arbitral Tribunal may decide the time, manner and form in which these written materials shall be exchanged between the parties and presented to the Arbitral Tribunal; and it *may* allow, refuse or limit the written and oral testimony of witnesses." As can be seen from the text of the article, the tribunal is not required to hear the witnesses that the parties may wish to call. It is up to the tribunal to determine, in light of the circumstances of the dispute, whether the appearance of any proposed witness is really necessary (Hunter, Paulsson, 1985, p. 171).

Art. 20(5) of the LCIA Arbitration Rules also enshrines an additional admissibility rule that allows the arbitral tribunal to exclude the written testimony if the arbitral tribunal has not examined the witness during the hearing: "If the Arbitral Tribunal orders that other party to secure the attendance of that witness and the witness refuses or fails to attend the hearing without good cause, the Arbitral Tribunal *may* place such weight on the written testimony or exclude all or any part thereof altogether as it considers appropriate in the circumstances." One of the main rationales behind this rule is the improvement of fact-finding accuracy. The witness's oral testimony may provide additional factual information but also allows for verification of the factual accuracy of the written witness statement. As explained by legal scholarship, the principal purpose of evidentiary hearings is to enable the parties to test the witness testimony by using cross-examination (Turner, Mohtashami 2009, p. 133). When parties lose such an opportunity due to the witness's failure or refusal to attend the hearing, the arbitral tribunal has the power to exclude the witness's written testimony. However, Art. 20(5) of the LCIA Arbitration Rules gives the arbitrators a wide discretion because it does

not provide a clear answer to the question of when the arbitral tribunal should exercise its power and exclude the written testimony.

Art. 20(7) of the LCIA Arbitration Rules is also related to the admissibility of evidence: "Subject to any order by the Arbitral Tribunal otherwise, any individual intending to testify to the Arbitral Tribunal may be treated as a witness notwithstanding that the individual is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party." The provision "Subject to any order by the Arbitral Tribunal otherwise" gives the arbitral tribunal the discretion to decide to the contrary, *i.e.* to exclude the witness statement if the witness is a party to the arbitration or was, remains or has become an officer, employee, owner or shareholder of any party or is otherwise identified with any party.

In addition, the LCIA Arbitration Rules, like the UNCITRAL Arbitration Rules and the ICC Arbitration Rules, set out certain admissibility rules related to the admissibility of late evidence. Art. 22(1)(i) of the LCIA Arbitration Rules establishes the arbitral tribunal's right to refuse to permit the supplement, including by way of additional facts and supporting evidence, of a party's procedural documents: "The Arbitral Tribunal shall have the power […] to allow a party to supplement, modify or amend any claim, defence, counterclaim, cross-claim, defence to counterclaim, defence to cross-claim and reply, including a Request, Response and any other written statement, submitted by such party;."

Art. 22(1)(i) of the LCIA Arbitration Rules does not answer the question in which cases the arbitral tribunal could and should exercise such a right. Legal scholarship indicates that the decision on admissibility should be governed by practical considerations. It would seem appropriate to allow the supplement when the arbitral tribunal considers that the amendment is necessary to enable the party to present its case and when it does not cause unnecessary delay and expense to proceedings (Tuner, Mohtashami, 2009, p. 140). Thus, the decision on whether to allow any amendments, supplements or modifications will depend on a case-by-case analysis by the arbitral tribunal.

As can be seen from all of the described provisions of the LCIA Arbitration Rules, the admissibility of evidence is again left to the broad discretion of arbitral tribunals. However, as with regard to other arbitration procedure rules, in the context of the LCIA Arbitration Rules, discretion is also limited by three limitations described in the following paragraphs.

*Firstly*, as already mentioned, the parties may be inclined to agree on the application of the admissibility rules (Art. 22(1)(vi) of the LCIA Arbitration).

*Secondly*, the LCIA Arbitration Rules oblige the arbitral tribunal to be guided by already mentioned general principles of the arbitral procedure set forth in Art. 14 of the LCIA Arbitration Rules: "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); and (ii) a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute."

*Thirdly*, the arbitral tribunals' discretion may also be limited by the mandatory provisions which apply to arbitral proceedings. For example, Art. 14(2) of the LCIA Arbitration Rules provides: "The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to the mandatory provisions of any applicable law or any rules of law the Arbitral Tribunal may decide to be applicable." However, as mentioned above, the arbitration laws usually do not contain any mandatory provisions with regards to the application of specific admissibility rules (see **parts 1.2.2.1., 1.2.2.2.**)

Therefore, in the context of the admissibility of evidence, the LCIA Arbitration Rules follow the same approach as the Model Law, the UNCITRAL Rules and the ICC Arbitration Rules since the issue of admissibility of evidence is left to arbitral tribunals' broad discretion, which is to be exercised in accordance with the parties' agreement, if any, and the general principles of arbitral procedure.

### 1.2.3. The IBA Rules on the Taking of Evidence in International Arbitration

Neither the Model Law nor the rules of arbitration procedure govern the admissibility of evidence in detail, and in the absence of an agreement between the parties, the issue of the admissibility is left to the discretion of the arbitral tribunal. This conclusion raises the question: how exactly should this discretion be exercised? The IBA Rules attempt to answer this question in more detail.

The IBA Rules are not meant to change but only to supplement the arbitration rules. In other words, the IBA Rules only deal with issues related to the taking of evidence and are not intended to provide an entire mechanism for the conduct of international arbitration (Zuberbühler *et al*., 2012, p. 4).

The first version of the IBA Rules was adopted in 1983 as the Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration. Since the feedback from the international community was positive and over time, various new problems had to be addressed and new procedures developed; the IBA Rules were updated in 1999 as the IBA Rules on the Taking of Evidence in International Commercial Arbitration. The next revision took place in 2010 when the IBA drafted the IBA Rules on the Taking of Evidence in International Arbitration (Kubalczyk, 2015, p. 96). The latest review of the IBA Rules was conducted in 2020. However, while the IBA Rules in 2010 were changed and updated in order to reflect the new developments and best practices in international arbitration since 1999, upon completing its review of the 2010 IBA Rules, the 2020 Review Task Force recommended only a limited number of changes, mostly to ensure greater clarity (1999 IBA Working Party & 2010 IBA…, 2021, p. 3).

Since its establishment, the success of the IBA Rules has been remarkable. Their acceptance by the arbitration literature is exceptional. The leading commentaries consider the IBA Rules to be 'an internationally applicable standard' or 'best practices' (see Marghitola, 2015, p. 33). Various empirical studies also support international recognition of the IBA Rules. For example, the survey[24] conducted in 2009 by the Subcommittee of the IBA specified that 43% of the respondents stated that they used the IBA Rules in "nearly every" or "most" arbitrations, while 42% used them in "some" or "a few" arbitrations (von Segesser, 2010, p. 736). These percentages are even higher in subsequent studies. For instance, the IBA Arbitration Committee conducted a broad survey in 2015 and 2016.[25] The survey revealed that the IBA Rules had gained wide acceptance, with nearly 50% of the arbitrations known to the respondents worldwide referencing the rules, with no significant disparities between the civil law tradition and the common law tradition (International Bar Association. Report on…).

[24] The survey was based on 34 substantive questions and five demographic questions and resulted in 173 responses as of January 5, 2009. Some 30 jurisdictions were represented in the responses received (based on the nationality of admission to the bar).

[25] The research was based on a 35-question survey circulated to arbitration practitioners worldwide and received 845 "meaningful responses". These were mainly from Europe (323) but also from several countries in Latin America (199), the Asia Pacific (136), North America (78), the Middle East (42) and Africa (33) (Ross, 2016).

Before analysing how the IBA Rules govern the admissibility of evidence, it is necessary to highlight certain aspects of the application of the IBA Rules in arbitration proceedings. Paragraph 2 of the Preamble of the IBA Rules enshrines the basic rule with regard to the application of the IBA Rules: "Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings […]." Art. 1(1) of the IBA Rules "Scope of Application" stipulates a similar rule: "Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal." Consequently, the IBA Rules establish two instances when the IBA Rules could be applicable in the arbitration procedure: 1) the parties' consent to apply the IBA Rules; 2) the arbitral tribunal determines to apply the IBA Rules.

Moreover, the IBA Rules can also be used as guidelines in the evidentiary process. The same paragraph 2 of the Preamble of the IBA Rules provides for this alternative: "Parties and Arbitral Tribunals may […] use them as guidelines in developing their own procedures." The application of the IBA Rules as non-binding guidelines is quite frequent in practice. As mentioned, the survey conducted by the IBA revealed that nearly 50% of the arbitrations known to the respondents worldwide made a reference to the IBA Rules. In 80% of those arbitrations, the tribunal consulted the IBA Rules in the form of non-binding guidelines (see Khodykin *et al*., 2019, p. 20).

The different nature and scope of the application of the IBA Rules may lead to a very different application of the admissibility rules set forth in the IBA Rules. For example, the parties are free to agree that certain provisions on the admissibility of evidence in the IBA Rules will not apply in the proceeding. Nevertheless, the parties rarely agree to apply only part of the IBA Rules or decide to adjust specific provisions of the IBA Rules (Khodykin *et al*., 2019, p. 19–20). Thus, part 1.2.3 of this thesis will contain an analysis of all the IBA Rules provisions since such an analysis will most accurately reflect the *status quo* of admissibility of evidence in the IBA Rules.

The main article governing the admissibility of evidence is Art. 9 of the IBA Rules "Admissibility and Assessment of Evidence". Art. 9(1) of the IBA Rules lays down a basic and already seen provision: "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence." As it is explained in the IBA commentary of the IBA Rules: "Article 9.1 states the general principle, also found in many institutional and *ad hoc* arbitration rules, that the arbitral tribunal shall determine the

admissibility, relevance, materiality and weight of evidence. Obviously, the arbitral tribunal shall exercise its discretion in making such determinations, which are central to its role." (1999 IBA Working Party & 2010 IBA…, 2010, p. 25). Art. 9(1) of the IBA Rules is framed in the mandatory term "shall determine". However, the IBA Committee's commentary makes it clear that it does not oblige the arbitral tribunal to do anything specific. Rather, it provides that the arbitral tribunal has discretion (see Ashford, 2013, p. 146).

In contrast to the abovementioned arbitration law sources, the IBA Rules contain significantly more admissibility rules. *Chapéu* of Art. 9(2) of the IBA Rules provides the following: "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons: […]." Nevertheless, before turning to specific admissibility rules, it is necessary to briefly explain certain terminology used in the IBA Rules. The term that requires a more detailed explanation is "Document", which is defined in the IBA Rules as a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means. This definition, albeit not obvious, directly impacts the admissibility of evidence. As mentioned above, in civil procedure law, one of the admissibility rules has long been (and in some jurisdictions continues to be) the establishment of a *numerus clausus* list of means of proof (see **part 1.1.2.1.**). None of the sources of the arbitration law analysed above provides a list of possible means of proof in arbitration proceedings. Meanwhile, the broad and wide-ranging definition of the term "Document", which encompasses a variety of means of proof, confirms that the international commercial arbitration process is not characterised by *a numerus clausus* list of means of proof. On the contrary, the IBA Rules allow the parties to rely on various types of evidence, including audio recordings, video recordings or electronic documents.

Having explained the meaning of the term "Document", it is time to turn to specific admissibility rules. Art. 9(2) of the IBA Rules provides the following reasons to declare evidence inadmissible:

| | |
|---|---|
| (a) | lack of sufficient relevance to the case or materiality to its outcome; |
| (b) | legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Art. 9.4 below); |
| (c) | an unreasonable burden to produce the requested evidence; |

| | |
|---|---|
| (d) | loss or destruction of the Document that has been shown with reasonable likelihood to have occurred; |
| (e) | grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling; |
| (f) | grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or |
| (g) | considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling. |

However, not all of these reasons should be considered admissibility rules. One of these rules is the exclusion of evidence due to the insufficient relevance to the case or materiality to its outcome. The analysis provided in the following paragraphs confirms the distinction between the admissibility, relevance and materiality of evidence in arbitration proceedings.

As already mentioned, the relevance of evidence is not considered a part of the admissibility of evidence but an independent ground for the exclusion of evidence. In other words, the evidence must first be relevant and only then can it be excluded on the basis of specific rules of admissibility (see **parts 1.1.1., 1.1.2.**). The distinction between admissibility, relevance and materiality in arbitration proceedings is also confirmed by the arbitration law sources analysed above. For example, Art. 27(4) of the UNCITRAL Arbitration Rules establishes: "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." and linguistically clearly distinguishes the relevance, materiality and admissibility. The distinction between relevance, materiality and admissibility is also confirmed by Art. 9(1) of the IBA Rules. Legal scholarship also supports this view. The relevance, materiality and admissibility of evidence are collectively referred to as the admissibility of evidence *sensu largo*, but when arbitration rules and arbitration laws refer to "admissibility" as the specific criterion of evidence, they use it mostly in the specific narrow sense, *i.e. sensu stricto* (Pilkov, 2014, p. 148). Accordingly, the rule contained in Art. 9(2)(a) of the IBA Rules should not be categorised as the admissibility rule in terms of this thesis and hence will not be explored further.

One additional ground of the exclusion, which also falls outside the scope of the admissibility of evidence, is established in Art. 9(2)(d) of the IBA Rules and permits exclusion due to the loss or destruction of the document that has

been shown with reasonable likelihood to have occurred. This ground should not be regarded as the admissibility rule due to its specific nature. This ground relates only to a document production, or more precisely, to the possible refusal to produce documents as requested by the other party or the arbitral tribunal (Art. 3 of the IBA Rules). This means that this ground does not enable the arbitral tribunal to exclude or declare inadmissible particular evidence and is essentially only used as a possible defence to a party's or a tribunal's request. This ground does not involve the exclusion of specific evidence since the evidence is either lost or destroyed. In other words, if the arbitral tribunal determines that the evidence has been destroyed or lost, it is not the evidence itself that is excluded, but simply the party's request to produce the evidence is denied.

The paragraphs above identified which of the grounds in Art. 9(2) of the IBA Rules are not relevant from the point of view of the admissibility of evidence. The following sub-parts of this thesis will explore the admissibility rules set out in Art. 9(2) and other articles of the IBA Rules (see **parts 1.2.3.1., 1.2.3.2., 1.2.3.3., 1.2.3.4., 1.2.3.5.**).

#### 1.2.3.1. The Admissibility of Legal Impediment or Privilege Under the Legal or Ethical Rules Determined by the Arbitral Tribunal to be Applicable

The peculiarities of the application of legal privileges and legal impediments in international commercial arbitration have been repeatedly reviewed in various scholarly works (see, *e.g.* Born, 2021, p. 2549 – 2563). One of the famous sayings concerning the admissibility of legal privileges and legal impediments is that "the only thing that is clear is that nothing is clear in this area" (Berger, 2006, p. 501). This legal uncertainty is due to various aspects, such as differences in the nature and concept of evidentiary privileges in the civil law tradition and the common law tradition, that there is no established conflict of law rules for the determination of the law applicable to privileges in international arbitration, *etc*. (see Zuberbühler *et al*. 2012, p. 171). The following analysis provides a general overview of three main aspects related to the application of these admissibility rules in international commercial arbitration.

*Firstly*, Art. 9(2)(b) of the IBA Rules does not provide either a detailed or an exemplary list of legal privileges or legal impediments that would allow declaring specific evidence inadmissible in arbitration proceedings.

As indicated above, both the civil law tradition and the common law tradition contain a wide variety of legal privileges or legal impediments (see

**parts 1.1.1.2., 1.1.2.2.**). Due to the international nature of arbitration, a wide variety of legal privileges or legal impediments may be recognised in international arbitration. For example, the commentary of the IBA Rules distinguishes the following legal privileges: the attorney-client privilege, the professional secrecy (the medical privilege, the accountant-client privilege, *etc*.), and the without prejudice privilege (1999 IBA Working Party & 2010 IBA…, 2010, p. 25). Meanwhile, legal scholarship adds to this list by pointing out that international arbitration can also recognise privileges related to confidential government information or matters of national interest and so forth (Berger, 2006, p. 504).

As with regard to legal privileges, legal impediments may also take many forms. Legal scholarship identifies the following legal impediments often found in international arbitration: 1) the risk of prosecution. In essence, the argument is that if the party was to comply with an order for the discovery of evidence, such compliance would breach the laws of another state and render that party liable to sanctions; 2) the banking secrecy, for example, national legislation may provide that a bank cannot disclose information and documents about the bank accounts held by the clients of the bank; 3) the data protection or privacy laws – a number of jurisdictions have in place a legislation that prevents holding, use, or disclosure of personal information, *etc*. (Khodykin *et al.*, 2019, p. 434–436).

*Secondly*, Art. 9(2)(b) of the IBA Rules provides that the arbitral tribunal shall exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for legal impediment or privilege "under the legal or ethical rules determined by the Arbitral Tribunal to be applicable." The question arises as to how and on what basis the arbitral tribunal should determine applicable legal or ethical rules. Unfortunately, the IBA Rules do not provide a specific answer to this question.

As mentioned, the legal impediment or legal privilege is likely to be directly linked to the application of a national system of law. However, the determination of that applicable law poses various challenges. Legal scholarship points out that the question – which law should be applicable – is far from having a single answer (Zuberbühler *et al*., 2012, p. 174). The problems related to the determination of the applicable law have been characterised as the "catch-22 situation" (Berger, 2006, p. 507).

Generally, it is suggested that there are four approaches a tribunal might take when faced with the question of which legal rules apply to the legal privilege: 1) the application of general principles of law, which allows applying the general principles to the question of whether the asserted protection exists; 2) the application of a single national law determined

through a choice-of-law approach. For example, the arbitral tribunal may determine whether to apply the *lex arbitri*, the *lex causae*, the most closely connected law, the "most-favoured-nation" regime (which involves selecting the law of the country which gives the highest level of protection) or the "least-favoured-nation" regime (under this approach a tribunal can order the production of a document if it is not considered to be privileged in any one of the potentially relevant jurisdictions); 3) the cumulative approach which allows the arbitral tribunal to apply two or more relevant laws simultaneously. For example, the tribunal applies the *lex arbitri* to all issues of privilege but also takes into account the domestic legal or ethical rules that bind individual counsel acting in the arbitration case; 4) the autonomous approach which allows the arbitral tribunal to determine its independent standard to the claimed privilege. This approach is, of course, subject to the tribunal's overriding duty to act fairly and treat the parties equally (see Khodykin *et al*., 2019, p. 438–443).

*Thirdly*, Art. 9(4) of the IBA Rules also lays down several further aspects that the arbitral tribunal could take into account. Art. 9(4) of the IBA Rules provides the following: "In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account: […]."

As it is explained in the commentary of the IBA Rules: "The Subcommittee provided additional non-binding guidance on determining the applicable privileges in Art. 9.3.[26] Although the standard to be applied is left to the arbitral tribunal's discretion, the tribunal should consider the elements set forth in Article 9.3, in particular if the parties are subject to different legal or ethical rules." (1999 IBA Working Party & 2010 IBA…, 2010, p. 25).

Art. 9(4) of the IBA Rules provides: "(a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice; (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations; (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen; (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and (e) the need to maintain fairness and equality as between the Parties, particularly if they are

[26] Now Art. 9(4) of the IBA Rules.

subject to different legal or ethical rules." The following paragraph provides only a general overview of these aspects without going into specifics about the application of each of these aspects in international arbitration practice.

Both Art. 9(4)(a) and (b) of the IBA Rules establish already mentioned legal privileges by giving them special attention *vis-à-vis* other possible privileges in international commercial arbitration. The IBA explains that Art. 9.4(a) seeks to encompass the common law understanding of the attorney-client privilege and the civil law understanding of the duty of professional secrecy, while Art. 9.4(b) expresses a generalised understanding of the "without prejudice" or settlement privilege, which relates to the content of settlement negotiations (1999 IBA Working Party & 2010 IBA…, 2010, p. 25). Art. 9(4)(c), (d), and (e) are of more general application. As indicated in legal scholarship, Art. 9(4)(c) highlights for the tribunal that it should take into account the expectations of the parties at the time that the legal impediment or privilege arose. Art. 9(4)(d) reflects a widely accepted exception to the operation of an evidentiary privilege, namely, the waiver of that protection. Art. 9(4)(e) emphasises the need for any outcome to maintain fairness and equality between the parties (Khodykin *et al*., 2019, p. 445).

#### 1.2.3.2. The Admissibility of Requested Evidence the Production of which Causes an Unreasonable Burden

Art. 9(2)(c) of the IBA Rules establishes another admissibility rule that provides that the arbitral tribunal shall, at the request of a party or on its motion, exclude evidence due to the unreasonable burden to produce the requested evidence.

Art. 9(2)(c) of the IBA Rules explicitly states that evidence may be inadmissible for the "unreasonable burden to produce". However, this admissibility rule is not exclusively related to the production of documents stage, *i.e.* it can be used not only as a possible defence to the request for the production of documents made by the party or the arbitral tribunal. For example, Art. 4(10) of the IBA Rules allows the arbitral tribunal to ask the party to make arrangements for the appearance of a witness. Nevertheless, the party may object to such a request due to various reasons[27], which could

[27] For example, witnesses have left a company and cannot be located despite reasonable efforts such as inquiries with former work colleagues and Internet research.

constitute, in the tribunal's mind, an unreasonable burden (Khodykin *et al*., 2019, p. 470).

The key question for the application of this rule is: what constitutes an unreasonable burden? The IBA Rules do not provide the answer to this question. The commentary of the IBA Rules provides: "This unreasonable burden can take many forms, and the nature of the burden is purposely left to the discretion of the arbitral tribunal." (1999 IBA Working Party & 2010 IBA…, 2010, p. 26). This broad discretion of arbitral tribunals to decide what constitutes an unreasonable burden is usually exercised in accordance with the principle of proportionality, which imposes the question: "Is the probative weight of the requested evidence worth the apparent burden of producing it?" In addition, legal scholarship recognises that the principle of proportionality should be complemented by the following balancing criteria: 1) the volume or number of documents (or another type of evidence requested); 2) the timing of the request; 3) the relative accessibility of the requested evidence; 4) the cost of producing the requested evidence; 5) the standard record-keeping activities of the industry; 6) the manner and form in which the requested evidence is stored; 7) the contractual or legal duties incumbent upon the parties to maintain records; 8) whether facts or issues of the dispute require an in-depth phase of document production, *etc*. (O'Malley, 2019, p. 308).

Accordingly, the arbitral tribunal retains a wide discretion in applying the principle of proportionality and weighing the various criteria to decide whether the evidence should be excluded on the grounds of "unreasonable burden".

#### 1.2.3.3. The Admissibility of Evidence due to the Grounds of Commercial, Technical Confidentiality or Special Political or Institutional Sensitivity (including Evidence that has been classified as Secret by a Government or a Public International Institution) that the Arbitral Tribunal Determines to be Compelling

The admissibility rules set forth in Art. 9(2)(e) and (f) of the IBA Rules will be described together. As explained by the IBA, both of these rules involve related concerns (1999 IBA Working Party & 2010 IBA…, 2010, p. 26).

Art. 9(2)(e) of the IBA Rules excludes evidence due to commercial, technical confidentiality that the arbitral tribunal determines to be compelling. The main rationale behind the said rule is that international arbitration acknowledges the legitimate interest to keep certain commercial or technical confidential information secret. However, the IBA Rules do not clearly define

what should be considered confidential or technical information. Legal scholarship provides a couple of examples – the research and development information, the price calculations, the sources of supply, the distribution channels, the agreements with suppliers and customers, *etc.* (Zuberbühler *et al*., 2012, p. 180).

The text of Art. 9(2)(e) of the IBA Rules states that the arbitral tribunal must only protect commercial, technical confidentiality if it is "compelling". Some positions in legal scholarship point out that, in general, confidential information should be considered (presumed) admissible, absent strong reason to the contrary (Waincymer, 2012, p. 869). Generally, it is recognised that the decision on whether a "strong reason to the contrary" exists should be determined on a case-by-case basis. One of the "threshold questions" that an arbitral tribunal should ask when deciding on the admissibility of confidential information is whether the evidence is of a kind that normally a party would go to great lengths to keep it from disclosure to business contacts or the public (Khodykin *et al*., 2019, p. 477). In order to answer this question, legal scholarship again proposes to evaluate various criteria: 1) the sensitivity of confidential information; 2) the extent to which the interests of third parties may be affected by disclosure of such evidence; 3) the interest in preserving the confidentiality of personal reports; 4) the wider interest which may be seen to exist in preserving confidentiality; 5) the probative value of the confidential information, *etc*. (Ashford, 2013, p. 165; O'Malley, 2019, p. 315).

The early draft of the IBA Rules referred only to the admissibility of commercial and technical information. Certain international political organisations feared that "commercial and technical confidentiality" might not include confidentiality within such organisations. In light of this, the IBA Rules were supplemented by Art. 9(2)(f) to put such special political or institutional sensitivity on an equal footing with commercial or technical confidentiality (1999 IBA Working Party & 2010 IBA…, 2010, p. 26).

The text of Art. 9(2)(f) of the IBA Rules provides that evidence can be excluded due to the political or institutional sensitivity that the arbitral tribunal determines to be compelling and, therefore, as with regard to Art. 9(2)(e) leaves a wide discretion to determine whether the considerations of sensitivity are sufficient to exclude the evidence.

It is important to note that in some jurisdictions, political or institutional sensitivity could be considered to be a certain type of privilege (see, *e.g*. Ginsburg, Mosk, 2013, p. 363). Thus, if the arbitral tribunal determines that legal or ethical rules applicable in international arbitration establish such privilege, evidence which falls under such protection could be excluded in accordance with Art. 9(2)(b) of the IBA Rules. Meanwhile, Art. 9(2)(f) allows

the tribunal to exclude evidence on the grounds of political or institutional sensitivity, even if that type of confidentiality is considered not to be protected by evidentiary privileges (Khodykin *et al*., 2019, p. 477).

The IBA Rules do not specify what should be considered political or institutional sensitivity, nor what criteria an arbitral tribunal could use to determine its admissibility. The scholarly writings indicate that politically sensitive information may consist of various types of information, such as information related to the national security interest, the technical data on weapons, the algorithms used for encryption programmes, and certain information of national banks, while the institutional sensitivity could constitute information which is regarded as sensitive by organisations, such as the United Nations, the World Bank or the International Monetary Fund (Zuberbühler *et al*., 2012, p. 180).

As mentioned, the political or institutional sensitivity has to be "compelling" for the arbitral tribunal to exclude it. The arbitral tribunal is not obliged to respect a government or institutional classification made out merely because it is so certified under the domestic law (Ashford, 2013, p. 166). Like other provisions of the IBA Rules analysed above, the application of Art. 9(2)(f) of the IBA Rules calls for a balancing approach. Legal scholarship distinguishes the following criteria which could be taken into account by the arbitral tribunal: 1) the provisions of the domestic law which protect the confidentiality of politically or institutionally sensitive information; 2) the content of the document itself (in other words, whether the content of the document is of the type that should qualify for protection under the domestic law); 3) whether the interest in maintaining confidentiality is compelling when weighted against other competing public interests such as the proper administration of justice (including the probative value of confidential evidence), equal treatment of parties or the principle of fairness, *etc*. (O'Malley, 2019, p. 316–327).

#### 1.2.3.4. The Admissibility of Evidence due to the Considerations of Procedural Economy, Proportionality, Fairness or Equality of the Parties that the Arbitral Tribunal Determines to be Compelling.

Art. 9(2)(g) of the IBA Rules provides that the arbitral tribunal shall, at the request of a party or on its own motion, exclude evidence due to the "considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling". Art 9(2)(g) of the IBA Rules is a catch-all provision intended to assure procedural

economy, proportionality, fairness and equality in the arbitration case (see 1999 IBA Working Party & 2010 IBA…, 2010, p. 26). Thus, when the evidence cannot be excluded on one of the other grounds set out in Art. 9(2) of the IBA Rules, the evidence could possibly be excluded based on Art. 9(2)(g) of the IBA Rules.

The principles of procedural economy, fairness, equality, *etc*., have already been mentioned several times in this thesis. Both the Model Law and the rules of arbitral procedure require the arbitral tribunal and the parties to follow these principles (see **parts 1.2.1., 1.2.2.**). This general obligation is also established in paragraph 1 of the Preamble of the IBA Rules.[28] Art. 9(2)(g) of the IBA Rules establishes a close relationship between these principles and the admissibility of evidence. To shed more light on the substance and application of Art. 9(2)(g) of the IBA Rules, the following paragraphs provide an overview of how the principles of procedural economy, proportionality, fairness and equality are manifested in deciding on the admissibility of evidence in international commercial arbitration.

*Firstly*, Art. 9(2)(g) of the IBA Rules provides that the arbitral tribunal shall, at the request of a party or on its own motion, exclude evidence due to the considerations of procedural economy. The importance of both the principles of expediency and efficiency has already been explored in the analysis of civil procedure law (see **part 1.1.3.2.4.**). Arbitration, as an alternative dispute resolution forum, is also interested in the expeditious and cost-effective resolution of disputes (see, *e.g*. Redfern *et al*., 2015, p. 327–328). In the context of international commercial arbitration the relationship between these principles and the admissibility of evidence is most often characterised by the rule establishing the (in)admissibility of late evidence. The late submission of evidence in arbitration delays the entire proceedings, which inevitably makes the whole process more expensive. Due to this reason, Art. 9(2)(g) of the IBA Rules, albeit implicitly, establishes the arbitral tribunals' power to declare late evidence inadmissible.

The IBA Rules do not provide specific conditions for the application of this rule. However, legal scholarship provides that tribunals will most likely decide on whether the procedural economy should lead to the exclusion of evidence by balancing various criteria: 1) the probative value or character of the evidence; 2) the prejudice to the adverse party that would be caused by

[28] Paragraph 1 of the Preamble to the IBA Rules states: "These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations […]."

admitting evidence (which includes a consideration of the general disruption of the procedure); 3) the cause of the delay, in particular, whether it was legitimate and reasonable given the circumstances; 4) any other need and context of the case that the arbitral tribunal decides to take into account (O'Malley, 2019, p. 331).

*Secondly,* Art. 9(2)(g) of the IBA Rules provides that the arbitral tribunal shall, at the request of a party or on its own motion, exclude evidence due to the considerations of proportionality. The text of the IBA Rules does not lay down specific rules on the admissibility of evidence in relation to applying this principle. Nevertheless, as mentioned above, the application of the principle of proportionality is closely linked to Art. 9(2)(c) of the IBA Rules, which allows the arbitral tribunal to exclude evidence or refuse the production of specific evidence due to the unreasonable burden (see **part 1.2.3.2.**).

*Thirdly,* Art. 9(2)(g) of the IBA Rules provides that the arbitral tribunal shall, at the request of a party or on its own motion, exclude evidence due to the considerations of fairness. As mentioned above, the implementation of the principle of fairness is inherent in both civil procedure law and arbitration law (see **parts 1.1.3.2.2., 1.2.2.**). Until the 2020 amendments to the IBA Rules, the arbitral tribunals' power to exclude evidence due to the considerations of fairness was mostly related to the admissibility of illegally obtained evidence (see, *e.g*. Bertrou, Alekhin, 2018, p. 30). With the addition of a separate provision on the admissibility of illegally obtained evidence in the IBA Rules after the 2020 amendments, the issue of admissibility of illegally obtained evidence will be analysed not in the context of Art. 9(2)(g), but in the context of Art. 9(3) of the IBA Rules (see **part 1.2.3.5.1.**).

However, the principle of fairness also implies a wide range of other cases where the requirements of fairness may render the evidence inadmissible. For example, the principle of fairness may be a basis for excluding evidence where a party appears to be manipulating access to the relevant information, *e.g.* it has been held that procedural fairness requires that the party should not be allowed to present evidence in the case, if, earlier in the process, the same party has claimed that the same evidence is not within its possession, custody or control in response to a disclosure request (O'Malley, 2019, p. 335–336).

The IBA provides another possible example. Documents that might be considered privileged within one national legal system may not be considered privileged within another. If this situation was to create an unfairness, the arbitral tribunal might exclude the production of the technically non-privileged documents according to Art. 9(2)(g) (1999 IBA Working Party & 2010 IBA…, 2010, p. 26). Moreover, some scholars point out that, like the

principle of procedural economy, the principle of fairness may also imply the exclusion of late evidence since the principle of fairness in arbitration essentially implies another principle, *i.e.* the principle of "no surprises" (Khodykin *et al*., 2019, p. 14).

*Fourthly*, Art. 9(2)(g) of the IBA Rules provides that the arbitral tribunal shall, at the request of a party or on its own motion, exclude evidence due to the considerations of equality of the parties.

The principle of equality is one of the fundamental principles of arbitration (Zuberbühler *et al*., 2012, p. 181; Fouchard *et al*., 1999, p. 957–958). As with other principles, the principle of equality may imply various admissibility rules. In the context of the taking evidence, a tribunal's duty to treat parties equally is generally fulfilled by applying the evidentiary procedure with equal force. This may, in some instances, lead to the exclusion of evidence submitted in violation of such rules (O'Malley, 2019, p. 337). For example, the evidence submitted by the party may be declared inadmissible because the other party did not have the opportunity to respond to it or to present evidence of its own to rebut it.

Therefore, as seen from the analysis, Art. 9(2)(g) of the IBA Rules may lead to the application of various admissibility rules in the arbitral procedure. It is not without a reason that, as mentioned at the beginning of this subpart, Art. 9(2)(g) of the IBA Rules is referred to as a "catch-all provision". Additionally, Art. 9(2)(g) of the IBA Rules retains the broad discretion of arbitrators since the text of Art. 9(2)(g) of the IBA Rules itself explicitly states that evidence may be declared inadmissible due to the considerations of procedural economy, proportionality, fairness or equality of the parties "that the Arbitral Tribunal determines to be compelling".

#### 1.2.3.5. The Admissibility Rules set forth in other provisions of the IBA Rules

The IBA Rules are not limited to Art. 9(2). Various other provisions of the IBA Rules enshrine additional admissibility rules. This part of the thesis explores other rules contained in the IBA Rules, namely: 1) the admissibility rule that excludes illegally obtained evidence (see **part 1.2.3.5.1.**); and 2) the admissibility rules that exclude evidence due to infringements of procedural law (see **part 1.2.3.5.2.**).

#### 1.2.3.5.1. The Admissibility of Illegally Obtained Evidence

In both the common law tradition and the civil law tradition, albeit with some exceptions, the admissibility of illegally obtained evidence forms an important part of the concept of admissibility of evidence (see **part 1.1.3.1.**). As mentioned above, for a long time, Art. 9(2)(g) of the IBA Rules and the principle of fairness enshrined therein have presupposed the arbitral tribunals' right to exclude the illegally obtained evidence (see **part 1.2.3.4.**). The 2020 revision of the IBA Rules made an important addition by introducing new Art. 9(3) of the IBA Rules, which explicitly establishes the arbitral tribunals' right to exclude evidence obtained illegally: "The Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally."

Neither the rules of arbitration procedure nor the case law of arbitral tribunals provides a unified answer on how this rule should be applied. In the case law of both international courts and international arbitral tribunals, we can find cases where the arbitral tribunals have admitted the illegally gathered evidence. In contrast, in other instances, the exact opposite decision has been taken, and the illegally obtained evidence has been declared inadmissible (see, *e.g.* Reisman, Freedman, 1982, p. 754; Bertrou, Alekhin, 2018, p. 15; **part 3.1.2.4.**). The *status quo* of illegally obtained evidence is summed up by legal scholarship as follows: "Where international arbitration is concerned, it is likely to be a discretionary matter for a tribunal and may depend on the circumstances" (Waincymer, 2012, p. 797).

These reasons have led to the wording of Art. 9(3) of the IBA Rules. The IBA explains that the 2020 Review Task Force concluded that there was no clear consensus on the issue of admissibility of illegally obtained evidence and, thus, has sought to allow for this diversity by providing that the arbitral tribunal "may" exclude evidence under Art. 9(3) of the IBA Rules (1999 IBA Working Party & 2010 IBA…, 2021, p. 30–31).

My previous research, which analyses the admissibility of illegally obtained evidence in more detail, points out that since neither the rules of arbitration nor the IBA Rules provide any answers, the question of how the issue of illegally obtained evidence should be dealt with is left to legal scholarship. The analysis of legal scholarship leads to the conclusion that the prevailing suggestion is to apply a balancing test, which allows for the assessment of various criteria (Bartkus, 2021b, p. 73).

For example, some authors believe that the arbitral tribunal should assess the following criteria: 1) whether the evidence was unlawfully gathered by the party which seeks to rely on it; 2) whether the public interest supports the exclusion of the evidence; 3) whether the interest of justice supports the

exclusion of the evidence (Blair, Gjokovic, 2018, p. 256–258). Other authors propose to balance completely different criteria: 1) the rights that were violated by the unlawful taking of the evidence; 2) the circumstances surrounding the infringement. For example, it should be considered whether the infringement was deliberately intended to gather the evidence or whether the evidence was gathered only incidentally; 3) the circumstances related to the evidence, such as whether a party was involved in the unlawful taking of the evidence or whether the evidence was publicly available prior to the commencement of proceedings, whether the evidence is relevant to the subject-matter of the dispute and material to the resolution of the dispute, *etc*.; 4) the circumstances surrounding the proceedings, such as the nature of proceedings, the subject matter, *etc*. (Fallah, 2020, p. 147–176).

In addition, the IBA itself suggests that arbitral tribunals should apply the balancing test and assess the following criteria: 1) whether the party offering the evidence was involved in the illegality; 2) the considerations of proportionality; 3) whether the evidence is material and outcome-determinative; 4) whether the evidence has entered the public domain through public "leaks"; 5) the clarity and severity of the illegality (1999 IBA Working Party & 2010 IBA…, 2021, p. 30–31).

Therefore, as can be seen from the paragraphs above, Art. 9(3) of the IBA not only empowers the arbitral tribunal to decide on the admissibility of illegally obtained evidence but also gives it broad discretion as to how to do so.

#### 1.2.3.5.2. The Admissibility of Evidence due to the Failure to Comply with the Procedural Rules

As described above, the evidence can be excluded not only due to its unlawfulness in terms of substantive law but also due to the failure to comply with procedural law (see parts **1.1.1.2., 1.1.2.3.**). The IBA Rules also lay down three instances when the admissibility rules may exclude evidence due to infringements of procedural law. All of these instances are analysed in the following paragraphs.

*Firstly*, the IBA Rules lay down admissibility rules that determine the admissibility of new evidence. As mentioned above, the principle of economy enshrined in Art. 9(2)(g) of the IBA Rules determines the arbitral tribunals' power to declare late evidence inadmissible (see **part 1.2.3.4.**). The IBA Rules go beyond this provision and also provide for more specific cases where the arbitral tribunal is entitled to exclude new evidence from the case.

Art. 4(6) of the IBA Rules provides for a limited possibility to the parties to submit additional (the second round of) witness statements, including statements from persons not previously named as a witness: "If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to: (a) matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration; or (b) new factual developments that could not have been addressed in a previous Witness Statement." An identical provision is established in Art. 5(3) of the IBA Rules concerning expert reports.

Although the second round of witness or expert evidence is common in the practice of international arbitration, the arbitral tribunal may limit the second round of evidence to two instances. As is clear from the text of Art. 4(6) and 5(3) of the IBA Rules, the first requirement for the second round of evidence is that it may only respond to the matters contained in a witness statement, an expert report or other submissions of the other party. The second requirement, which was added in 2020, clarified that the second round of witness statements or expert reports may, in certain circumstances, address new factual developments, whether or not referred to in another party's earlier submissions (1999 IBA Working Party & 2010 IBA…, 2021, p. 19).

While applying all of these rules, the arbitral tribunal retains the broad discretion. As stated in legal scholarship, each situation has to be considered on the facts of a particular case. There may be circumstances where even very late delivery of new evidence is justified in order to ensure that a party has a proper opportunity to present its case (Khodykin *et al*., 2019, p. 252).

*Secondly*, the IBA Rules establish the admissibility rules that determine the exclusion of witness statements or expert reports due to a failure to appear for the testimony. Art. 8(1) of the IBA Rules establishes the procedural requirement for a witness and an expert to appear for the testimony at the hearing. The question may naturally arise as to what the consequences would be if a witness or an expert is not able to appear for the testimony. This question is answered by Art. 4(7) of the IBA Rules: "If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise" An identical provision is also established in Art. 5(5) of the IBA Rules in relation to the party's expert.

The main rationale behind the said rules is the party's right to cross-examine witnesses or experts. The cross-examination is often described as "beyond any doubt the greatest legal engine ever invented for the discovery of truth" (Wigmore, 1923, p. 27), and it is widely assumed that the deprivation of such a right may give rise to challenges based on the lack of procedural fairness (O'Malley, 2019, p. 131). However, the right to cross-examine is not absolute. The arbitral tribunal may disregard the witness statement or expert report if the two conditions are met: 1) the witness or expert fails to provide a valid reason; 2) the existence of exceptional circumstances.

The IBA Rules do not answer what constitutes a "valid reason" or "exceptional circumstances". Thus, the application of these conditions is subject to the discretion of arbitral tribunals. Legal scholarship points to a number of examples that could determine the existence of a "valid reason", such as legitimate and serious illness of the expert or witness or disappearance of a witness or expert due to reasons unconnected to the arbitration. Meanwhile, the "exceptional reasons" may also cover very different situations. These situations might be linked to the probative value of the statement or report or to situations where a tribunal has little other evidence to consider (O'Malley, 2019, p. 136). Moreover, even if these conditions are established, the arbitral tribunal still retains the discretion not to exclude such evidence, as the arbitral tribunal should, in all cases, balance the legitimate interest of the parties (Khodykin *et al*., 2019, p. 259).

*Thirdly*, the IBA Rules lay down rules that determine the admissibility of report by an unqualified and/or partial expert. National civil procedure laws of various jurisdictions contain specific requirements that must be met by an expert in order for his / her report to be admissible evidence (see **part 1.1.1.1**). Art. 6(2) of the IBA Rules also lays down the requirements for experts appointed by the arbitral tribunal: "The Tribunal-Appointed Expert shall, before accepting appointment, submit to the Arbitral Tribunal and to the Parties a description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal. Within the time ordered by the Arbitral Tribunal, the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take."

As can be seen from the text of Art. 6(2) of the IBA Rules, the tribunal-appointed expert report could be considered inadmissible evidence if the expert does not meet two criteria: 1) the qualification; and 2) the independence. If it is established that the expert (both before or after the appointment of the expert) does not meet at least one of these criteria, the arbitral tribunal has the power to exclude the expert from arbitration proceedings.

Art. 6(2) of the IBA Rules and its proper application ensure the main objective of the expertise, *i.e.* to obtain technical information in order to guide the search for the truth in arbitration proceedings (Redfern *et al*., 2015, p. 395). In contrast, an unqualified or biased expert not only do not help the arbitral tribunal to determine the truth and thus infringe fact-finding accuracy in arbitration proceedings but also may clearly violate the principle of fairness.

As with regard to other rules, the arbitral tribunals' discretion as to what to do with such an expert and its report is quite broad. For example, if the arbitral tribunal establishes that the expert lacks competence after the appointment of the expert, the tribunal is not obliged to revoke the expert's mandate. Another possible solution may be appointing a second (sub-)expert (Zuberbühler *et al*., 2012, p. 136).

Hence, as can be derived from part 1.2.3 of this thesis, the IBA Rules are undoubtedly an important source of the admissibility of evidence in international commercial arbitration. In contrast to other sources of arbitration law, the IBA Rules provide a significantly more detailed set of admissibility rules that can be applied in international commercial arbitration proceedings.

Although the IBA Rules set out quite detailed admissibility rules, the above presented research identifies one feature which is common to all of the rules. As in the Model Law or the arbitral procedure rules, the application of the admissibility rules established in the IBA Rules is left exclusively to the discretion of arbitral tribunals. In other words, it is not specific provisions of the IBA Rules but the arbitral tribunal itself that determines both how to apply the rules and whether to apply them at all. The admissibility rule that deals with the admissibility of illegally obtained evidence is a prime example. The question of whether the illegally obtained evidence should be admissible has no answer in the IBA Rules and is left to the arbitral tribunal's discretion.

The broad discretion of arbitral tribunals may not be immediately obvious since Art. 9(2) of the IBA Rules states that the arbitral tribunal "shall" and not "may" "at the request of a Party or on its own motion, exclude from evidence or production […]." However, as it is explained by the IBA: "While the provision states that the arbitral tribunal "shall" exclude evidence meeting one of the specified exceptions, the arbitral tribunal obviously retains its discretion

to determine whether one of the specified criteria has been met" (1999 IBA Working Party & 2010 IBA…, 2010, p. 25). In support of this position, some scholars use the term "may" instead of "shall" when analysing the admissibility rules in Art. 9 of the IBA Rules, for example: "Under Article 9.2(e), the tribunal may exclude evidence […] on compelling ground of commercial or technical confidentiality" (Khodykin *et al*., 2019, p. 476).

Of course, it is important to note that the discretion of the arbitral tribunals is not unlimited, and this is due to three reasons, which are found in the IBA Rules and are detailed in the following paragraphs.

*Firstly*, the application of the IBA Rules depends on the parties' will. In other words, the IBA Rules give power to the parties to modify or waive certain provisions of the IBA Rules. For example, the parties may agree on the mandatory application of specific legal privileges in arbitration proceedings. However, as already mentioned in the previous parts of this thesis, parties rarely agree to apply only a part of or decide to modify the IBA Rules. Thus, in most cases, these IBA Rules will apply in full.

*Secondly*, the arbitral tribunals' discretion may be limited by the already-mentioned general principles of arbitral procedure. Provision 1 of the Preamble of the IBA Rules indicates: "These IBA Rules on the Taking of Evidence in International Arbitration are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations." As legal scholarship points out, whenever a tribunal doubts whether to make a particular form of order, it should ask itself whether making the order would be efficient, economical and fair (Ashford, 2013, p. 11).

*Thirdly*, the arbitral tribunal's discretion may be limited by the mandatory provision of law determined to be applicable to the case by the parties or by the arbitral tribunal. Art. 1(1) of the IBA Rules provides: "Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the extent that any specific provision of them may be found to be in conflict with any mandatory provision of law determined to be applicable to the case by the Parties or by the Arbitral Tribunal." However, as already mentioned several times above, national arbitration laws usually give the arbitral tribunals a broad discretion with regard to various procedural questions, while the substantive law chosen by the parties should not have a significant impact on the application of the admissibility rules established in international commercial arbitration (see **parts 1.2.1, 1.2.2.**).

### 1.2.4. The Admissibility of Evidence in International Commercial Arbitration: Concluding Remarks

The analysis of authoritative and widely used sources of international commercial arbitration identifies the main features of the *status quo* of admissibility of evidence, which allows us to reveal and clarify how the admissibility of evidence is understood in international commercial arbitration. Before moving on to the conclusions, it is worth highlighting two main features of the admissibility of evidence in international commercial arbitration, which have been highlighted in parts 1.2.1 – 1.2.3 of the thesis.

*Firstly*, the admissibility of evidence in arbitration depends on the will of the parties. Arbitration can be described as a nexus of contracts, *i.e.* a contractual dispute resolution mechanism. Arbitration, in this view, is a case of displacing adjudication with an alternative, party-chosen procedure that nevertheless retains the judgment-rendering function (Markovits, 2010, p. 431). The contractual nature of arbitration is also reflected in the admissibility of evidence. Both the Model Law, the arbitration procedure rules and the IBA Rules, first and foremost, provide for the right of the parties to agree on the application of specific admissibility rules. Which rules of admissibility of evidence are applied in proceedings and, consequently, what is the concept of admissibility of evidence in international commercial arbitration depends primarily on the agreement of the parties. Due to the parties' will, the conceptual approach towards the admissibility of evidence in international commercial arbitration may be characterised by various categories of admissibility rules, such as admissibility rules designed to improve fact-finding accuracy or admissibility rules that exclude evidence because of its content, *etc*.

However, as noted, the parties' agreements, while possible, are very rare in practice. In fact, parties are generally reluctant to agree on any rules of evidence at all since bringing up the subject of detailed procedures for future litigations would have a chilling effect on the negotiations of commercial agreements (Craig *et al*., 1990, p. 373). Accordingly, in the absence of an agreement between the parties, the evidentiary provisions of the arbitration laws and the arbitration procedure rules have an important significance in the context of the admissibility of evidence.

*Secondly*, the admissibility of evidence in arbitration depends on the discretion of arbitral tribunals. In the absence of an agreement between the parties, the admissibility of evidence is left to the broad discretion of arbitral tribunals. With some minor exceptions, neither the Model Law nor the rules of arbitration procedure provide for specific rules on the admissibility of

evidence. Moreover, even when the arbitration law sources lay down rules on the admissibility of evidence, the application of these rules is also left to the broad discretion of arbitral tribunals (see **parts 1.2.1., 1.2.2.**).

The IBA Rules, which summarise the best practice in international arbitration, can be characterised by quite detailed rules on the admissibility of evidence. However, as explained above, the application of these rules is also primarily based on the broad discretion of arbitral tribunals, *i.e.* the arbitral tribunals are given very broad powers to decide how and in what circumstances and whether to apply the admissibility rules at all (see **part 1.2.3.**).

Of course, the broad discretion of arbitral tribunals is not absolute. The arbitration law sources examined above suggest that in international commercial arbitration, the arbitral tribunal is obliged to take into account the following aspects when faced with questions of the admissibility of evidence: 1) the agreement between the parties on specific admissibility rules; 2) the general principles of arbitration procedure, *i.e.* the fairness, the efficiency, the economy and the equal treatment of the parties; 3) the mandatory provisions of the law that apply in the arbitration proceedings, principally the *lex arbitri*;

The analysis in part 1.2.3 and these two main features of the admissibility of evidence allow us to identify further the two main approaches towards the admissibility of evidence. As in the analysis of civil procedure law, the admissibility of evidence in international commercial arbitration should be understood from the same two approaches, *i.e.* the conceptual approach (see **part 1.2.4.1.**) and the purposive approach (see **part 1.2.4.2.**).

#### 1.2.4.1. The Conceptual Approach towards the Admissibility of Evidence in International Commercial Arbitration

The conceptual approach towards the admissibility of evidence reflects the admissibility rules established in various sources of arbitration law. The research above indicates that the admissibility rules can be grouped into the same categories of the admissibility rules as those identified in the analysis of the admissibility of evidence in civil procedure law (see **part 1.1.3.1.**):

| **The Categories of the Rules of Admissibility of Evidence** | **The Admissibility Rules as Set Out in the Arbitration Law Sources** |
|---|---|
| Admissibility rules designed to improve fact-finding accuracy | Art. 20(5) of the LCIA Arbitration Rules |

| | |
|---|---|
| | Art. 4(7) 5(5), 6(2) and 9(2)(g) of the IBA Rules |
| Admissibility rules that exclude evidence because of its content | Art. 9(2)(b), (e), (f) and (g) of the IBA Rules |
| Admissibility rules that exclude evidence due to infringements of substantive law or procedural law | Art. 23(2) of the Model Law<br><br>Art. 22 and 27(3) of the UNCITRAL Arbitration Rules<br><br>Art. 25(1) and 27 of the ICC Arbitration Rules<br><br>Art. 22(1)(i) of the LCIA Arbitration Rules<br><br>Art. 4(6), (7), 5(3), (5), 6(2), 9(2)(g) and 9(3) of the IBA Rules |

While such an approach may, at first glance, give a general impression of the admissibility of evidence in international commercial arbitration, as has already been mentioned on several occasions, the mere reference to specific rules of law is insufficient to provide a comprehensive account of any legal concept. In order to shed a light on the substance of these rules, we need to examine the admissibility of evidence in the context of the purposive approach.

#### 1.2.4.2. The Purposive Approach towards the Admissibility of Evidence in International Commercial Arbitration

The purposive approach towards the admissibility of evidence in civil proceedings has helped to identify the main purposes behind the admissibility rules. The admissibility of evidence in civil proceedings acts as a procedural instrument that 1) helps to avoid misleading information and thus improves fact-finding accuracy in the judicial process; 2) allows ensuring various other objectives and principles of judicial proceedings (see **part 1.1.3.2.**).

Can the admissibility of evidence in arbitral proceedings also be characterised by the same purposive approach? The answer to this question depends on the discretion of the arbitral tribunals. The arbitral discretion in

the context of the admissibility of evidence can be distinguished into 1) discretion in a general sense; and 2) discretion in a narrow sense.

The discretion in a general sense is manifested in the provisions of both the Model Law, the arbitration procedure rules and the IBA Rules, which establish that the arbitral tribunal is the sole entity in the arbitral proceeding that has the power to decide on the admissibility of evidence (see Art. 19(2) of the Model Law, Art. 27(4) of the UNCITRAL Arbitration Rules, Art. 19 of the ICC Arbitration Rules, Art. 22(1)(vi) of the LCIA Arbitration Rules, Art. 9(1) of the IBA Rules). In other words, international commercial arbitration establishes a simple and clear rule that, in the absence of an agreement to the contrary by the parties, the issues of the admissibility of evidence shall be decided not by one of the parties, not by the national court, not by the arbitral institution or not by any other entity, but by the arbitral tribunal.

The discretion, in a narrow sense, gives the arbitral tribunal not only the right to decide on the admissibility of evidence but also the right to decide how specific rules of admissibility will be applied. The arbitral tribunals' discretion extends not only to the decision on whether to apply a particular rule of admissibility but also to how to apply it. The narrow sense of discretion becomes apparent when we analyse the legislative formulation of the admissibility rules. As seen from the analysis above, the admissibility rules are not formulated as "legal rules" but rather in the form of "discretion-conferring provisions" that are applied by balancing various criteria when arbitral tribunals try to decide on the admissibility of evidence.

The distinction between the "legal rules" and the "discretionary provisions" is very important. On the one hand, the legal rule clearly establishes the desired legal answer to the legal issue and withdraws from the adjudicator's consideration balancing the circumstances that would be relevant to the decision-making. On the other hand, discretionary provisions, for example, legal standards, are legal or social criteria that adjudicators use to judge actions under particular circumstances. In that sense, standards are circumstantial, open-ended and allow the adjudicator to make a fact-specific determination on the legal issue (Parisi, 2004, p. 510).

A good example is provided by Justice Antonin Scalia of the US Supreme Court: "In deciding, for example, whether a particular commercial agreement containing a vertical restraint constitutes a contract in restraint of trade under the Sherman Act, a court may say that under all the circumstances the particular restraint does not unduly inhibit competition and is therefore lawful; or it may say that no vertical restraints unduly inhibit competition, and since this is a vertical restraint it is lawful. The former is essentially a discretion-

conferring approach; the latter establishes a general rule of law." (Scalia, 1989, p. 1177).

The difference between legal rules and discretionary provisions is also commonly emphasised in terms of whether the legal provision is established *ex ante* or *ex post*. For example, a rule may entail an advance determination of what conduct is permissible, leaving only factual issues for the adjudicator: a rule might prohibit "driving in excess of 55 miles per hour on expressways." A discretionary provision may entail leaving both specifications of what conduct is permissible and factual issues for the adjudicator: a discretionary provision might prohibit "driving at an excessive speed on expressways." (see Kaplow, 1992, p. 559–560).

In terms of the admissibility of evidence, a legal rule *ex ante* determines what evidence is inadmissible. For example, Art. 29(4) of the Croatian Constitution states: "Evidence illegally obtained shall not be admitted in court proceedings." (see, *e.g.* Nunner-Kautgasser, Anzenberger, 2016, p. 203). Meanwhile, the admissibility rules in arbitration law are not formulated as legal rules but as discretionary provisions, which are implemented by balancing various criteria relevant to the arbitration case. For example, Art. 9(3) of the IBA Rules states: "The Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally." Both the IBA and legal scholarship take the position that Art. 9(3) of the IBA Rules implies balancing of various not pre-determined criteria and hence do not implies a direct answer to the question of whether illegally obtained evidence should be admissible (see **part 1.2.3.5.1**.; Bartkus, 2021b, p. 73).

The discretion-conferring approach is present in virtually all admissibility rules in arbitration proceedings analysed above. For example, the text of Art. 9(2)(e) of the IBA Rules states that the arbitral tribunal should determine whether the commercial or technical confidentiality is "compelling". The determination is based on applying and balancing various criteria (see **part 1.2.3.3.**, Ashford, 2013, p. 165; O'Malley, 2019, p. 315). Art. 23(2) of the Model Law, which establishes the rule for the admissibility of late evidence, also does not provide a clear answer as to when the arbitral tribunal should consider the admission of late evidence appropriate (see **part 1.2.1.**; Bantekas *et al*., 2020, p. 653).

To illustrate the abovementioned discretion-conferring approach, a quote from US Supreme Court Justice Potter Stewart fits perfectly: "I know it when I see it" (Park, 2001, p. 259). Similarly, the discretionary provisions mean that arbitrators declare evidence inadmissible only after seeing the evidence that the arbitrator believes is inadmissible. While the *ex ante* legal rule approach

presupposes another citation: “I see it because I know it”, *i.e.* an *ex ante* rule of admissibility allows the arbitrator to see the inadmissible evidence.

The discretion-conferring formulation of the admissibility rules should not be considered necessarily negative. As mentioned by Justice Scalia, this is one image of how justice can be done – one case at a time, taking into account all the circumstances and identifying within that context the “fair” result (Scalia, 1989, p. 1176).

Nevertheless, the discretion-conferring formulation of the admissibility rules is central to the purposive approach towards the admissibility of evidence. The establishment of the *ex post* rather than *ex ante* admissibility rules allows the arbitral tribunal to apply the admissibility rules in a variety of ways (see **part 1.2.4.1.**), *i.e.* either to apply them by balancing one set of criteria or a different set of criteria, or, in certain cases, do not apply them at all. This conditional application of the admissibility rules only achieves their purposes to a limited extent. The admissibility rules do not function as a set of pre-determined rules that help the arbitral tribunal avoid misleading evidence or to ensure efficient proceedings. On the contrary, it is up to the arbitrators themselves to decide whether they should exclude the misleading information from proceedings, whether the proceedings based on illegally obtained evidence will undermine the principle of fairness or the legitimacy of the arbitral award, *etc*. In other words, in the arbitration proceedings, it is not the admissibility rules that ensure and perform the functions of the admissibility of evidence as referred to in part 1.1 of this thesis, but it is the arbitrators that decide on the fulfilment of those functions.

Accordingly, the discretion-conferring approach towards the admissibility rules presupposes the image of an arbitrator, not as a person who is sometimes prone to various epistemic mistakes, but as a person who can understand, comprehend and decide on various procedural matters, *i.e.* almost like the famous R. Dworkin’s Judge Hercules (Dworkin, 1998, p. 239). This position seems to be supported by legal scholarship: “International arbitration markedly differs from municipal court proceedings. The finder of fact in arbitration has a significantly greater expertise than a lay juror. Arbitrators also are not judges of general jurisdiction. They are specialists chosen for their specific subject-matter expertise. This expertise significantly changes the calculus whether information is more probable to mislead a finder of fact than it is to lend additional support to its factual determination.” (Sourgens, *et al.*, 2018, p. 238).

Therefore, the admissibility of evidence in arbitral proceedings can be characterised as “floating”, *i.e.* dependant, first of all, on the will of the parties and, more importantly, on the arbitrators’ discretion. The arbitration law

sources allow us to distinguish three main categories of the rules of admissibility of evidence: 1) admissibility rules designed to improve fact-finding accuracy; 2) admissibility rules that exclude evidence because of its content; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law. However, the application of these specific rules of admissibility of evidence, respectively, as well as the fulfilment of the purposes of these rules in arbitral proceedings, do not depend on *ex ante* legal rules but, in the absence of an agreement between the parties to the contrary, on the discretion of the arbitral tribunal. In this sense, the admissibility of evidence resembles one of the characters of classic literature, Alice in Wonderland – Cheshire Cat, who keeps appearing and disappearing and fading away so that sometimes one can see the whole body, sometimes only a head, sometimes only a vague outline and sometimes nothing at all, so that Alice was never sure whether or not he was there or, indeed, whether he existed at all (Twining, 1990 quoted, Stein, 2005, p. 110).

# 2. THE EXERCISE OF DISCRETION IN DECIDING ON THE ADMISSIBILITY OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

Part 1 of this thesis argues in detail that the application of the admissibility rules depends on the will of the parties and, in the absence of an agreement between the parties, on the discretion of the arbitral tribunal. Accordingly, the fulfilment of the purposes pursued by the admissibility rules depends mostly on the arbitral tribunals' broad discretion rather than on the *ex ante* admissibility rules.

The formulation of admissibility rules inevitably raises the question: how do arbitral tribunals exercise this, albeit limited, but very broad discretion? Only by answering this question, we can properly uncover, evaluate and, if necessary, improve the admissibility rules in international commercial arbitration.

As detailed above, there are three main categories of admissibility rules in arbitration proceedings: 1) admissibility rules designed to improve fact-finding accuracy; 2) admissibility rules that exclude evidence because of its content; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law (see **part 1.2.4.1.**).

At first glance, it may seem that the most appropriate research approach is to analyse how arbitral tribunals exercise their discretion in relation to each of the abovementioned categories of admissibility rules. Unfortunately, due to the confidentiality of the arbitral tribunal's awards (see, *e.g.* Born, 2021, p. 3001–3002), which does not allow us to obtain a clear picture of all the peculiarities of the exercise of discretion, and the limited scope of the dissertation itself, it is inefficient to analyse the application of each of the abovementioned admissibility rules in the arbitral procedure.

On the other hand, this should not preclude the analysis of the exercise of arbitral tribunals' discretion in the context of the admissibility of evidence. In some respects, it is more useful to analyse the application of admissibility rules in a broader context than in a specific legal situation with its particularities. As was shortly explained in the introduction of this thesis, the exercise of discretion in the context of the admissibility of evidence can be characterised by a general approach towards the admissibility of evidence. This approach can be described as a "liberal approach towards the admissibility of evidence" since it is based on a liberal view towards the application of admissibility rules. Accordingly, part 2.1 reveals this prevailing approach towards the admissibility of evidence in arbitration proceedings (see

**part 2.1**.), while part 2.2 critically assesses this approach in order to evaluate the exercise of arbitral tribunals' discretion (see **part 2.2**.). Finally, at the end of part 2 of this thesis, concluding remarks are provided (see **part 2.3.**).

## 2.1. The Liberal Approach towards the Admissibility of Evidence

The liberal approach towards the admissibility of evidence is found not only in international commercial arbitration proceedings but also in proceedings before international courts or tribunals in general. As early as 1794, the Jay Treaty concluded between the USA and Great Britain authorised the Mixed Commissions to consider all forms of evidence without imposing restrictions on the rules of evidence of the two countries. Various subsequent international treaties governing the dispute settlement process have adopted the same liberal approach (Amerasinghe, 2005, p. 164).

This liberal view is confirmed, among other things, by the evidentiary practice of modern international courts. As W. Reisman and E. Freedman argued in 1982: "the practice of international tribunals in the admission of evidence has developed a pattern comparable to that of the liberal system of procedure in the civil law countries." (Reisman, Freedman, 1982, p. 738). As another source of legal scholarship substantiates it: "The traditional practice of international tribunals is thus to admit virtually any evidence, subject to evaluation of its relevance, credibility, and weight." (Brower, 1994, p. 48).

The current case law of international courts also confirms this view. For example, the International Court of Justice has a long-standing practice of applying the freedom of admissibility of evidence, and it prefers to analyse issues of evidence as a matter of weight and not as a matter of admissibility (Chen, 2015, p. 39). Meanwhile, in its case law, the ECtHR has stated: "In the proceedings before the Court, there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. It adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions." (Nachova and Others v. Bulgaria…). Other human rights courts adopt a similar view: "The general admissibility of evidence is thus the basic paradigm in international human rights proceedings." (Stirner, 2021, p. 443).

The liberal approach towards the admissibility of evidence is also characteristic of the international arbitration process. This approach can be traced back to the 19$^{th}$ century, which is usually associated with the rise of international commercial arbitration. During that time, the arbitrators in

international commercial arbitrations were usually merchants or traders rather than lawyers. Their decisions were generally based on trade practices and notions of fairness rather than the rule of law. Such arbitrations were conducted without formal rules of procedure and evidence. Even with the advent of arbitral institutions in the late 19th and early 20th centuries, international commercial arbitration remained an informal and largely non-legalistic affair (Pietrowski, 2006, p. 376). Although, the codification of arbitration proceedings in the second half of the 20th century has led to the development of various rules of evidence, which have been analysed in more detail above (see **part 1.2.**). Nevertheless, the liberal approach of the arbitral tribunals has remained. As one legal scholar pointed out at the end of the 20th century: "with regard to international arbitration the cases of strict application of the judicial rules of admissibility are rare and seem to be on the decline." (Saleh, 1999, p. 155).

The liberal approach is also recognised in various modern-day treatises on international arbitration. For example, as already indicated, J. Lew, L. Mistelis and S. Kröll, in their analysis of the admissibility of evidence, explain: "Arbitration tribunals will admit almost any evidence submitted to them in support of parties' position, they retain significant discretion in the assessment and the weighing of the evidence. Accordingly even hearsay evidence will be admitted." (Lew *et al*., 2003, p. 561). Other prominent arbitration law experts also point out: "[…] tribunals nearly always adopt a flexible approach to admissibility of evidence; it is unlikely that a party will be prevented from submitting evidence that may genuinely assist the arbitral tribunal in establishing the facts, should they be disputed." (Redfern *et al*., 2015, p. 378). Many other sources of legal scholarship also support this view (see, *e.g*. Waincymer, 2012, p. 793; Born, 2021, p. 1123, 1126).

Moreover, the liberal approach towards the admissibility of evidence is supported not only by legal scholarship but also by empirical studies. In one of the best-known studies in this field, 401 respondents[29] were asked the following question: "Do you exclude evidence that is not admissible under the evidentiary standards you believe would be appropriate outside the arbitration forum rather than take the evidence and give it such weight as you deem appropriate?" The answers to this question clearly demonstrate the general tendency of arbitrators to disregard the admissibility rules:

[29] Of the 401 respondents, 79% were from the US, 12% were from Europe, 5% were from North America outside the US, and the rest were from Asia, Latin America and Africa. More than 55% of the respondents had been arbitrators in more than 50 cases, and 20% had been arbitrators in 21 to 50 cases.

| |
|---|
| Always 1%<br>Usually (*i.e.*, around 75% of the time) 5.1%<br>Often (*i.e.*, around 50% of the time) 4.8%<br>Sometimes (*i.e.*, around 25% of the time) 55.2%<br>Never 33.9% |

As can be seen, the survey results revealed that 33% of the respondents never excluded evidence, and 55% excluded evidence only about 25% of the time. Hence, 88% of arbitrators admit evidence even though it is inadmissible under evidentiary standards at least 75% of the time, and 34% never exclude it. In comparison, only 1% of the arbitrators always exclude such evidence (Sussman, 2017, p. 49–51).

The analysis of the arbitral case law also confirms this view. The arbitral tribunals' decisions confirm both their broad discretion to decide on various evidentiary issues and their liberal approach towards the admissibility of evidence (see, *e.g.* Indian company v. Pakistani bank...; Interlocutory awards Nos. 1–9...). Arbitral tribunals also often refuse to apply the admissibility rules under the law of the place of arbitration, which would lead to the exclusion of the presented evidence. For example, in the ICC arbitration case, the arbitral tribunal, while ruling on the admissibility of diary entries of persons not involved in the proceeding, stated: "This is an international arbitration procedure. The strict rules of evidence, as they apply in England where the Tribunal is sitting, or in India, do not apply. In accordance with the power given to the arbitrators in the Terms of Reference, and under the ICC Rules, the Tribunal has the right to determine whether and what evidence shall be admitted. The Tribunal considers that the diary notes of Dr. Y and Dr. V are admissible." (Technical know-how buyer P v. Engineer/seller A…; see also Licensor Company B v. Licensee Company H2..., The Western Company of North America v. Oil and Natural...).

The analysis of the case law of arbitral tribunals also demonstrates the tendency of arbitral tribunals to accept various types of evidence. The research identifies proceedings where arbitral tribunals have admitted: 1) hearsay evidence (Inversiones y Procesadora Tropical INPROTSA..., Joint Venture Participant No. 1, Joint Venture Participant...); 2) late evidence (Deutsche Telekom AG v. Network..., Bamberger Rosenheim Ltd. v. OA Development..., Buyer (Taiwan) v. Seller (Germany)...); 3) the written testimony of witnesses who were not examined at the arbitration hearing (Injazat Technology Fund B.S.C. v. Najafi...); 4) *amicus curiae* briefs (Buyer (Switzerland) v. Seller (Kosovo)...); 5) confidential evidence (Gujarat State

Petroleum Corporation LTD..., Parties Not Indicated, LCIA Reference No. 122039...), *etc*.

Moreover, the vast majority of the arbitral awards did not address the admissibility of evidence questions at all. Some arbitral tribunals did not even address the issues of admissibility even if the parties themselves raised it (see, *e.g*. Parties Not Indicated, LCIA Reference No. 142778...). This also confirms the fact that arbitral tribunals often do not give much attention to the issues of the admissibility of evidence.

All of the above has led to the widely held belief that arbitrators almost never exclude evidence (see, *e.g*. Radvany, 2016, p. 508). Moreover, this implies that in the proceedings of international courts, including arbitral tribunals, the admissibility of evidence is even regarded as a procedural right of a party: "Admission is a matter of right, and the burden is upon the party challenging any evidence to show that the particular procedural law of the tribunal will be violated by a refusal to exclude it." (Sandifer, 1975 quoted Reisman, Freedman, 1982, p. 740) or even as a procedural principle: "Thus, there is a general principle of admissibility of evidence before international tribunals […]" (Amerasinghe, 2005, p. 167).

Nevertheless, the liberal approach towards the admissibility of evidence in arbitration proceedings is not absolute. Arbitral tribunals, albeit rarely, in some instances, tend to exclude evidence submitted by the parties. These cases are mostly related to the procedural requirements for the submission of evidence, for example, the exclusion of evidence which is not translated into the language of the arbitration (Parties Not Indicated, LCIA Reference No. 101735…) or exclusion of late evidence (Cessna Finance Corporation v. Al Ghaith Holding..., Buyer (Utopia) v. Seller (Germany)..., Barracuda and Caratinga Leasing Company B.V...).

Legal scholarship also points to a few instances that confirm the limits of this approach. For example, one author provides the following position: "it is widely recognised by scholars and arbitration practitioners that the discretion of arbitrators in determining admissibility is subject to the following limitations: 1. Evidence obtained in a manner that is contrary to international public policy (*e.g.* testimony obtained through torture) shall not be admissible. 2. Evidence may be protected by a privilege or secret (professional privilege, trade secrets, governmental secrecy)." (Pilkov, 2014, p. 150).

While it is necessary to bear in mind these limitations to the liberal approach, these limitations do not undermine the general approach of the arbitral tribunals towards the rules of admissibility of evidence because of the following two reasons.

*Firstly*, as detailed above, the admissibility rules in international commercial arbitration are not formulated as *ex ante* legal rules but as discretionary provisions (see **part 1.2.4.2.**). Accordingly, the abovementioned statement, "Evidence obtained in a manner that is contrary to international public policy […] shall not be admissible" is not accurate. The IBA Rules clearly provide that the question of admissibility of illegally obtained evidence should be left to the arbitral tribunal, which is not obliged but only entitled to exclude such evidence from arbitration proceedings (see **part 1.2.3.5.1.**). This is not to give the impression that, in practice, arbitral tribunals refuse to exclude evidence in all cases. What is relevant in this respect is that the sources of arbitration law, while giving a wide discretion in deciding on the admissibility of evidence, allow for the application of the prevailing liberal approach towards the admissibility of evidence. Moreover, as detailed above, the liberal approach is, in principle, usually not precluded either by very rare parties' agreements on the admissibility rules or by mandatory provisions of law, most often the *lex arbitri*, which only serve to justify the broad discretion of arbitral tribunals in the context of the admissibility of evidence (see **part 1.2.**).

*Secondly*, the arbitral tribunals' decisions to exclude evidence in some cases do not negate the general importance of the liberal approach in arbitration proceedings. The importance of this approach in arbitration is not only confirmed by various authoritative sources of legal scholarship but also by various empirical studies and arbitral case law. Accordingly, even when excluding evidence, the arbitral tribunals must inevitably bear in mind the general approach towards the admissibility of evidence. The case law of arbitral tribunals also confirms this. For example, the arbitral tribunal in one LCIA arbitration case stated: "The decision to exclude the letter before action had been highly unusual in that there was, as a general rule, no prohibition in international arbitration on the admission of materials and documents upon which a party relied." (Parties Not Indicated, LCIA Reference No. 5665…). We can also find examples where the arbitral tribunal, while eventually excluding the evidence, begins its reasoning by emphasising the general approach: "Generally, international tribunals take a liberal approach to the admissibility of evidence [...]" (EDF Service v. Romania…). Hence, the liberal approach does not lose its influence even when, in some instances, the evidence is declared inadmissible. In this respect, the quote by legal scholar A. Bickel fits perfectly: "If men are told complacently enough that this is how things are, they will become accustom to it and accept it. And in the end this is how things will be." (Bickel, 1962 quoted Bork, 1991, p. 72).

Therefore, albeit with some exceptions, the exercise of the arbitral tribunals' discretion can be characterised by a dominant approach, *i.e.* the liberal approach towards the admissibility of evidence. This approach implies a rather declarative approach towards the application of the rules of admissibility of evidence. Although this approach has been questioned in some respects (see, *e.g.* Reisman, Freedman, 1982, p. 744 – 745), as of to date, legal scholarship has not provided a more detailed critical assessment of this approach. Accordingly, the next part of this thesis is devoted to a critical assessment of the liberal approach towards the admissibility of evidence.

## 2.2. The Critical Assessment of Liberal Approach towards the Admissibility of Evidence

As explained in the introduction of this thesis, the liberal approach is assessed by critically analysing the main reasons behind this approach. In order to conceptually evaluate the liberal approach towards the admissibility of evidence, one needs, firstly, to identify and, secondly, to assess the reasons for this approach, *i.e.* one needs to ask the question: why the liberal approach is the dominant approach in international commercial arbitration proceedings? Accordingly, the following parts firstly identify and briefly describe the main six reasons for the liberal approach and, secondly, critically evaluate these reasons while trying to answer the question of whether a specific reason actually justifies the liberal approach towards the admissibility of evidence in international commercial arbitration (see **parts 2.2.1., 2.2.2., 2.2.3., 2.2.4., 2.2.5., 2.2.6.**).

### 2.2.1. The Principle of Free Evaluation of Evidence

The first and probably one of the most important reasons is the influence of the principle of free evaluation of evidence in international commercial arbitration. As already mentioned, the liberal approach towards the admissibility of evidence is essentially rooted in the civil law tradition, which can be characterised by the influence of the principle of free evaluation of evidence in continental Europe from the beginning of the 18$^{th}$ century onwards (see **part 1.1.**).

The essence of this principle is that a judicial procedure should abandon all, or at least most, of the rules of evidence and leave the question of proof largely to the judge's own discretion. In other words, the principle of free

evaluation of evidence is manifested in the judge's free evaluation of evidence, which is not bound by any pre-determined probative value of the evidence nor by the admissibility rules nor by any other rules of evidence (for more details on the impact of this principle on the judicial process see Damaška, 1995, p. 344).

One of the main pioneers of this principle is English scholar Jeremy Bentham, whose work not only revealed the essence of this principle but was also partly responsible for its profound impact in Europe. Bentham's key work in this context is "Rationale of Judicial Evidence", in which Bentham fiercely criticised the admissibility rules that were widely applied at the time. The critique of the rules of evidence was later referred to as the "anti-nomian thesis" (Twining, 2006, p. 209). This Bentham's thesis and his description of the judicial process as a "Natural System of Procedure" came from his vision of the judge as the *pater familias, i.e.* the judge who is presiding over trials in the same manner as a father would settle disputes among members of his family: "But in the bosom of his family, the lawyer, by the force of good sense, returns to this simple method from which he is led astray at the bar by the folly of learning [...]. The father of a family, when any dispute arises among those who are dependent on him, […], calls the interested parties before him; he allows them to give evidence in their own favour; he insists on an answer to every question, even though it should be to their disadvantage [...]. He does not refuse any witness; he hears every one, reserving to himself to appreciate the worth of the testimony of each. [...] He permits each of them to give his narrative at once, in his own way, and with all the circumstances which may be necessary […]." (Bentham, 1825 quoted Kirkpatrick, 1992, p. 839).

Bentham's advocacy of the principle does not derive only from the tradition of "family tribunals" or from Bentham's general critique of the legal profession, which he somewhat derisively referred to as "Judges and Co." (Bentham, 1825 quoted Stein, 2005, p. 113). In addition, Bentham highlighted the risks of excluding evidence from the proceedings. This risk is linked to the fact that the judge, by excluding evidence, runs a risk of failing to establish relevant facts and, thus, failing to do justice in the case (Bentham, 1827 quoted Stein, 2015, p. 469). These reasons have given rise to Bentham's imagination, which, as contemporary authors describe it, "reflects the classic picture of a system of free proof in adjudication: no rules excluding classes of witnesses or of evidence; no rules of priority or weight or quantum; no binding rules as to form or manner of presentation; no artificial restriction on questioning or reasoning; no right of silence or testimonial privileges, *etc*." (Twining, 2006, p. 209).

The influence of Bentham's ideas cannot be overstated. Although the influence of the principle is not the same in every continental European country, the influence of this principle in the evidentiary process is more than evident. Some legal scholars divide the influence of the free proof principle in continental Europe into two groups: 1) the modernised system of legal proof[30], which recognises the principle but implements it only partially because of the different rules of evidence that still exist (*e.g.* France, Italy)[31]; 2) the system of free assessment of evidence, which is based on the virtually full implementation of this principle (*e.g.* Germany, Austria, Central and Northern Europe). In the latter system, the judge is independent when assessing the evidence and relies only on his or her experience, ratio and perception of fairness and justice. However, such a free assessment of evidence relates only to freedom from formal rules of evidence since the judge is still bound by the general laws of logic, psychology, science and experience (see Sladič, Uzelac, 2016, p. 113–116; 119–124).

Lithuanian civil procedure law is part of the system of free assessment of evidence. Art. 185(1) of the LCPC establishes free assessment of evidence: "The court shall assess the evidence in a case on the basis of its own independent conviction, based on a full and objective examination of the facts which have been adduced in evidence in the course of proceedings, in accordance with the law." In Lithuanian civil procedure, this principle not only abolishes the rules that predetermine the value of evidence but also has a direct impact on the admissibility of evidence: 1) as in other countries of the civil law tradition, Lithuanian civil procedure law is not aware of many admissibility rules that are known in the common law tradition (see **part 1.1.1.1.**); 2) Lithuanian civil procedure pays relatively little attention to the development of admissibility rules. For example, neither the legislator nor the case law has so far formulated clear rules on the admissibility of illegally obtained evidence. Legal scholarship also notes that the case law on the admissibility of late evidence is contradictory (Mikelėnas *et al*., 2020, p. 399); 3) the case law is focused on the determination of the relevance and weight of

[30] The legal proof system, which originates in medieval Europe, is based on the formal rules of evidence, *i.e.* the rules of evidence that set out the requirements for the quantity, assessment and sufficiency of evidence (see **part 1.1.**).

[31] For example, Italian legal scholarship explains that, in principle, the trial judges apply free assessment of evidence according to the principle of inner conviction under Art. 116 of the Italian Code of Civil Procedure, except for cases where the law provides for legal proof, such as in the case of confession and in the case of a decisory oath (Sladič, Uzelac, 2016, p. 113).

presented evidence rather than on the admissibility of such evidence (see Bartkus, 2021c, p. 109–110).

As mentioned above, the influence of the free proof principle has not been so strong in the common law tradition (see **part 1.1.**). However, while retaining various rules of evidence, the common law tradition has also been influenced by this principle. One of the direct impacts of the free proof is the creation of the "abolition wave" movement. Followers of this movement argue for the abolition of evidentiary rules in the judicial process (Stein, 2005, p. 108–116; Schauer, 2020, p. 2).

The principle of free evaluation of evidence is also of great importance in international commercial arbitration. In the opinion of some legal scholars, the influence of this principle has led to the fact that arbitration proceedings come closer to an absolute rejection of the admissibility rules than the litigation model envisioned by Bentham (Kirkpatrick, 1992, p. 844).

Like the liberal approach itself, the free proof principle is rooted in the case law of various international courts. The influence of the free proof is well illustrated by a quote from Judge Huber of the Permanent Court of Justice: "The Parties may present any proof that they judge useful, and the Court is entirely free to take the evidence into account to the extent that it deems it pertinent" (Huber, 1926 quoted Pietrowski, 2006, p. 373). Legal scholarship provides additional support for this view (see, *e.g.* Waincymer, 2012, p. 792; Brower, 1994, p. 48).

International arbitration also follows the tradition of the free evaluation of evidence (see, *e.g.* Sourgens *et al.*, 2018, p. 237). The free evaluation of evidence in arbitration implies that the focus is not on the exclusion of evidence submitted by the parties but on the free evaluation of such evidence, *i.e.* the determination of its relevance and weight. The principle of free evaluation of evidence is not explicitly enshrined in sources of arbitration law. However, it can be derived from the abovementioned provision, which gives the arbitral tribunals a wide discretion in deciding not only on the admissibility but also on the relevance, materiality and weight of the evidence (see Art. 19(2) of the Model Law, Art. 27(4) of the UNCITRAL Arbitration Rules, Art. 19 of the ICC Arbitration Rules, Art. 22(1)(vi) of the LCIA Arbitration Rules and Art. 9(1) of the IBA Rules). In addition, as pointed out by one of the most authoritative works on international commercial arbitration law: "Arbitration tribunals will admit almost any evidence submitted to them in support of parties' position, they retain significant discretion in the assessment and the weighing of the evidence." (Lew *et al.*, 2003, p. 561; see also Saleh, 1999, p. 155).

The influence of this principle can also be seen in the case law of arbitral tribunals. The influence of free proof can be shown by the fact that arbitral tribunals tend to evaluate even the excluded evidence. For example, in one ICC arbitration, the arbitral tribunal stated: "The Arbitral Tribunal, upon concluding that there are no substantial grounds for the belated submission of the aforementioned documents, declares as inadmissible such documents which are not considered in this Arbitral Award. However, the Arbitral Tribunal considers that even if said documents had been considered, they would not change the sense of this Arbitral Award." (De Rendon *et al.* v. Ventura…). The exact position has been taken in other ICC arbitration cases: "Since the record of these proceedings was closed at the end of the September 2010 Hearing, this production is inadmissible. The Tribunal nevertheless observes that, if the extract were admissible, it would be of no assistance to the Respondent […]." (Sonera Holding B.V. v. Cukurova…; see also Entes Industrial Plants Construction and…).

Accordingly, as can be seen from the paragraphs above, both Bentham's ideas and the international commercial arbitration share the same fundamental premise: the rules of exclusion should be narrowly confined and the evidence offered by parties, provided it is relevant, should generally be admitted, with concerns regarding its probative force going to weight rather than its admissibility (see also Kirkpatrick, 1992, p. 847).

The strong influence of the principle of free evaluation of evidence in international commercial arbitration should not be very surprising. Detailed rules of evidence that strictly determine the value, relevance or admissibility of evidence are usually associated with the historical judicial process, which is neither flexible nor suitable for the expeditious and cost-effective handling of commercial disputes. In contrast, the principle of free evaluation of evidence and its broad implementation allows for the admission of substantially all evidence and, in the light of the circumstances of a particular case, for the weight to be given to each of them in arbitral proceedings. In essence, the main argument in favour of the free evaluation of evidence in arbitration is that this principle guarantees that the arbitral tribunal decides according to its intimate conviction instead of following technical rules (see Marghitola, 2015, p. 178).

As seen from the paragraphs above, the principle of free evaluation of evidence is widely accepted in civil and arbitral proceedings. Nevertheless, this principle has not escaped criticism. One of the prominent critics of this principle is Justice A. Stein of the Israeli Supreme Court. Justice Stein, in his writings, outlines several aspects of this criticism: 1) the implementation of this principle does not guarantee one of the fundamental objectives of the rule

of law – the application of institutionalised justice, as the objective goal of the legal system, must be coherent, comprehensive, encompassing also procedural-probative aspects of the judicial process. Meanwhile unlimited principle of free proof entails the danger of discrimination, lack of uniformity and arbitrariness in evidentiary proceedings; 2) with the abolition of various rules of evidence, the legal proof becomes a mystical phenomenon unfathomable by the litigants, which is likely to harm their ability to present their case and can undermine their faith in the judicial system (Stein, 1985, p. 262–263).

As with regard to specific admissibility rules, Justice Stein points out that because of the influence of the principle of free proof, the abandonment of the hearsay or opinion evidence rules known in the common law tradition results in the violation of other fundamental procedural principles, namely the principle of the equality of the parties. Stein argues that the abolition of these rules will make it impossible for the opposing party, *i.e.* the party against whom the evidence is being used, to effectively test the accuracy of the hearsay or the opinion evidence when examining the witness and will inevitably put that party at a significant procedural disadvantage (Stein, 2005, p. 229).

The criticism of this principle also exists in the civil law tradition. As early as 1937, J. H. Wigmore, while criticising the influence of the free proof in the civil law tradition, stated: "In the early 1800s the ancient worn-out numerical system of "legal proof" was abolished by fiat, and the so-called "free proof" – namely, no system at all-was substituted. For centuries, lawyers and judges had evidenced and proved by the artificial numerical system; they had no training in any other, – no understanding of the living process of belief. In consequence, when "legal proof" was abolished, they were unready, and judicial trials have been carried on for a century past (except for a few rules about proof of documents) by uncomprehend, unguided, and therefore unsafe mental processes […]." (Wigmore, 1937 quoted Kirkpatrick, 1992, p. 852). The contemporary legal scholarship also provides similar criticisms related to judicial subjectivity, lack of legal certainty in assessing the evidence, and a lack of foreseeability of the litigation results (Sladič, Uzelac, 2016, p. 113).

In arbitration, on the other hand, there is virtually no criticism of the free proof principle. The free proof system is virtually unquestioned procedural value. Nevertheless, as is probably the case with any legal phenomenon, the principle of free evaluation of evidence in arbitral proceedings is not without its critics. Thus, the following paragraphs set out two main arguments against the free evaluation of evidence in international commercial arbitration.

*Firstly*, an arbitrator, like a judge or any other human being, is unfortunately prone to make various errors in the process of proof. It has already been mentioned that human beings are prone to various errors in decision-making (see **part 1.1.3.2**). Nevertheless, the arbitrator's broad discretionary approach to the admissibility rules creates an image of the arbitrator as a person who is perfectly capable of understanding, grasping and deciding on a wide range of procedural issues. As already mentioned, this is also echoed by legal scholarship, where the arbitrator, unlike a judge or jury, is described as a special subject-matter expert who has the ability to clearly identify misleading, unreliable or irrelevant information provided by the parties (see **part 1.2.4.2.**; Sourgens *et al*., 2018, p. 238). As legal scholarship additionally points out in support of this image: "One is the fact that because arbitrators are typically lawyers and therefore trained in evidence, they are perceived to be more "trusted" than jurors and more able to perform in a role similar to that of a bench trial judge" (Radvany, 2016, p. 504).

Unfortunately, this image is not true. It has already been mentioned that judges, like jurors, are prone to various cognitive errors in the decision-making process. In other words, unjustified overestimation of certain information, prejudices, life experiences, personality traits, *etc*., tend to have an undue influence on both the judge and the non-lawyer alike (see **part 1.1.3.2.**). Arbitrators are no exception. Arbitrators can be, and usually are, excellent practitioners and insightful lawyers in their field. Nevertheless, like judges, arbitrators are influenced in the decision-making process by various internal and external factors beyond their control, such as age, gender, cultural background, *etc*. (Hornikx, 2017, p. 75). In this respect, even arbitration itself was subject to various criticism, for example, on the grounds that arbitrators tend to favour certain classes of parties (see, *e.g*. Brekoulakis, 2017, p. 344–355).

These aspects have a direct impact on the principle of free proof. This impact is unavoidable because the principle is based on the fundamental idea that a judge or an arbitrator can make a perfect assessment of the weight, reliability and relevance of evidence of the case. Legal scholarship explains: "a legal system "without rules of evidence altogether", and one which relies on "fact-finders to give relevant evidence, in whatever form, the weight it deserves", […] presupposes the existence of a near-perfect fact-finder." (Chen, 2015, p. 32).

Due to the limited scope of this thesis and the number of empirical studies, it is not efficient to review all of the studies or arguments that clearly refute the image of the arbitrators as a "near-perfect fact-finder". Nevertheless, it is worth pointing out numerous cognitive errors that can be made by the

arbitrators in the context of the evaluation of evidence: 1) one of the most important cognitive errors is the so-called "framing bias", which means that the consistency of the factual history presented by the parties, rather than the credibility of evidence presented, determines the arbitrator's decision in a particular case; 2) coherence and ego-centricity biases which imply a tendency on the part of the arbitrator, once he or she is convinced of the outcome of the case, to bias certain, albeit unreliable, pieces of evidence in favour of arguments that support his or her formed conviction; 3) the confirmation bias, which means that in many cases the evidence acquired early in the process is likely to carry more weight than the ones that was acquired later and, thus, arbitrators often form an opinion early in the process and then evaluate subsequently acquired information in a way that is partial to that opinion; 4) the attitudinal bias, which dictates that arbitrators' decision making is influenced by their prior experience, worldview, self-serving interests, cultural and legal background (Sussman, 2017, p. 56–65).

These cognitive errors can manifest themselves in any arbitration process. This implies that arbitrators, like any other human beings, are at significant risk of overestimating unreliable or misleading evidence. This risk is exacerbated when the arbitral tribunals refuse to apply the rules of admissibility of evidence, especially the first category of admissibility rules, *i.e.* the admissibility rules designed to improve fact-finding accuracy (see **part 1.2.4.1**).

For example, as already analysed above, Art. 4(7) of the IBA Rules establishes the arbitral tribunal's right to exclude the written testimony of a witness: "If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise." (see **part 1.2.3.5.**; a similar provision is also set out in Art. 20(5) of the LCIA Arbitration Rules). One of the purposes of this admissibility rule is to avoid unreliable written testimony of a witness that has not been verified during the cross-examination.

However, both the provision itself, the arbitral case law and legal scholarship recognise the possibility for the arbitral tribunal not to exclude such testimony (see **part 1.2.3.5.2.**). The principle of free evaluation of evidence and the liberal approach towards the admissibility of evidence presupposes that the arbitral tribunal should not exclude such evidence but rather give it an appropriate, *i.e.* usually lesser, probative value in arbitration

proceedings (see, *e.g.* Injazat Technology Fund B.S.C. v. Najafi..., S. D. Myers Inc. v. Canada...).

However, such a view towards the application of the admissibility rule would, most of the time, lead to a high risk of various cognitive errors. For example, the arbitrator would be inclined to overestimate the value of written witness testimony due to 1) the presentation of written witness testimony in the party's consistent factual history of the case (the framing bias); 2) the arbitrator's preconceived belief in the outcome of the case, which would lead to an overvaluation of written witness testimony (the coherence and egocentricity bias); 3) the presentation of written witness testimony at an early stage of the case (the confirmation bias); 4) the coincidence of the content of written witness testimony or of witness's own qualities or views with the arbitrator's personal views, personal or professional experience, *etc*. (the attitudinal bias) (Bartkus, 2023, p. 119).

On the other hand, if the written witness testimony were simply excluded, mentioned cognitive errors in decision-making could be avoided. Similar risks of cognitive errors arise if the arbitral tribunal decides not to exclude but to assess the written opinion of an expert who was not examined during the hearing (Art. 5(5) of the IBA Rules) or the opinion of a biased or unqualified expert (Art. 6(2) of the IBA Rules).

Moreover, the risk of various cognitive errors is even higher in arbitration proceedings due to several additional reasons: 1) arbitrators are mostly lawyers, and a legal background does not provide knowledge of assessing facts, *i.e.* determining the weight or credibility of evidence. In law faculties, one will usually not find courses focused on the study of fact-finding. All of this is usually left to the field of legal practice rather than legal education. Accordingly, the legal education of arbitrators *per se* will rarely help to avoid mistakes in the determination of facts; 2) the main criterion for choosing an arbitrator is not the arbitrator's ability in the fact-finding process. Often, one of the main criteria for selecting an arbitrator is his or her legal knowledge or experience in relevant business sectors (Latham & Watkin, 2019, p. 8; International Centre for Settlement of Investment Disputes…). In contrast, an arbitrator's ability to dissociate himself from cognitive biases or his ability to assess facts of the case properly is usually unreasonably not considered as criteria for assessing a person's ability to arbitrate a case; 3) the rules of arbitral procedure usually provide for an opportunity to appoint as arbitrator a person with no legal training at all. For example, in disputes with a specific field of expertise, it is often advisable to appoint an expert in that specific field who may not have a legal background (Waincymer, 2012, p. 278). Although rare, in practice, there have been arbitral cases where a person without a legal

background but with specific knowledge and experience in arbitral proceedings has been appointed as the president of the arbitral tribunal (Fry *et al*., 2012, p. 157). Legal education, although it does not *per se* provide practical experience in fact-finding, at least acquaints a person with the essence of court proceedings, the rules of evidence, and other procedural rules that help to understand and, in some cases, avoid various errors in the evidentiary process. In contrast, an arbitrator with no legal training is often even more susceptible to various errors related to the overestimation of the weight or reliability of evidence (Bartkus, 2023, p. 119 – 120).

Perhaps the main counter-argument against reducing the importance of the principle of free assessment of evidence is the threat of excluding relevant and reliable evidence. For example, excluding written witness testimony rather than giving it appropriate weight runs the risk of excluding potentially reliable and relevant evidence, even if the witness was not cross-examined during the hearing. In such a case, in the words of Bentham, the exclusion of evidence might exclude justice (Bentham, 1827 quoted Stein, 2015, p. 469). Unfortunately, we cannot avoid this counter-argument. Arbitral tribunals will inevitably exclude potentially relevant evidence in certain cases while applying the admissibility rules.

On the other hand, it is doubtful whether we will ever find a legal rule or principle whose application does not have negative consequences. The rules of admissibility of evidence and their application should not claim to be ideal. In this respect, one must choose between two evils: on the one hand, by choosing to exclude evidence, there is a risk of excluding potentially relevant evidence, and on the other hand, by choosing not to exclude evidence, there is a risk of misleading the arbitral tribunal. The lesser evil is the first option. As a rule, the written testimony of a witness who has not been examined at the hearing or the opinion of an unqualified and biased expert is more likely to be unreliable than reliable evidence, and the admission of such evidence, due to the abovementioned cognitive biases of the arbitrators, leads to an even greater risk of over-evaluation of such evidence. Accordingly, if we look at the problem of excluding reliable evidence not in terms of a specific case but in terms of all cases in general, the negative consequences of the exclusion of evidence would be considerably less than in the case of non-exclusion. In this respect, the remark by legal scholar F. Schauer is very relevant: "[…] a rule-based approach to evidence may produce frequent epistemic suboptimalities when it excludes genuinely probative evidence [...]. But, analogously, the suboptimality of such decisions, even when aggregated, may be less than the suboptimality, in the aggregate, of fact-finding by decidedly suboptimal

decision-makers, whether they be judges or members of a jury." (Schauer, 2020, p. 22; see also Bartkus, 2023, p. 121).

*Secondly*, another and equally important argument against the principle of free evaluation of evidence is that the implementation of this principle neglects other procedural values. Legal scholarship sometimes defines the principle of free evaluation of evidence as a "utopian ideal that may be incompatible with reality" since it "ignores important notions such as fairness and due process which are integral to adjudication." (Chen, 2015, p. 32). This criticism becomes even more relevant when we consider the importance and purposes of the admissibility rules.

The principle of free assessment of evidence is essentially focused only on the determination of facts in proceedings. In other words, this principle is based on the notion that each item of evidence offered at a trial should be individually evaluated on a case-by-case basis to assess how much probative value, if any, that particular evidence should be given in the determination of the fact (Schauer, 2020, p. 3). Accurate assessment of the facts is an important objective, but it is not the only objective in the process. As detailed above, a purposive approach towards the admissibility of evidence allows for the identification of various purposes of the admissibility rules that are not directly related to the establishment of facts: 1) ensuring the fair proceedings; 2) ensuring the legitimacy of the court and its decision; 3) ensuring the expedient and efficient proceedings; 4) ensuring the protection of other legal values (see **part 1.1.3.2.**). These objectives are as important, if not more important, than the implementation of the principle of free proof. This is confirmed, *inter alia*, by sources of arbitration law analysed above – the Model Law, the UNCITRAL Arbitration Rules, the ICC Arbitration Rules, the LCIA Arbitration Rules, and the IBA Rules directly establish fairness, efficiency and expediency as the main objectives of the arbitral procedure (see **parts 1.2.1., 1.2.2., 1.2.3.**).

Accordingly, the application of the free proof principle can often be incompatible with these principles. The incompatibility is particularly evident in analysing two categories of admissibility rules: 1) admissibility rules that exclude evidence because of its content; 2) admissibility rules that exclude evidence due to infringements of substantive law or procedural law (see **part 1.2.4.1.**).

For example, Art. 9(3) of the IBA Rules gives the arbitral tribunal a wide discretion to decide on the admissibility of illegally obtained evidence (see **part 1.2.3.5.1.**). In accordance with the principle of free evaluation of evidence and the liberal approach it implies, the arbitral tribunal may be inclined to admit illegally obtained, submitted, presented or evaluated

evidence. The admissibility can be justified in the context of fact-finding since the content of illegally obtained, submitted, presented or evaluated evidence may contribute to a more accurate determination of facts. Nevertheless, the admission of unlawful evidence inevitably entails both the risk of violating the principle of fairness and calls into question the legitimacy of the arbitral tribunal and of its final award (see **parts 1.1.3.2.2., 1.1.3.2.3.**). It is true that not every decision to admit illegally obtained evidence *per se* entails a breach of the principle of fairness. However, the admissibility of such evidence in all cases entails a risk of such a breach.

The same applies to other admissibility rules that fall within the category of admissibility rules that exclude evidence due to infringements of substantive law or procedural law. For example, the arbitral tribunal's decision to admit the late submission of evidence[32] gives the opportunity to assess late evidence and, thus, to determine more precisely the circumstances that are relevant to the case. However, such a decision inevitably runs the risk of infringing both the principles of efficiency and expediency (see **part 1.1.3.2.4.**).

Legal scholarship also explains this threat posed by the principle of free assessment of evidence. While criticising the liberal approach of international courts, W. Reisman and E. Freedman point out that "International tribunals and judicial scholars err seriously when [...] they ignore other significant policy implications involved in rules limiting admissibility." (Reisman, Freedman, 1982, p. 744–745). The same criticism should be applied to international commercial arbitration. After all, it is often forgotten, but even Bentham himself was not totally against some of the admissibility rules. In his writings, Bentham expressed his support for two admissibility rules: 1) he supported the confidentiality of a confession given to a priest and; 2) the immunity of State secrets (Stein, 1985, p. 273). The main arguments in favour of these rules relate to certain policy considerations, which are not related to a more precise determination of facts in the judicial trial. Bentham opposed compelling catholic priests to disclose communications made to them by way of confession on the ground that such a law "would be contrary to the law of the state, which allows the exercise of the catholic religion" and would be "an act of tyranny over the conscience". Likewise, Bentham opposed compelling the government to disclose information in political trials due to possible prejudice to the public interest (Kirkpatrick, 1992, p. 842). Hence, even the

[32] For example, Art. 23(2) of the Model Law, Art. 22 and 27(3) of the UNCITRAL Arbitration Rules, Art. 25(1) and 27 of the ICC Arbitration Rules, Art. 22(1)(i) of the LCIA Arbitration Rules.

pioneer of the principle of free evaluation of evidence was aware of and supported the limits of this principle in relation to other legal values.

Therefore, the abovementioned arguments against the principle of free proof lead to the conclusion that one cannot recognise free proof as a fundamental or absolute principle of international commercial arbitration. Both the risk of cognitive mistakes of arbitrators in the evidentiary process and other competing values inherent in international commercial arbitration proceedings, such as fairness or efficiency of the process, make it impossible to place too much confidence in the usefulness and appropriateness of this principle. This is not to argue that free proof should be abandoned altogether. Nevertheless, the application of admissibility rules makes it possible to compensate for the main drawbacks of free assessment of evidence, namely cognitive errors on the part of arbitrators and the disregard of other legal values in arbitral proceedings. Thus, the analysis in this part of this thesis suggests that the principle of free evaluation of evidence should have a much lesser impact on arbitral proceedings than it does at present.

### 2.2.2. The Purpose of Establishing the Truth

The second reason for the liberal approach towards the admissibility of evidence is the objective of establishing the truth in international commercial arbitration. The relationship between the objective of establishing the truth and the judicial or arbitral process is so close that it seems there is no need to expand on this point. However, neither the Model Law nor the arbitration rules nor the IBA Rules explicitly state the objective of establishing the truth. Probably the closest provision to the purpose of establishing the truth in arbitration proceedings is the already mentioned Art. 25(1) of the ICC Arbitration Rules: "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means."

Like the principle of free evaluation of evidence, the objective of establishing the truth is inherent in proceedings of various international courts and tribunals. As legal scholarship points out: "The general approach of international tribunals is to keep open all avenues for the submission of evidence that will assist the tribunal in establishing the truth with respect to disputed facts. All evidence, documentary and testimonial, is generally admissible." (Pietrowski, 2006, p. 407). In this respect, one of the most cited arbitration cases is W. P. Parker v. the United Mexican States, in which the Mixed Commission held: "[…] the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering

the whole truth with respect to each claim submitted." (see Amerasinghe, 2005, p. 165; Born, 2021, p. 2485).

The determination of truth, as the reason for the liberal approach, is revealed in the analysis of its relationship with the admissibility rules. The arbitral tribunal, by excluding evidence from the case, always runs a risk of failing to establish the truth in the arbitration case. Arbitrator G. Abi-Saab, in his dissenting opinion, highlights this risk, albeit in a somewhat radical but precise manner: "In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that basis, can pass over such evidence […]. It would be shutting itself off by an epistemic closure into a subjective make-believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication." (Dissenting opinion of Georges Abi-Saab…). Additionally, the view that the purpose of establishing the truth is one of the reasons for the liberal approach is also supported by renowned arbitration law experts (see, *e.g.* Redfern *et al*., 2015, p. 378).

Establishing the truth in international commercial arbitration is clearly an important objective. However, in the context of this thesis, the most important question is whether this objective really justifies the liberal approach towards the admissibility of evidence. The following three arguments demonstrate that the answer to this question is negative.

*Firstly*, international commercial arbitration is characterised by a concept of truth that is compatible with the application of admissibility rules. When analysing the purpose of determining the truth in both civil and arbitral proceedings, the first and most fundamental question is: what kind of truth should be determined? The answer to this question is not primarily provided by legal scholarship but by the philosophy, which, although not uniform in its approach, is an important starting point for the analysis of the concept of truth in international commercial arbitration. Hence, the following paragraphs provide an overview of the four main concepts of truth in philosophy.

One of the classical concepts of truth in philosophy is the correspondence theory of truth (from the meaning of the word "correspondence", *i.e.* similarity, connection). The proponents of this conception of truth, Aristotle and later St. Thomas Aquinas, defined truth succinctly as correspondence between a thing and a thought (Latin: "veritas est adaequatio rei et intellectus") (Nekrašas, 1993, p. 126; Szaif, 2018, p. 45). Correspondence theory entails the existence of a certain objective reality, which manifests itself in the correspondence between a thing and a thought. This notion has not been

without its critics. The criticism is most often provided in the form of the question: by what criteria do we determine that a thought or a word corresponds to reality? And even if we follow specific criteria, how can we know that the chosen criteria are the correct ones (Nekrašas, 1993, p. 128).

This criticism lead to another concept of truth – the theory of certainty, which hold the truth to be what is obvious and certain. The main proponent of this theory, R. Descartes, points out that true knowledge is what is obvious, elementary or logically derived from such obvious, elementary knowledge (Mikelėnienė, Mikelėnas, 1999, p. 129). This theory seems to identify specific criteria for determining truth, *i.e.* certainty or obviousness, but at the same time, it has been subject to a number of criticisms. The theory has rather limited applicability since, in most cases, many statements about the world are far from being obvious but are, nevertheless, true, and, moreover, what may be obvious to one person may not be obvious at all to another (Nekrašas, 1993, p. 130).

The third concept of truth is the theory of coherence, which considers truth to be that which is non-contradictory, interrelated and coherent. G. Leibniz, a proponent of this concept, used the laws of logic in his analysis of the truth and was convinced that in order to ascertain the truth of our knowledge, it is sufficient to show how it can be derived from a logical deduction (Nelson, 2018, p. 87). Like previous theories, this theory has not escaped criticism because of the difficulty of establishing the interrelationship and coherence of different factual circumstances, especially when such determination is often conducted by various subjective interpretations, which do not always lead to correct conclusions (Nekrašas, 1993, p. 134–135).

The fourth concept is the pragmatic concept of truth, whose proponents, A. Comte and W. James, linked the truth to its practical usefulness. In other words, if one or another theory has helped a person to achieve certain goals, then it is true (Mikelėnienė, Mikelėnas, 1999, p. 130). Proponents of this theory emphasise not only the practical usefulness of knowledge but also its subjectivity. Unlike the proponents of classical theory, who perceived reality as material, objective and existing independently of human activity, the proponents of pragmatic theory regarded reality as a human activity, a practice, which resulted in the subjectivity of reality itself (Nekrašas, 1993, p. 138).

Classical and the three neoclassical conceptions of truth are not the only concepts of truth in philosophy. For example, both F. Nietzsche and later M. Foucault, albeit for different reasons, have argued that there is no truth at all (Stepukonis, 2004, p. 104; Foucault, 2020).

This thesis does not attempt to identify all concepts of truth in philosophy. However, it is important to briefly mention the main concepts found in philosophy in order to clearly illustrate and understand concepts of truth found in judicial proceedings. Although there are also many concepts of truth in the judicial process, this thesis is limited to the three most common and basic concepts of truth, which are described in the following paragraphs.

The first concept of truth is the objective or absolute truth. The following two aspects characterise the concept of objective truth: 1) the objective truth obliges the court to accept as true only those facts which objectively exist in the external world; 2) the objective truth obliges the court to be active, *i.e.* to gather evidence on its own initiative and not to limit itself to the evidence provided by the parties (Laužikas *et al*., 2003, p. 44).

The objective truth most closely reflects the classical theory of correspondence, which also regard the truth as factual statements which correspond to the true state of affairs. The aim of establishing the objective truth was particularly characteristic of the judicial process of communist states (see Nekrošius, 2002, p. 37; Goda *et al*., 2011, p. 173). For example, Art. 15 of the 1964 Code of Civil Procedure of the Lithuanian Soviet Socialist Republic provided: "The court must, without limiting itself to the materials and explanations submitted, take all measures provided for by law in order to fully, completely and objectively clarify the true circumstances of the case, the rights and obligations of the parties." (Code of Civil Procedure of the Lithuanian Soviet Socialist Republic, 1964).

The second concept of truth is the formal or legal concept of truth, which defines the truth as that which is most likely to be true in the light of the materials of the case. This concept of truth is called legal or formal because of its determination in a judicial context in which the judge is not able to determine all possible circumstances since 1) the parties and the judge cannot use all possible means for the search for truth; 2) the search for truth has to be stopped when the need to reach a final judgment prevails over the need for collecting further evidence; 3) the unavailability of evidence in court proceedings, *etc*. (Taruffo, 2010, p. 7; Summers, 1999, p. 501 – 510).

This concept is often linked to the common law tradition and the principle of adversarial proceedings. For example, Justice Harlan of the US Supreme Court explains that: "in a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact-finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact-finder can acquire is a belief of what probably happened." (In re Winship…). Lord Wilberforce makes a similar point: "it often happens, from the imperfection of evidence, or the withholding of it [...] that an adjudication has to be made which is not,

and is not known to be, the whole truth of the matter." (Air Canada v. Secretary of State for Trade...).

The formal truth derives its philosophical justification from the theory of coherence, which considers the truth not to be what is objective but what we can deduct from the coherence of non-contradictory circumstances. Similarly, in a court of law, after identifying non-contradictory, mutually consistent factual circumstances, the judge makes a finding of the fact that is relevant to the case.

The third concept of truth is the so-called material truth which is established when the court is fully or almost fully satisfied with the truthfulness of the decision in the case. The notion of material truth is usually associated with the influential European school of civil procedure, *i.e.* the school of social civil procedure. F. Klein, a proponent of this concept, argued that the material truth would be established when the court has had the opportunity to ascertain as far as possible the facts at issue and, on that basis, to apply the rules of substantive law correctly (Parker, Lewisch, 1998 quoted Nekrošius, 2002, p. 37). Thus, unlike in the case of objective truth, the court does not have an absolute power, but neither is bound to limit itself to the evidence adduced by the parties. Accordingly, the material truth does not refer to a passive, but to an inquisitorial court, which in certain cases has a duty to go beyond the evidence presented by the parties to seek the material truth.

The different nature and diversity of these three concepts of truth raise the question – which of these concepts of truth should be accepted in international commercial arbitration? At first glance, it seems that arbitration should not focus on the determination of any truth but on the determination of the objective truth. This is confirmed by the abovementioned case of W. P. Parker v. United Mexican State, where the Mixed Commission emphasised the whole, *i.e.* absolute, truth: "[…] the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth […]." (Born, 2021, p. 2485).

Unfortunately, as lofty as the goal of establishing the objective truth may sound, this goal simply cannot be achieved due to the following two reasons: 1) the diversity of abovementioned concepts of truth in philosophy and the judicial process in general calls into question the existence of the objective truth. The correspondence theory of truth is a classical theory. However, it is only one of many theories of truth. When we consider that other truth concepts do not even recognise the objectivity of truth, there is no ground to argue that the objective truth actually exists in judicial proceedings; 2) the attainment of objective truth in arbitration is precluded by various factors. In addition to the abovementioned reasons inherent in court proceedings (see **part 1.1.3.2.2.**),

the arbitration process can also be characterised by a number of additional factors which preclude the establishment of the objective truth. For example, different cultures of those involved in international arbitration, which have a profound effect on one's appreciation and processing of the environment, translate into a particular inclination to believe or disbelieve specific facts. Moreover, in modern arbitration, we are often faced with the need to translate various pieces of information into English, which can have unfortunate consequences that what is translated in the language of the arbitration does not convey the true message of the evidence or, even worse, conveys a message which is not understandable, even if the interpretation is correctly made (Hanotiau, 2019, p. 4, 6). In addition, legal scholarship notes that "The inconvenient truth is that some disputes are too fact-rich, too complex to be properly adjudicated by way of arbitration. In these disputes, it is humanly impossible for three arbitrators to read, understand, and evaluate all the facts reported." (Risse, 2019, p. 307). The impossibility of attaining the objective truth is also supported by the drawbacks of the content of specific evidence itself. For example, the ICC Commission's 2020 report "The Accuracy of Fact Witness Memory in International Arbitration" provides: "Science shows that the memory of an honest witness who gives evidence in international arbitration proceedings can easily become distorted and may therefore be less reliable than the witness, counsel or the tribunal expects." (ICC Commission, 2020, p. 5).

The material truth is also not suitable for international commercial arbitration. Actually, the main problem with the concept of material truth is that it is not a concept of truth at all. The material truth is not defined through the concept of truth itself, which seeks to answer the question of what truth should be established in a judicial proceeding, but through the court's duty to ascertain the relevant circumstances of the case. In other words, as it is pointed out in legal scholarship, material truth does not provide for "more truth" or "better truth" but, in fact, only attempts to justify an active procedural role of the court (Merkevičius, 2019, p. 219). It should be no surprise that material truth is often precisely associated with the strong, inquisitorial, paternalistic judge (see, *e.g.* van Rhee, Uzelac, 2012, p. 6). These adjectives are not appropriate to describe arbitral tribunals. The arbitral process is, first and foremost, based on the free will of the parties and on the principle of adversary proceedings. As G. Born points out: "Even in civil law traditions, arbitrators are not generally permitted to engage in independent fact-finding." (Born, 2021, p. 2371).

Due to the shortcomings of the concepts of objective and material truth, the arbitration process should focus on the determination of formal or legal

truth. This is due to the aforementioned aspects of various obstacles, which prevent the establishment of objective truth, and quite limited power of arbitrators to collect, evaluate and investigate evidence on his or her own initiative. Legal scholars also recognise the concept of formal truth in arbitration (see, *e.g*. von Mehren, 1996, p. 122–123; Demeyer, 2003, p. 252).

The conclusion that the arbitration process should focus on determining legal truth directly influences the application of admissibility rules. The legal truth does not strive for an absolute, objective or complete determination of the facts. On the contrary, as already mentioned in this part of the thesis, the legal truth is not determined by objective facts but only by the parties' evidence, which forms the arbitrator's belief of what probably happened. This creates a favourable procedural environment for the admissibility rules. The arbitral tribunal must always be aware that it is not the tribunal's duty to establish all the facts. Hence, the exclusion of sometimes even relevant evidence does not undermine the establishment of truth in arbitral proceedings. The formal truth allows arbitral tribunals to confine themselves exclusively to admissible evidence, on the basis of which the tribunal would either grant or deny the claims of the parties.

*Secondly*, the second argument against the establishment of truth, as a reason of the liberal approach, is that certain admissibility rules help to establish the truth in arbitration proceedings. As detailed above, one of the categories of admissibility rules in arbitral proceedings is aimed at improving the accuracy of fact-finding (see **parts 1.2.4.1.**, **1.1.3.2.1.)**. Thus, admissibility rules that fall within this category are not an obstacle but an aid to the arbitral tribunal in determining the truth. For example, as already mentioned, the exclusion of the testimony of witnesses who were not cross-examined at the hearing (Art. 4(7) of the IBA Rules; Art. 20(5) of the LCIA Arbitration Rules) or of the opinion of a biased and dependent experts (Art. 6(2) of the IBA Rules) is much more likely to lead to a positive, *i.e.* to a more accurate determination of facts, than to a negative result (see **part 2.2.1.**).

*Thirdly*, the determination of truth cannot and should not be regarded as the sole and overriding objective of arbitral proceedings. As detailed above, the purpose of establishing the truth in civil proceedings is neither the only one, nor it is the most important purpose. In other words, civil procedure law does not tolerate the establishment of the truth at any cost (see **part 1.1.3.2.2.**). Arbitration proceedings should follow the same approach. Principles of fairness, expedition and efficiency enshrined in the arbitration law must be reconciled with the objective of establishing the truth. This is precisely what the rules of admissibility of evidence enable us to do. The application of admissibility rules, although sometimes at the cost of establishing the truth,

guarantees and safeguards the fair, expeditious and efficient proceedings, the legitimacy of arbitral awards and other legal values (see **parts 1.1.3.2., 1.2.4.2.**).

For example, with regard to the expedient and cost-effective proceedings, a renowned arbitration expert W. W. Park stresses the need to reconcile the various objectives: "To fulfill its promise of enhancing economic cooperation, arbitration must aim at an optimum counterpoise between truth-seeing and efficiency. Just as a restaurant can fail to provide an agreeable dining experience either by serving bad food or by making customers wait too long for their meal, arbitrators fall short of their duty by neglecting procedures that promote correct awards, just as much as by failing to calibrate the expenditure of time and money." (Park, 2012, p. 71).

The same applies to the principle of fairness. For example, if the arbitral tribunal, at the expense of the establishment of truth, decides to admit illegally obtained evidence, not only the fairness of proceedings or the legitimacy of arbitral decisions but also the reputation and attractiveness of arbitration as an alternative dispute resolution mechanism, could be called into question. As I have pointed out in one of my articles – to paraphrase the beginning of the book "For Whom the Bell Tolls" by E. Hemingway[33], arbitration is not an island unto itself, the arbitral process cannot exist on its own, in its own separate world, the rules of which have nothing to do either with illegal acts committed by the parties or with essentially universal requirements of a fair trial (Bartkus, 2021b, p. 77).

Finally, the expectations of the business community itself are also a very important factor when one considers the need to reconcile the establishment of the truth with other values of the arbitral process. From the point of view of the business community, the determination of truth in arbitration should not be overstated. For example, at a seminar on truth-seeking in arbitration in Switzerland a decade ago, several in-house lawyers stated that what they really wanted from arbitrators was a peaceful settlement that would bring a commercial dispute to a fair conclusion and that the truth-seeking was actually not their main concern in dispute resolution (Hanotiau, 2019, p. 4). It should not be argued that the business community disregards the objective of the establishment of truth entirely. However, the main client of arbitration rightly understands that during the course of proceedings, the arbitral tribunal, while attempting to determine the facts of the case as accurately as possible, will nevertheless be bound by various requirements, including the requirements of

[33] "No man is an Island, intire of it selfe; every man is a piece of the Continent, a part of the maine" (Hemingway, 2015, p. 5).

fairness, efficiency and expediency, which are enforced by the rules of admissibility of evidence.

Therefore, the abovementioned three arguments support the conclusion that one of the main reasons for the liberal approach, *i.e.* the objective of establishing the truth, is not and cannot be a reason for rejecting the application of admissibility rules that are not only capable of increasing fact-finding process in arbitration, but also of achieving other equally important objectives of the arbitration process.

### 2.2.3. The Standard of Proof

The third reason for the liberal approach towards the admissibility of evidence is the standard of proof in international commercial arbitration. The standard of proof is usually defined as the judge's degree of conviction, which, once reached, entitles the party with the burden of proof to win the case or to a finding of fact in its favour (see Glover, 2017, p. 124). In other words, the standard of proof is a specific degree of certainty that a judge must reach in order to find that the fact is established.

The standard of proof is directly linked to the admissibility rules. The importance of the admissibility rules depends on the standard of proof applied in proceedings. The higher the standard, the riskier it is to exclude the evidence presented by the parties. For example, if the required standard of proof is absolute, *i.e.* a fact-finder must be fully satisfied as to the facts to be proved by a party, a judge or an arbitrator will be reluctant to apply the admissibility rules that exclude, in some cases, even relevant evidence, and, thus, might hinder a fact-finder from reaching the required degree of proof. In the case of a lower standard, the risk of failing to reach a degree of proof by excluding relevant evidence is considerably lower. Accordingly, the question arises – what standard of proof is or should be applied in international commercial arbitration? Before attempting to answer this question, it is important to briefly describe various standards found both in the civil law tradition and in the common law tradition. Such analysis will provide a better understanding of the nature of applicable standards and the requirements they impose on an arbitrator. Hence, the following paragraphs explain four standards of proof, most commonly found in both the civil law tradition and the common law tradition.

The first and one of the most important standards of proof is the preponderance of evidence or balance of probabilities standard. This standard treats a fact proven if, on the evidence presented, it is more likely than not that

it existed. This standard is most commonly associated with civil cases in the common law tradition. The standard is well illustrated in the Federal Jury Practice and Instructions: "To 'establish by a preponderance of the evidence' means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case." (Schweizer, 2013, p. 2). This standard sometimes is also defined in mathematical terms – if the plaintiff is able to convince the court 51% to 49% based on his or her presented evidence, then the factual circumstances of the plaintiff's claim are established (Mikelėnas, 2005, p. 10).

The origins of this standard can be traced back to the 18th century. For example, English jurist Richard Wooddeson pointed out in his lectures at Oxford in 1777 that "In cases concerning civil rights and property, that side must prevail, in favour of which probability preponderates [...]." (Leubsdorf, 2016, p. 1583). Obviously, over such a long time, the probability standard has not been without its critics. The critics point out that the lives and fates of people cannot be decided based on the standard of more likely than not and that probability itself only encourages the court to believe that a factual circumstance only may or may not have existed (see, *e.g.* Nekrošius, 2005, p. 14–15). Nevertheless, the standard is still widely accepted in various jurisdictions[34], and its favourability for civil and commercial disputes is particularly evident in the fact that this standard does not impose an undue burden on either party in the evidentiary process, hence striking the best balance between the abilities of the parties during the trial.

The second standard of proof is the beyond a reasonable doubt standard, which treats a fact as established if the judge is not left with a reasonable doubt about its existence. The beyond reasonable doubt standard essentially requires one of the highest degrees of certainty. This standard is most commonly associated with criminal proceedings in the common law tradition (Glover, 2017, p. 126). This is explained by the fact that the consequences of criminal law for the individual are significantly more severe than those of other branches of law. Thus, this standard seeks to apply *ultima ratio* measures only after all reasonable doubts have been resolved. Nevertheless, the beyond a

[34] For example, the application of the standard of probability in civil cases is also recognised in rulings of the Supreme Court of Lithuania (see, *e.g.* ruling of the Supreme Court of Lithuania of 8 July 2021 in a civil case).

reasonable doubt standard does not require absolute certainty. The very name of the standard implies a requirement to resolve only all reasonable doubt as to the facts of the case.

The relationship and differences between the beyond a reasonable doubt standard and the standard of higher probability are reflected in famous proceedings related to the American football player O. J. Simpson. In the criminal case, the jury decided to acquit O. J. Simpson because all reasonable doubts had not been resolved as to the possible criminal conduct. Meanwhile, in the civil case, a different conclusion was reached under the standard of balance of probability, finding that it was more likely than not that O. J. Simpson had committed a tort by the same conduct (Clermont, Sherwin, 2002, p. 263).

The third standard is the clear and convincing evidence standard, which is an intermediate version of the standards of balance of probabilities and the beyond a reasonable doubt standard. The clear and convincing evidence standard requires a degree of certainty that provides a firm and definite conviction as to the existence of the facts (Clermont, 2018, p. 23–24). In other words, while this standard does not require the elimination of all reasonable doubts, it does not allow the judge to restrict himself or herself to a probability. This standard is most associated with the common law tradition and is usually applicable in cases involving certain aspects of family law, such as termination of parental rights, *etc*. (Clermont, 1987, p. 1119–1120).

The fourth standard of proof, which is also the most common standard in the civil law tradition, is the rational or reasonable conviction standard. The historical aspects of this standard have already been mentioned in the earlier parts of this thesis (see **part 1.1.**). The application of this standard depends on the civil procedural law of a particular country. However, analysis of legal scholarship allows us to highlight certain common features of this standard. The very name of the standard implies that it requires the judge to be reasonably convinced as to the existence of the facts. In other words, a reasonable conviction is a conviction of the court that leaves no doubt in the mind of any reasonable person as to the existence or non-existence of a circumstance that is relevant to the case (Nekrošius, 2005, p. 14).

Legal scholarship sometimes describes this standard by referring to Art. 353 of the French Code of Criminal Procedure: “The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the

accused and the arguments of his defence. The law asks them but this single question, which encloses the full scope of their duties: are you inwardly convinced?" (Engel, 2009, p. 440). The German Federal Supreme Court similarly describes this standard: "[...] the judge may and must be content with a degree of certainty useful for practical life that silences doubt without completely excluding it." (Schweizer, 2013, p. 4). Although descriptions of the standard do not provide a mathematical expression of the standard, legal scholarship indicates that the level of a judge's conviction must be high as 90%, sometimes 95%, and sometimes as high as 99.8% (Schweizer, 2013, p. 4).

The reasonable conviction standard is often compared with the standard of balance of probabilities (see, *e.g.* Clermont, Sherwin, 2002, p. 243). Although some authors unjustifiably unify these standards (see, *e.g.* Laužikas *et al*., 2003, p. 421), there are two main differences between these standards: 1) the reasonable conviction standard puts more emphasis on the judge's internal belief, *i.e.* on the subjective side of judge's belief. In other words, under the reasonable conviction standard, the judge is not bound by a predetermined specific degree of certainty, such as a higher probability of existence or non-existence of facts. This is mainly due to the historical reasons, which are linked to the popular ideas of the 18th century to abandon any restrictions on judges in the process of fact-finding since the imposition of a strict and objective standard would not have been met favourably at the time (see **part 1.1.**; see also Brinkmann, 2004, p. 888); 2) as demonstrated by a purely mathematical expression of the two standards, the standard of higher probability requires a lower degree of conviction on the part of a judge than does the standard of reasonable conviction.

The abovementioned four standards of proof and their essential differences bring us back to the question – which of these standards applies in international commercial arbitration? Two aspects complicate the answer to this question: 1) the sources of arbitration law analysed above, *i.e.* the Model Law, the rules of arbitration procedure, and the IBA Rules, do not provide a clear answer as to which standard of proof should be applied in arbitration proceedings; 2) the arbitral case law does not pay much attention to the standard of proof. As indicated by legal scholarship: "This subject is rarely addressed in the arbitral process. Arbitrators are often either completely silent on the subject or dodge the question and draft around it." (Smith, Nadeau-Séguin, 2015, p. 134).

In the absence of a clear position from the legal acts or arbitral case law, legal scholarship tries to answer this question. For example, some scholars point out that due to the wide discretion of arbitrators, the standard of proof is

a purely subjective category: "the tribunal must decide for itself whether, based on the evidence submitted by the parties, the truth of a particular claim or defence has been established. This discretionary authority by its nature invites an entirely personal assessment of evidence by the tribunal." (Pietrowski, 2006, p. 378).

Nevertheless, most scholars tend to argue that arbitration is best suited for the standard of balance of probabilities. For example, G. Born points out: "In general, although there is little discussion of the issue, the burden of proof appears to be (or is assumed to be) a "balance of probabilities" or "more likely than not" standard" (Born, 2021, p. 2488). Another prominent source also supports this standard: "The degree of proof that must be achieved in practice before an international arbitral tribunal is not capable of precise definition, but it may be safely assumed that it is close to the test of the 'balance of probability' (that is, 'more likely than not')." (Redfern *et al*., 2015, p. 378). The standard of balance of probabilities is also recognised in many other sources of legal scholarship (see, *e.g*. Von Mehren, Salomon, 2003, p. 291; Redfern *et al*., 1994, p. 335).

Moreover, the recognition of the standard of balance of probabilities in international commercial arbitration is also confirmed by the commentaries of the UNCITRAL Arbitration Rules and the IBA Rules. The commentaries of these arbitration rules indicate that the standard of balance of probabilities is the most applicable standard in arbitral proceedings (Caron, Caplan, 2012, p. 561; Khodykin *et al*., 2019, p. 423).

The prevalence of the standard of balance of probabilities is also confirmed by the case law of arbitral tribunals. For example, in one arbitration case, the tribunal makes the following finding: "[t]he Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings […] does not impose on the Parties any burden of proof beyond a balance of probabilities." (Ioannis Kardassopoulos v. The Republic of …).

The application of this standard of proof in international commercial arbitration should come as no surprise since there is ample justification for recognising this standard. For example, as mentioned above, this standard strikes the best balance between the opportunities of the parties in the evidentiary process and does not impose an excessive burden of proof on either party. Moreover, this standard is closest to the concept of legal truth, which is associated with the fact-finder's "belief of what probably happened." (In re Winship…; see **part 2.2.2.**). In support of the balance of probabilities, a quote by Nobel Laureate C. Milosz in his book "The Enslaved Mind" also fits perfectly: "When someone is honestly 55% right, that's very good and

there's no use wrangling. And if someone is 60% right, it's wonderful, it's great luck, and let him thank God. But what's to be said about 75% right? Wise people say this is suspicious. Well, and what about 100% right? Whoever says he's 100% right is a fanatic, a thug, and the worst kind of rascal." (Milosz, 1980, p. v).

However, at least according to some authors, the application of the standard of balance of probabilities is not absolute. Some authors argue that in certain cases, the standard of proof should be adjusted to take into account specific circumstances that are being proved. This is most often the case concerning circumstances such as document forgery or bribery, which require the application of a higher standard, for example, the clear and convincing evidence standard or the beyond reasonable doubt standard (Caron, Caplan, 2012, p. 559). Meanwhile, some authors also suggest applying a lower standard of proof than the standard of balance of probabilities when proving the incurred damages of the party (Smith, Nadeau-Séguin, 2015, p. 150–151).

These positions are strongly questioned in legal scholarship. Some authors argue that there are actually significantly more benefits to be gained from applying uniform rather than different standards in arbitration proceedings (Waincymer, 2012, p. 769). Moreover, some authors point out that the use of different standards is, in fact, not rationally justified and is even dangerous due to the risk of errors during the evaluation of evidence and possible abuse arising from the application of different standards by arbitrators (Smith, Nadeau-Séguin, 2015, p. 153). Finally, some authors argue that the standard of balance of probabilities, while proving fraud or illegal actions in arbitration proceedings, remains the same since the arbitral tribunals in those instances are simply more demanding as to the content of evidence itself and as to the certainty that the standard of balance of probabilities is indeed reached (Redfern *et al.*, 2015, p. 379).

Thus, albeit with some possible exceptions, the standard of balance of probabilities is and should be the applicable standard in arbitration proceedings. Accordingly, it is precisely the standard of balance of probabilities that leads to a favourable approach towards the application of admissibility rules and, hence, essentially refutes yet another reason for the liberal approach. The following two considerations support this conclusion.

*Firstly*, the standard of balance of probabilities requires the arbitral tribunal to reach a 51% certainty and, thus, allows the arbitral tribunal to exclude even relevant evidence. The arbitrator is not required to, and should not, reach a higher degree of certainty than a higher probability, which means that the arbitrator may, in the vast majority of cases, be satisfied exclusively with only admitted evidence, the totality of which must be capable of reaching

only a higher probability with regard to the existence of facts. Obviously, the situation would be quite different if the arbitral tribunal were required to reach a higher standard of proof. For example, in the case of beyond reasonable doubt standard, the exclusion of every piece of evidence entails a significantly higher risk of reasonable doubt and, accordingly, a higher risk of failing to reach the required degree of certainty. Accordingly, like the legal truth, the higher probability standard creates a more favourable procedural environment to apply the admissibility rules.

*Secondly*, admissibility rules that aim to improve the accuracy of fact-finding are meant to help the arbitral tribunal to reach the required degree of certainty and thus to reach a decision which is in accordance with the required standard of proof, *i.e.* the balance of probability standard (see **parts 1.2.4.1., 2.2.1.**).

Therefore, the standard of proof in international commercial arbitration does not imply the liberal approach towards the admissibility of evidence, but on the contrary, like the concept of legal truth, it is compatible with the application of the admissibility rules in international commercial arbitration.

### 2.2.4. The Party's Right to Present its Case

The fourth and probably the most often cited reason for the liberal approach towards the admissibility of evidence is the right of the parties to present their case in arbitration proceedings. The right of the parties to present its case is enshrined in both Art. 18 of the Model Law, Art. 17(1) of the UNCITRAL Arbitration Rules, Art. 22(3) of the ICC Arbitration Rules and Art. 14(1)(i) of the LCIA Arbitration Rules (see **parts 1.2.1., 1.2.2.**).

The right to present its case is also established in the New York Convention. Art. V of the New York Convention sets out an exhaustive list of grounds for refusing recognition and/or enforcement of arbitral awards. Art. V(1)(b) of the New York Convention provides one of the grounds: "The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or". Accordingly, the arbitral tribunal's failure to allow a party to present its case can result in the annulment of the award itself.

From a formal point of view, the exclusion of any evidence submitted by a party in an arbitration proceeding implies a restriction on that party's ability to present its case. Therefore, the risk of violating this right is one of the main reasons of the liberal approach towards the admissibility of evidence (see, *e.g.*

Waincymer, 2012, p. 793). As legal scholarship explains in more detail: "Experience shows that arbitrators are extremely reluctant to limit the evidence that can be submitted and normally err toward permitting parties to present evidence, including the introduction of materials of questionable relevance. Arbitrators are governed by the concern that their award will be overturned under the New York Convention, which states that a national court may refuse to recognise or enforce a foreign arbitral award if a party was "otherwise unable to present his case." (Von Mehren, Salomon, 2003, p. 290; see also Sussman, 2017, p. 51).

However, Art. V(1)(b) of the New York Convention is one of the main, but not the only reason for refusing to apply the admissibility rules due to a possible violation of the party's right to be heard. Another reason relates to the arbitrators' incentive to satisfy the interests and expectations of both parties in the arbitration.

Arbitrators, as independent adjudicators appointed by the private parties, operate in an arbitration market, which inevitably determines the arbitrators' behaviour during the arbitration process. The competitive market of arbitrating services results in the fact that arbitrators often try to satisfy the expectations of both parties. R. Posner aptly illustrates this arbitrators' tendency: "An arbitrator who gets reputation for favoring one side in a class of cases – such as cases of employment termination, or disputes between investors and brokers or between management and unions – will be unacceptable to one of the parties in any future such dispute, and so the demand for his service will wither. We can therefore expect arbitrators to rend to "split the difference" in their award – that is, to try to give each side a partial victory (and therefore, a partial defeat)." (Posner, 2008, p. 127–128).

A direct consequence of arbitrators' incentive to satisfy both parties is the arbitrators' tendency to give both parties every opportunity to present their cases. The arbitral tribunals' decision to exclude evidence submitted by one of the parties immediately places that party in a more difficult position. In contrast, by giving the parties virtually unlimited opportunities to submit their evidence, the arbitral tribunal meets the expectations of both parties in the evidentiary process. In turn, the arbitral tribunals' liberal approach towards the admissibility of evidence does not disadvantage either party and thus makes it more likely that the arbitrator will be reappointed in future disputes.

The following two reasons related to the parties' right to be heard in arbitration will be examined below. Due to the sufficiently broad scope of these reasons, this part of the thesis is divided into two sub-part, *i.e.* firstly, this thesis presents the fear of non-recognition or non-enforcement of an award based on Art. V(1)(b) of the New York Convention (see **part 2.2.4.1.**);

and secondly, this thesis examines the tendency of arbitral tribunals to satisfy the interests of both parties (see **part 2.2.4.2.**).

#### 2.2.4.1. The Fear of Non-recognition or Non-enforcement of an Award on the Basis of Art. V(1)(b) of the New York Convention

Art. V(1)(b) of the New York Convention encompasses various dues process requirements in international commercial arbitration. As stated in legal scholarship: "The second defense covers, in broad and non-exhaustive fashion, all cases in which party was "otherwise" unable to present its case. The second defense thus guarantees, in particular, the right to submit evidence; make legal and factual submissions to the tribunal; and comment on evidence and submissions in the case file." (Wolff *et al*., 2019, p. 291).

The ground for the annulment established in Art. V(1)(b) of the New York Convention requires national courts to assess more than four essential aspects, which are described in the following paragraphs.

The first and most important aspect is the determination of the due process content. Art. V(1)(b) of the New York Convention does not explicitly state the law under which the content of the due process is to be revealed. Unfortunately, there is no unanimous view on this point, and national case law adopts four different answers to this question: 1) the national law of recognition forum; 2) the national law of arbitral seat; 3) the national law standard which is developed especially for the international arbitration; 4) the internationally uniform standard which is directly derived from Art. V(1)(b) and the New York Convention (see Born, 2021, p. 3828).

The second important aspect that courts must assess is the causal link between the breach of due process and the outcome of the arbitration. Legal scholars recognise that Art. V(1)(b) ground for refusal of enforcement or recognition can only apply when the violation of a party's right to present its case had an impact on the outcome of the arbitration (Wolff *et al*., 2019, p. 291).[35]

[35] On the other hand, some authors take the position that Art. V(1)(b) of the New York Convention does not require establishing the causation: "The Convention censures a breach of due process *per se*, without making the refusal of recognition or enforcement subject to proof by the party resisting enforcement of damage suffered as a result of the breach. In itself, a breach of due process is considered to be sufficiently important to justify such redress without the need for the party invoking it to establish actual damage." (see, *e.g*. Fouchard *et. al*., 1999, p. 987).

The third aspect is the waiver of procedural rights. The arbitration process, as a method of dispute resolution arising from the free will of the parties, implies that the parties may limit their procedural rights, the violation of which, in the absence of an agreement between the parties, would constitute a violation of Art. V(1)(b) of the New York Convention. Nevertheless, the parties are not entirely free in this respect. It is acknowledged that the parties cannot completely waive the minimum requirements of due process before the commencement of arbitration (Wolff *et al*., 2019, p. 300).

The fourth important aspect of the application is that the ground which is set forth in Art. V(1)(b) is closely related to another ground of annulment in the New York Convention, *i.e.* Art. V(2)(b) which provides: "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: The recognition or enforcement of the award would be contrary to the public policy of that country." A close relationship between these grounds is due to the fact that a breach of due process in some jurisdictions may also lead to a breach of public policy. In addition, the ground set forth in Art. V(2)(b) must be analysed by national courts *ex officio*, which provides an additional justification for analysing a possible breach of Art. V(1)(b) alongside the breach of public policy (Linetzky *et al*., 2010, p. 237).

The abovementioned application aspects of Art. V(1)(b) and various procedural situations which fall under the breach of due process determine that Art. V(1)(b) is one of the widely used grounds in practice (see, *e.g*. Karrer, 2005, p. 431). Nevertheless, despite such a broad scope of Art. V(1)(b), the actual non-recognition or non-enforcement of arbitral awards based on Art. V(1)(b) (or on the concurrently applicable Art. V(2)(b)) is extremely rare. This is confirmed by a survey conducted in 2008. The survey showed that out of 136 reported court proceedings where a party invoked Art. V(1)(b), the courts annulled the award on Art. V(1)(b) ground only in 14 cases (approximately 10%) (Verbist, 2008 quoted, Linetzky *et al*., 2010, p. 233).

The results of the survey should not be surprising due to two reasons: 1) legal scholarship observes that the objective of the New York Convention, *i.e.* to build an effective international legal framework which would facilitate the recognition and enforcement of arbitral awards and arbitration, has led national courts to interpret and apply the New York Convention in accordance with the pro-enforcement bias (Wolff *et al*., 2019, p. 4, 21); 2) national courts tend to interpret due process and the public policy violation very narrowly. For example, the US District Court has stated: "Consistent with the federal policy of encouraging arbitration and enforcing arbitration awards, the defense that a party was 'unable to present its case' raised pursuant to Art.

V(1) (b) of the Convention is narrowly construed." (Consorcio Rive, S.A. de C.V. v. Briggs of Cancun…). Similarly, a breach of public order is only associated with a violation of the most fundamental values. For example, the Swiss Court of Justice has clarified that: "violation of Swiss public policy will only be deemed to be present where the innate feeling of justice is hurt in an intolerable manner […]." (Dutch seller v. Swiss buyer…). The US District Court followed a similar path: "The public policy defense under Art. V(2)(b) of the Convention is an extremely narrow one, which pertains only when enforcement would violate the forum state's most basic notions of morality and justice" (Coutinho Caro & Co. USA, Inc. v. Marcus…). Meanwhile, the German courts have not only found that the: "[…] violation of public policy means a macroscopic violation of the core provisions of German mandatory law." (The Republic of Bulgaria v. ST-AD GmbH…), but also that: "A mere violation of the substantive or procedural law applied by the arbitral tribunal is not such a violation." (Exclusive distributor v. Seller...).

Nevertheless, in order to evaluate the threat of annulment of an arbitral award on the basis of Art. V(1)(b), it is even more important to analyse the application of Art. V(1)(b) and (2)(b) precisely when the arbitral tribunal decides to exclude the evidence submitted by the party. Accordingly, the following paragraphs provide a detailed analysis of national court decisions that have dealt with the annulment of arbitral tribunals decisions on the basis of Art. V(1)(b) and (2)(b) when the arbitral tribunals decided to exclude the evidence which was presented by one of the parties. As already explained in the introduction of this thesis, the decisions of national courts have been analysed according to two specific criteria: 1) specific source – ICCA Yearbook Commercial Arbitration; 2) specific timeframe – the period between 1976 and 2022. Accordingly, the following paragraphs provide the results of this analysis, *i.e.* national court decisions, which demonstrate that, contrary to the concerns indicated at the beginning of part 2.2.4 of this thesis, national courts are not inclined to refuse to recognise or enforce arbitral awards on the basis of the exclusion of evidence from the arbitration proceedings.

| **Decisions of the National Courts** | **Ruling on the grounds established in Art. V(1)(b) and (2)(b) of the New York Convention** |
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| The Italian Court of Appeal decision of 16 March 1984 (Arenco- | The Italian Court of Appeal found that the arbitral tribunal's refusal to order the expert |

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| BMD Maschinenfabrik GmbH v. Societá…) | report did not violate Italian public policy or the applicant's right to present its case. |
| The Swiss Supreme Court decision of 11 November 1991 (Main contractor v. Subcontractor…). | The Swiss Supreme Court held that neither the principles of equality of arms nor fair procedure are violated by a mere fact that an arbitral tribunal excludes unsubstantiated evidence: "These principles also do not prohibit an arbitral tribunal from making findings of fact only on the basis of evidence considered relevant and refusing to accept evidence on unsubstantiated claims." |
| The Supreme Court of Hong Kong decision of 5 January 1993 (Qinhuangdao Tongda Enterprise Development Company…). | The Supreme Court of Hong Kong found no violation of the party's right to present its case (Art. V(1)(b)). The court held that the arbitral tribunal had acted properly in declaring the party's late evidence inadmissible: "It was not until after the proceedings had been formally declared closed that any attempt was made to have new evidence admitted. It seems to me that public policy requires proceedings, both in the courts and in arbitral tribunals, to have a finite end. I ask myself whether the defendant actually expects the arbitration proceedings to go on indefinitely. Once a tribunal has set a date for the end of the proceedings, it cannot be right that any party can go to the tribunal with new evidence and demand that it have an opportunity to be heard."<br>Other national case law also follows the same approach and confirms that the exclusion of late evidence does not lead to a refusal to recognise or enforce an arbitral award (see, *e.g.* Jorf Lasfar Energy Company, S.C.A. (Morocco)...; OJSC Ukrnafta v. Carpatsky Petroleum...; M/S. Centrotrade Minerals and Metals Inc...; Generica Ltd. v. Pharmaceutical Basics...). |

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| The Hong Kong Court of Appeal decision of 9 February 1998 (Hebei Import & Export Corporation v. Polytek…) | The Hong Kong Court of Appeal did not find a violation of the right to be heard in the arbitral tribunal's refusal to grant a party's request for the examination of a witness in the arbitration |
| The Supreme Court of Spain decision of 8 February 2000 (Vinalmar, SA (Switzerland) v. Gaspar Peral) | The Supreme Court of Spain found that the arbitral tribunal did not violate a party's right to be heard when it refused to admit evidence which was not translated into the language of arbitration proceedings (see also Glencore Ltd. v. Agrogen S.A…). |
| The United States District Court decision of 9 May 2003 (Broome & Wellington v. Levcor International…). | The US District Court found that the arbitral tribunal did not violate public policy when it did not admit evidence submitted by a party and further stressed that the arbitral tribunal is not obliged to admit all the evidence submitted by the parties: "It is well settled that arbitrators are afforded broad discretion to determine whether to hear evidence. […]. Although arbitrators must have before them enough evidence to make an informed decision, they need not compromise the speed and efficiency that are the goals of arbitration by allowing the parties to present every piece of relevant evidence." |
| The Regional Court of Hamburg decision of 2 February 2012 (OAO C v. Y GmbH & Co. KG…). | The Regional Court of Hamburg found that the arbitral tribunal had not violated public policy when it declared the testimony of an anonymous witness inadmissible. The Regional Court, while relying on German civil procedure law principles, held: "German civil procedural law (Sect. 355 ZPO) also provides principle for direct evidence. In principle witnesses must be asked about their personal details (Sect. 395(2) ZPO). The (limited) anonymous hearing of a witness can be considered only on the conditions (which are not present here) […]. Among other things, these principles also serve to guarantee due |

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| | process for both parties. It can be left open whether other procedural rules provide for exceptions or limitations. In any event no public policy violation can be found in arbitration solely because an arbitral tribunal does not accept anonymous witness evidence (whether written or oral)." |
| The United States District Court decision of 6 December 2012 (China National Chartering Corp. v. Pactrans…) | The US District Court found that the arbitral tribunal did not violate a party's right to present its case when it ruled on the exclusion of not only irrelevant but also inauthentic and illegal evidence. The District Court, disagreeing with the applicant's arguments, stated: "Our judicial system is not meant to provide a second bite of the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received [....]. Nor are arbitrators required to hear all of the evidence tendered by the parties [...]." |
| The Austrian Supreme Court decision of 19 December 2018 (D v. C...). | The Austrian Supreme Court found no violation of Art. V(1)(b) and (2)(b) of the New York Convention when the arbitral tribunal did not allow one of the parties to cross-examine a witness |

The case law of the national courts, as detailed in the table above, demonstrates that generally, the exclusion of evidence will not lead to the annulment of the arbitral tribunal's award on the grounds of Art. V(1)(b) and Art. V(2)(b). However, it would not be appropriate to give the impression that arbitral tribunals have a completely unfettered power to exclude evidence submitted by the parties. Such arbitrariness on the part of the tribunals should not be tolerated. The analysis of the national case law also allows us to identify five requirements of Art. V(1)(b) and (2)(b), which must be taken into account when an arbitral tribunal decides on the exclusion of evidence:

| **Requirement of Art. V(1)(b) and Art. V(2)(b) of the New York Convention** | **Decisions of the National Courts** |
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| The arbitral tribunal must provide clear reasons why the evidence is excluded. In other words, the arbitral tribunal may not, without any explanation, simply ignore the evidence submitted by the parties | See, *e.g.* Hanseatic Higher Regional Court of Hamburg decision of 3 April 1975 (Firm P v. Firm F…); The United States Court of Appeals, Second Circuit decision of 10 December 2004 (Phoenix Aktiengesellschaft v. Ecoplas, Inc...); Higher Regional Court of Munich decision of 14 November 2011 (Joint Stock Company A v. Joint…). |
| The arbitral tribunal should give a possibility to the parties to present their arguments with regard to the admissibility of the evidence | See, *e.g.* The United States District Court decision of 12 May 1976 (Biotronik Mess und Therapiegeräte GmbH…). |
| The arbitral tribunal may not mislead the parties as to the admissibility of evidence in arbitration proceedings. For example, a decision by an arbitral tribunal to change the rules of evidence in the course of a proceeding, thereby rendering certain evidence of the parties inadmissible, may lead to a refusal to recognise or enforce the arbitral award | See, *e.g.* The United States Court of Appeals, Second Circuit, decision of 24 November 1992 (Iran Aircraft Industries v. Iran…); The United States District Court decision of 18 September 1996 (Hoteles Condado Beach, La Concha…). |
| The arbitral tribunal must exercise extreme caution when deciding on the admissibility of a party's sole piece of evidence in arbitral proceedings | See, *e.g.* The United States Court of Appeals, Seventh Circuit, the decision of 29 September 1997 (Generica Limited v. Pharmaceutical Inc., No. 96-4004...). |
| The arbitral tribunal must ascertain whether the exclusion of the evidence renders the entire arbitration process fundamentally flawed. For example, a national court could refuse to recognise or enforce an arbitral award if, in a large and fact-intensive case, the | See, *e.g.* The United States Court of Appeals, Seventh Circuit, the decision of 27 March 2001 (Mary D. Slaney v. International…); The United States District Court decision of 13 September 2006 (Sphere Drake Insurance Limited…); The Supreme |

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| arbitral tribunal decides, without considering the parties' requests, to schedule only one hearing, thereby preventing the parties from presenting evidence | Court of Bulgaria decision of 28 July 2004 (HTEK Co. VLL v. T EAD…). |

Despite these rather stringent requirements, in this respect, it is also important to underline that although the New York Convention imposes certain mandatory requirements, the New York Convention also tolerates errors made by arbitral tribunals in deciding the admissibility of evidence. For example, The United States District Court has stated that: "The actions of the Panel as a whole may seem to be in disregard of its own rules and somewhat arbitrary. However, there was no showing that their actions prejudiced Toepfer's position. To [Toepfer's representative] the Panel's hearing may well have appeared 'painfully farcical' and a 'complete sham from start to finish'.… Yet the Court's inquiry is limited to whether the arbitrator provided 'a fundamentally fair hearing' that includes giving 'each of the parties to the dispute an adequate opportunity to present its evidence and arguments." (Al-Haddad Commodities Corporation...). As the US Court of Appeals for the Third Circuit has also aptly pointed out in this respect: "Every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award[;] a federal court may vacate an award only if the panel's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings. […] Unsurprisingly, application of this 'extremely deferential standard' generally results in the confirmation of an arbitration award." (Century Indemnity Company…).

Thus, the analysis of national case law allows us to refute another reason for the liberal approach towards the admissibility of evidence, *i.e.* the fear of annulment of an arbitral award on the basis of Art. V(1)(b). Not only do national courts allow arbitrators to exclude, in some cases, even relevant evidence, but they even, to some extent, allow the arbitral tribunals, while upholding general requirements of Art. V(1)(b) and V(2)(b), to err in deciding on the admissibility of evidence.

However, the analysis of the case law of national courts does not end here. The case law of national courts provides an additional argument that allows us to refute the fear of annulment of an arbitral award on the basis of Art. V(1)(b) even more – the New York Convention not only empowers arbitral tribunals to declare evidence inadmissible but, in certain cases, it even encourages the arbitrators to declare certain evidence inadmissible. National

courts have repeatedly emphasised that the admissibility of certain evidence may lead to a breach of public policy (Art. V(2)(b)). The case law of national courts which supports this conclusion is provided below.

| Decisions of the National Courts | Ruling on the ground established in Art. V(2)(b) of the New York Convention |
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| The District Court of Japan (Yokohama) decision of 25 August 1999 (Seller v. Buyer…) | The defendant argued that the plaintiff submitted forged evidence to the arbitral tribunal and that this fact, coupled with the additional contentions, should be sufficient for the Court to decide in favour of the defendant in accordance with Art. V(2)(b) of the New York Convention (public policy ground).<br><br>The national court did not annul the arbitral award in this case. However, the court did not rule out the possibility that Japanese public policy could be violated by not excluding forged evidence from the arbitral proceedings (see also The United States District Court decision of 7 July 1998 (Trans Chemical Limited v. China…) |
| The United States Court of Appeals, Fifth Circuit, the decision of 23 March 2004 (Karaha Bodas Co., L.L.C. (Cayman Islands) v. Perusahaan…) | The United States Court of Appeals for the Fifth Circuit has stated: "Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud." |
| The Chinese Higher People's Court, the decision of 27 February 2008 (First Investment Corp v. Not indicated...) | The Chinese Higher People's Court refused to enforce the arbitral award which relied on information derived from the parties' negotiation positions. The court took the position that the admissibility of such evidence violated procedural fairness: "On this particular point, the tribunal admitted the flaw in procedure, but failed to make any effort to remedy this, except to declare those |

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| | 'without-prejudice documents' irrelevant, and to be disregarded." |
| The Federal Court of Malaysia decision of 11 October 2011 (The Government of India v. Cairn…) | The Federal Court of Malaysia, while dealing with the annulment of an arbitral award, recognised the fundamental principle that awards tainted with illegality are always open for a challenge: "Court concluded that both cases merely reiterated the fundamental principle that awards tainted with illegality are always open for challenge: illegality may take the form of deciding on inadmissible evidence or on principles of construction that are not permitted." |
| The Higher Regional Court of Munich (Germany) decision of 6 March 2012 (M. T. v. 3-S F. Vertriebs GmbH…) | The Higher Regional Court of Munich has emphasised that an arbitral tribunal award may be annulled if the award was obtained by improper means: "Admittedly, there is a violation of procedural public policy based on the ground for retrial [...] when the arbitral award has been obtained by fraud [...]. This is the case when obtaining a decision by improper means [...]." (see also The Swiss Supreme Court decision of 25 September 2014 (X SA v. Y GmbH…). |
| The District Court of Netherlands (Amsterdam) decision of 10 May 2012 (Kompas Overseas Inc. v. OAO…) | The District Court of the Netherlands has stated: "The court stresses that it is not excluded that if it were (to be) established that the decision in the arbitral award was obtained on the basis of a forged document, leave for enforcement of the arbitral award would be refused on grounds of public policy." |

In this respect, some legal scholars present opinions supporting the national courts' rulings that the admissibility of certain evidence may lead to the annulment of the arbitral award. For example, co-authors B. A. McAllister and A. Bloom indicate: "Use of illegally obtained evidence in arbitration may result in its vacatur." (McAllister, Bloom, 2003, p. 52). Other authors follow a similar approach: "Procedural public policy may also be infringed where the

award uses evidence obtained in breach of fundamental rights, such as right to privacy." (Böckstiegel *et al*., 2015, p. 494).

Accordingly, the arbitral tribunal's decision to admit inadmissible evidence may lead to the annulment of an arbitral award. As can be seen from the positions in the national case law and legal scholarship, the risk of annulment of arbitral awards may materialise when arbitral tribunals do not apply admissibility rules that exclude evidence because of its content or due to infringements of substantive law or procedural law (see **parts 1.1.3.1., 1.2.4.**).

For example, suppose an arbitral tribunal decides to rely on illegally obtained evidence. In that case, the tribunal inevitably runs the risk of violating due process, which is often an integral part of the public policy of various jurisdictions (see **parts 1.1.3.2.2., 1.1.3.2.3.**; Wolff *et al*., 2019, p. 439–440). The same risk exists if an arbitral tribunal decides to disregard admissibility rules that declare evidence inadmissible because of its content. For instance, communication between clients and lawyers receives special protection in every developed legal system (see, *e.g.* Zuckerman, 2005, p. 611). The decision to admit this type of evidence should inevitably raise questions of violation of the public policy. This is not intended to give the impression that the admissibility of this type of evidence *per se* leads to the non-recognition or refusal to enforce an arbitral award. What is important in this respect is that this analysis substantiates that such a possibility reasonably exists, and, hence, it further undermines the validity of the liberal approach towards the admissibility of evidence in international commercial arbitration.

At the same time, however, it should be noted that interpretations of Art. V(1)(b) and/or V(2)(b) by couple national courts raise reasonable doubts. Some national courts, while interpreting the content of Art. V(1)(b) and/or V(2)(b), ignore the important categories of admissibility rules that exclude evidence because of its content or due to infringements of substantive law or procedural law (see **parts 1.1.3.1., 1.2.4.**).

For example, the German Court of Appeal, in its decision of 30 September 1999, states: "Hence, it appears that the arbitral tribunal deemed that the evidence that the defendant supplied in the second but not in the first proceeding was inadmissible. This could lead to a denial of due process only if that evidence could have influenced the outcome of the proceedings." (Not indicated v. Not indicated...). The French Court of Appeal took a similar position and also emphasised the importance of the admission of relevant evidence: "In particular, the arbitrators have no obligation to admit all evidence offered by the parties, just the evidence they deem relevant to the outcome of the dispute." (Robert Fayez Mouawad, Triple…).

The positions of the German Court of Appeal and the French Court of Appeal may give the impression that one of the main requirements to be taken into account by arbitral tribunals when deciding on the admissibility of evidence is the relevance of evidence. In other words, an arbitral tribunal should answer the question of whether the exclusion of evidence may lead to a different, possibly incorrect, decision in the case. These interpretations of the national courts are questionable due to two reasons.

*Firstly*, in order to ascertain whether the excluded evidence is relevant, the national courts must inevitably intervene in the arbitral tribunal's exclusive competence to assess the facts of the case. The competence to assess facts inevitably includes giving appropriate weight to the evidence adduced in the case. Hence, when national courts decide on the relevance of evidence, national courts review and assess the facts of the arbitration case for the second time. Such practice is contrary to the very essence of the New York Convention, which is not intended to provide additional opportunities for the second review of facts that arbitral tribunals already establish (Wolff *et al*., 2019, p. 255; see also Sonera Holding B.V. v. Çukurova...; Broome & Wellington v. Levcor International…).

*Secondly*, the more significant problem with the positions of German and French courts is the courts' disregard for admissibility rules that exclude evidence because of its content and admissibility rules that exclude evidence due to infringements of substantive law or procedural law. As detailed in part 1 of this thesis, admissibility rules that exclude evidence because of its content or due to infringements of substantive law or procedural law exclude evidence for reasons other than an improvement of fact-finding accuracy in arbitral proceedings (see **part 1.1.3.2.**). Evidence that is illegally gathered, or evidence that consists of communications between a client and his or her lawyer, may be extremely relevant in arbitration proceedings. Nonetheless, this type of evidence is considered to be inadmissible due to possible violation of procedural fairness, expeditious procedure or other legal values (see **parts 1.2.4.2., 2.2.2.**). Accordingly, the position of the German Court of Appeal and the French Court of Appeal, which exaggerates the relevance of inadmissible evidence, should be regarded as contrary to specific admissibility rules established in the arbitration law sources and, for this reason, should not be regarded as reasonable.

Therefore, to conclude part 2.2.4.1 of this thesis, the analysis of case law of national courts, albeit with some incorrect exceptions, allows us to make a conclusion that yet another reason for the liberal approach, *i.e.* the arbitral tribunals' fear of having their award annulled based on Art. V(1)(b) of the New York Convention (or the concurrently applicable Art. V(2)(b)) is

unjustified for the following two reasons: 1) the analysis of national case law suggests that national courts are not, and should not be, inclined to overturn arbitral awards on the basis of exclusion of evidence in arbitration proceedings; 2) the analysis of national case law and some positions in legal scholarship even lead to a different conclusion, *i.e.* failure to exclude certain evidence, such as illegally obtained or privileged evidence, may lead to the annulment of an arbitral award on the basis of Art. V(2)(b) of the New York Convention.

#### 2.2.4.2. The Tendency of Arbitral Tribunals to Satisfy the Interests of Both Parties

The second reason for the liberal approach which is related to the parties' right to be heard, is the interest of arbitrators to render decisions that are equally satisfactory to both parties. As mentioned, this reason is based on the idea that arbitrators participate in the arbitration market and hence are motivated to be re-appointed in future arbitration cases. The main problem with this arbitrators' behaviour is that it is simply unreasonable and does more harm than good to the whole arbitral process. The following paragraphs put forward four arguments that support the unreasonableness of this arbitrator's behaviour.

*Firstly*, as detailed above, the sources of the arbitral process go beyond the arbitral tribunal's obligation to allow the parties to present their positions. Both the Model Law and the rules of arbitration procedure impose on arbitral tribunals the duty to observe principles of fair, expedient and effective procedure (see **part 1.2.**). The close connection of these principles with the admissibility rules has already been demonstrated in the previous parts of this thesis (see **part 1.1.3.2.**). The arbitrators' desire to satisfy both parties and thereby enable the parties to present all the evidence is contrary to the arbitrators' obligation to implement other fundamental principles of arbitral proceedings. For example, the principles of fair, expedient or effective procedure could be violated if arbitrators, in order to satisfy the interest of the party, decide to admit late evidence (for example, Art. 23(2) of the Model Law or Art. 22 and 27(3) of the UNCITRAL Rules), illegally obtained evidence (Art. 9(3) of the IBA Rules) or confidential evidence (Art. 9(2)(e) or (f) of the IBA Rules). Such conduct by arbitrators should not be tolerated. Some legal scholars also make this point: "The consequence of this economic explanation would be that the arbitrator will behave strategically – that is to say, not in conformity with the best solution according to the applicable law but

according to her own interest (*i.e.*, to appear fair to both parties), which clearly contradicts his mandate." (Guandalini, 2020, p. 278–279).

*Secondly*, another and even more important argument, which substantiates why such behaviour of arbitrators is unjustified, concerns a potentially counterproductive effect – the reduction of the attractiveness of arbitration as an alternative dispute resolution.

As mentioned above, one of the goals that parties expect from the arbitration process is not the establishment of truth but the imposition of a peace treaty which provides a fair end to commercial warfare (see **part 2.2.2.**; Hanotiau, 2019, p. 4). Empirical studies also support this conclusion. For example, in 2013, Queen Mary University co-authored a study, "Corporate Choices in International Arbitration Industry Perspectives", which found that parties often choose arbitration not for truth-seeking reasons but for reasons related to the fairness of procedure: "Several interviewees who are frequent users of arbitration explained that, regardless of whether they are a claimant or respondent, "fairness" – above all other considerations – is what companies look for in a dispute resolution mechanism. One interviewee from the Energy sector indicated that it was easier to explain to senior executives, or the Board of Directors, why the company had been unsuccessful if the board felt that the process had been fair." (School of International Arbitration at Queen…, 2013, p. 7). In addition, this study also revealed that the expeditiousness and cost-effectiveness of the process, which are both ensured by the application of admissibility rules, are considered to be one of the most important advantages of arbitration proceedings (School of International Arbitration at Queen…, 2013, p. 8).

Hence, an arbitrator who chooses to satisfy the interests of both parties and accordingly adopts a liberal approach towards the admissibility of evidence may have a completely opposite effect of making him or her more unlikely to be appointed in the future. This aspect was noted as early as 2000 in a study carried out by US legal scholars: "Some commentators, dealing with labor arbitration in the U.S., clearly identified this behavior and argued that arbitrators who are preoccupied with procedural justice (*i.e.*, to conduct a fair procedure irrespectively of the outcome) will more probably be appointed in future cases than arbitrators who are preoccupied with distributive justice (*i.e.*, split-the-baby outcomes)." (Guandalini, 2020, p. 281–282; for the study itself, see Posthuma *et al*., 2000).

*Thirdly*, unlike, for example, a final award, which to a certain extent, can satisfy the interest of both parties, the liberal approach does not always result in the same manner. This is especially the case when one of the parties objects to the admissibility of evidence adduced by the other party. If the arbitral

tribunal decides to admit such evidence despite the objections, the party that opposed the admissibility of such evidence is a clear loser. In such a case, the arbitral tribunal's decision is not in the interests of both parties but exclusively in the interests of one of the parties. Obviously, a party with a position contrary to the arbitral decision may not be inclined to choose the arbitration again in the future (see, *e.g*. Guandalini, 2020, p. 278). Hence, the arbitral tribunal's desire to make decisions that satisfy the interests of both parties will usually be incompatible with the liberal approach towards the admissibility of evidence.

*Fourthly*, ultimately, the desire of arbitral tribunals to satisfy the interest of both parties is conceptually incompatible with the prevailing concept of international arbitration. The desire of arbitrators to make decisions that satisfy both parties is contrary to one of the most influential concepts of international arbitration. This concept regards international arbitration as an autonomous legal order that is essentially independent from the law of the place of arbitration, the law of the place of enforcement of an arbitral award, or, to some extent, also from the expectations of the parties.

One of the most prominent proponents of this concept, E. Gaillard, describes this concept in his famous work "Legal Theory of International Arbitration": "The third representation of international arbitration is that which accepts the idea that the judiciary of arbitration is rooted in a distinct, transnational legal order, that could be labeled as the arbitral legal order, and not in a national legal system, be it that of the country of the seat or that of the place or places of enforcement. This representation corresponds to the international arbitrators' strong perception that they do not administer justice on behalf of any given State, but that they nonetheless play a judicial role for the benefit of the international community." (Gaillard, 2010, p. 35).

In contrast, arbitrators' desire to satisfy the interests of both parties and thus to exaggerate the parties' expectations in arbitration proceedings should be linked in principle to another conception of international arbitration, which sees international arbitration exclusively as a product of the law of the place of arbitration. This concept is called the concept of single national legal order and is essentially derived from the will of the parties, which determines the choice of the place of arbitration. This concept is described by E. Gaillard as follows: "The connection between arbitration and the legal order of the seat is portrayed as being dependent on the parties' will more than on the material conduct of the arbitral proceedings. It nonetheless established exclusive correlation between each arbitration and a single national legal order, which is exclusive source of its legal force." (Gaillard, 2010, p. 20). Without going into a detailed analysis, it is safe to say that the concept of single national legal

order has not only been the subject of much criticism but is also nowadays considered to be simply outdated and out of touch with the legal reality (see, *e.g*. Paulsson, 2010, p. 4, 7).

The dominant concept of international arbitration as an autonomous legal order allows the arbitral tribunals, for the sake of the formation of an autonomous legal order, to disregard, in certain cases, the provisions of the law of the place of arbitration, the agreement of the parties, or the interests and expectations of the parties. This inevitably has an impact on arbitration proceedings itself. For example, in certain cases, arbitral tribunals should not apply provisions of substantive law chosen by the parties that are inflexible and inconsistent with transnational public policy (see, *e.g*. Gaillard, 2010, p. 93–134). A similar argument can be made against the desire of arbitral tribunals to satisfy the interests of both parties. Arbitral tribunals, by basing their decisions not on the principles of fairness, expeditiousness or other fundamental principles of arbitral proceedings, but on the desire to satisfy the interests of the parties, ignore their duty to pursue justice "for the benefit of the international community". The concept of autonomous legal order should not tolerate arbitrators' desire to render their decisions in accordance with the interests and expectations of the parties rather than in accordance with the rules that are recognised by the international community. An autonomous legal order should therefore oblige arbitrators to implement the fundamental values that are, to some extent, guaranteed by applying the admissibility rules.

Therefore, the above analysis suggests that arbitrators' desire to satisfy the interests of both parties by allowing them to present evidence freely is unjustified in the following respects: 1) the satisfaction of interests of both parties in some cases is contrary to the principles of fairness, expedition, efficiency and other principles and values of arbitral proceedings; 2) it may have a negative consequence of reducing the popularity of arbitrator in the market for arbitration services, and 3) it is incompatible with the prevailing concept of international arbitration as an autonomous legal order.

### 2.2.5. Institutional Aspects of the Arbitration Process

In addition to the reasons already identified above, part 2.2.5 of this thesis discusses two additional reasons related to the institutional framework of arbitral process. These two reasons are the absence of an appeal in the arbitral process and the arbitral tribunal as the sole entity that both determines facts and applies the law in proceedings. Both of these reasons are discussed in the following sub-parts: firstly, this thesis analyses whether the absence of an

appeal in the arbitration proceedings is a valid reason for the liberal approach towards the admissibility of evidence (see **part 2.2.5.1.**); and secondly, this thesis analyses whether the fact that the arbitral tribunal is the sole entity that both determines facts and applies the law in proceedings is a valid reason for the liberal approach towards the admissibility of evidence (see **part 2.2.5.2.**).

#### 2.2.5.1. The Absence of an Appeal in Arbitration Proceedings

The first institutional reason is the absence of an appeal in arbitration proceedings. Legal scholars tend to argue that one of the reasons behind the liberal approach towards the admissibility rules is the lack of appeal in proceedings of international courts or tribunals (see, *e.g.* Waincymer, 2012, p. 793; Brower, 1994, p. 48). As a general rule, the arbitral awards cannot be appealed to a higher, *i.e.* appellate, instance, which could review the facts of the case once again and correct any identified errors of fact or law. None of the arbitration law sources analysed above provides for such a possibility. This should not be surprising. The arbitration process is essentially based on the idea that arbitration is the sole, first and last mean of resolving the parties' dispute. This point is well explained in an authoritative treatise on arbitration law: "Indeed, most institutional rules provide unequivocally that an arbitral award is final and binding. These are not intended to be empty words. One of the advantages of arbitration is that it is intended to result in the final determination of the dispute between the parties. […] By choosing arbitration, the parties choose, in principle, finality." (Redfern *et al*., 2015, p. 569).

This finality inevitably has a direct influence on the admissibility rules. Arbitrators, while being aware that the arbitration process is the only opportunity for the parties to fully present their positions, are inclined to allow the parties to present their evidence and are therefore reluctant to apply the rules that exclude such evidence. Nevertheless, like the reasons analysed above, this reason has two fundamental flaws which cast a doubt on its validity. These two flaws are explained in the following paragraphs.

*Firstly*, the first drawback is that this reason for the liberal approach essentially ignores the benefits of admissibility rules, as revealed by the purposive approach towards the admissibility of evidence (see **parts 1.1.3.2., 1.2.4.2.**). For example, as revealed above, one of the main categories of admissibility rules in arbitral proceedings is the admissibility rules that are aimed at improving fact-finding accuracy (see **part 2.2.1.**). If arbitral tribunals decide to ignore these rules, the parties are able to rely on potentially misleading information in the arbitration proceeding, which is the sole and

only process for resolving the parties' dispute. Accordingly, the absence of an appeal should, in fact, encourage and not discourage the application of admissibility rules that promote fact-finding accuracy.

The same applies to other categories of admissibility rules, *i.e*. admissibility rules that exclude evidence because of its content or admissibility rules that exclude evidence due to infringements of substantive law or procedural law. As repeatedly mentioned, these rules safeguard and give effect to fundamental legal values and principles of arbitral proceedings (see **parts 1.1.3.2, 1.2.4.2.**). The importance of these principles and values should not be ignored because of the institutional set-up of arbitration. The fact that the parties will not have the opportunity to revisit the facts should not be an argument against, for example, the exclusion of confidential information or legal profession privilege. Again, it is not to say that such information should be excluded *per se*. The main point here is that the absence of an appeal is not a ground that overrides the principles of fairness, effectiveness or other principles of arbitral proceedings. Empirical studies also confirm this point: "Anecdotal evidence and empirical research indicate that business users ordinarily consider the efficiency and finality of arbitral procedures favorably, even at the expense of foregoing appellate rights." (Born, 2021, p. 81). Hence, the parties themselves, by opting for arbitration, accept the waiver of appeal and tend to assume risks arising therefrom.

*Secondly*, the second and more important shortcoming of this reason is explicitly stated in legal scholarship itself: "The lack of appeals as a reason for liberal admissibility rules may not be so powerful given that there are limited appeals on factual matters in most jurisdictions." (Waincymer, 2012, p. 793). In fact, various jurisdictions have a form of limited appeal that restricts the introduction of new facts at the appeal stage. In the first part of this thesis, it was already mentioned that, for example, Lithuanian civil procedure law offers only limited possibilities to present new evidence at the appellate court. Similar limitations are also found in countries such as Italy, England, Germany or the US (see **parts 1.1.1.2., 1.1.2.3.**, for German civil procedure, see Wolf, Zeibig, 2015, p. 17; for the US federal civil procedure law, see Marcus, 2014, p. 105 – 126; Saltzman, 2014, p. 95–104).

In this respect, the case law of the ECtHR is also relevant since it recognises that Art. 6 of the ECHR does not even impose an obligation on the contracting parties to establish appellate courts (Andrejeva v. Latvia...). Hence, as far as fact-finding is concerned, in the civil procedure law of some jurisdictions, the main and only fact-finding process takes place in the court of first instance, whose findings on facts will be binding on the court of appeal.

In this respect, the arbitration process, as the sole fact-finding process for the parties' dispute, is not as radical or as distinctive as it might appear at first.

Therefore, the position that the liberal approach towards the admissibility rules is based on a certain institutional aspect of the arbitral process, *i.e*. the non-existence of an appeal, is not justified. As it is argued in this part above, the rules of admissibility of evidence implement procedural values that are too important for the lack of an appeal to be a valid ground for not applying these rules. Moreover, the lack of appeal should not be regarded as a radical feature of the arbitral process which would be able to justify the liberal view towards the admissibility of evidence.

#### 2.2.5.2. The Arbitral Tribunal is the Sole Entity that both Determines Facts and Applies the Law in Proceedings

The second institutional reason is the institutional order of arbitral proceedings, which means that the same entity, *i.e.* the arbitral tribunal, decides on the admissibility of evidence and on the finding of facts. It has already been mentioned in this thesis that various sources of arbitration law are characterised by provisions which provide that the discretion of arbitral tribunals extends not only to the matters of admissibility of evidence but also to the matters of relevance, value or materiality of evidence (see Art. 19(2) of the Model Law, Art. 27(4) of the UNCITRAL Arbitration Rules, Art. 19 of the ICC Arbitration Rules, Art. 22(1)(vi) of the LCIA Arbitration Rules and Art. 9(1) of the IBA Rules; see also **part 1.2.**). These provisions result in that once an arbitrator has been made aware of the content of evidence that is subsequently declared inadmissible, he or she is often unable to distance himself or herself from the content of that evidence, which inevitably may affect his or her position on the facts of the case.

Various studies support that fact-finder is often unable to distance himself or herself from the content of inadmissible evidence. For example, one study found that judges, like juries, are unable to ignore inadmissible information: "In this study, both groups read about a product-liability case including (or not including) biasing material and were either instructed (or not) to disregard this piece of inadmissible evidence. Both jurors' and judges' verdicts depended heavily on whether the biasing material was included, but these decisions were not altered if that evidence was deemed as inadmissible. Thus, it seems that judges, as with jurors, cannot easily disregard inadmissible evidence, although they know they should." (Landsman, Rakos, 1994 quoted Peer, Gamliel, 2013, p. 116). Another study came to a similar conclusion –

judges often cannot ignore relevant but inadmissible information: "We found that the judges who participated in our experiments struggled to perform this challenging mental task. The judges had difficulty disregarding demands disclosed during a settlement conference, conversation protected by the attorney-client privilege, prior sexual history of an alleged rape victim, prior criminal convictions of a plaintiff, and information the government had promised not to rely upon at sentencing. This information influenced judges' decisions even when they were reminded, or themselves had ruled, that the information was inadmissible." (Wistrich *et al*., 2005, p. 1251). The results of these studies can also be applied to arbitrators (see Sussman, 2017, p. 50).

This problem is mainly absent in court proceedings, which are characterised by a separate fact-finder. A good example is a division of functions in the common law tradition between the judge, who decides questions of law, and the jury, who decide questions of fact. As mentioned above, this division has led to the fact that admissibility rules have traditionally occupied a much more prominent position in the common law tradition than in the civil law tradition (see **part 1.1.**). This point is well summarised by M. Damaška: "In the former context, the judge can keep inadmissible information from the fact finder by a preliminary ruling, and – provided that the two parts of the tribunal are acoustically separated – inadmissible but otherwise credible evidence leaves no imprint on the fact finder's mind." (Damaška, 1997, p. 47).

Given the arbitrator's inability to ignore inadmissible evidence, a legitimate question may arise – is it possible that in dispute settlement institutions with a sole legal and fact-finder, there is no place for admissibility rules at all and that all evidence should simply be admissible? For example, is it really effective to declare an illegally made but nonetheless relevant 10-minute audio recording inadmissible when the arbitral tribunal is already familiar with its content? After all, as the studies reviewed above show, there is a good chance that the inadmissible audio recording will, in any event, influence the arbitral tribunal's final decision in the case.

Legal scholarship offers various solutions to this problem. However, all solutions focus on court proceedings rather than arbitration. For example, some authors suggest that in such cases, the judge who got accustomed to the inadmissible information should be removed, although the authors themselves acknowledge that such a method would be relatively ineffective (Nunner-Kautgasser, Anzenberger, 2016, p. 201–202). Other authors propose to increase the number of cases in which the presence of jurors would be mandatory (Wistrich *et al*., 2005, p. 1327–1328). Meanwhile, some jurisdictions address this problem by providing that the admissibility of

evidence is to be decided by a different judge at the initial stage of proceedings (see, *e.g*. Juozapavičius, 2012, p. 100).

Could any of these solutions be applied to the arbitration process? For example, in the case of institutional arbitration, could the admissibility of evidence be decided by a chairperson or secretary of an arbitral institution? Perhaps, in the case of a three-arbitrator panel, the questions of admissibility of evidence could be left exclusively to the presiding arbitrator, thereby reducing the exposure of other arbitrators to potentially inadmissible information? Perhaps it would be worthwhile to introduce provisions allowing the arbitral tribunal to appoint independent external experts to review the content of evidence and rule on its admissibility?[36] Would reforms of this kind be effective at all, or is it possible that the importance of the admissibility rules does not justify such changes? These and related questions, while very interesting, are too complicated. Answering these questions and proposing a clear institutional reform of the arbitration process could be the subject of another dissertation. Accordingly, due to the subject matter and the limited scope of this thesis, possible institutional changes to arbitration proceedings are left for future research.

On the other hand, possible solutions to this problem are not only related to the institutional reform of arbitration proceedings. Although somewhat paradoxical, another solution to this problem is an adversarial process in which parties raise questions about the admissibility of presented evidence. In the context of adjudication, R. Posner identifies such a solution: "Gatekeeping is one way of combating cognitive illusions; another is the adversary process itself. If the lawyer for one party uses "framing" to influence a witness's testimony, the other lawyer can on cross-examination reframe the question to offset the effect of his opponent's framing."[37] (Posner, 1999, p. 22). In other words, if the parties or their representatives raise legitimate questions about the admissibility of evidence during proceedings, the judge, even if he or she

[36] A similar possibility is set out in Art. 3(8) of the IBA Rules: "In exceptional circumstances, if the propriety of an objection can be determined only by review of the Document, the Arbitral Tribunal may determine that it should not review the Document. In that event, the Arbitral Tribunal may, after consultation with the Parties, appoint an independent and impartial expert, bound to confidentiality, to review any such Document and to report on the objection. To the extent that the objection is upheld by the Arbitral Tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed." However, as the provision's text itself makes clear, this option can only be used in exceptional cases.

[37] For more details on the framing bias, see part 2.2.1 of this thesis.

is aware of the inadmissible information, will be more attentive to it and, therefore, less likely to be influenced by the content of that information. For example, going back to the illegally made 10-minute audio recording, there are two possible situations: 1) judges, aware of their limited ability to distance themselves from inadmissible information, accept the liberal approach towards the admissibility rules and simply allow the parties to present the evidence; 2) judges allow the parties, in accordance with the principle of adversarial procedure, to raise questions and challenge the admissibility of the evidence in proceedings. In contrast to the first case, in the second case, the judge hears the risks that the evidence poses to the case, such as its misleading nature or the risk of violating the principle of fairness, which makes it easier for the judge to distance himself or herself from the influence of the content of such evidence.

The parties' arguments and questions about the admissibility of presented evidence should also be recognised as a solution to the problem of the inability to ignore inadmissible information in international commercial arbitration. As in court proceedings, the parties, by raising issues of admissibility of evidence in arbitration proceedings, would enable the arbitral tribunal to identify the risks arising from potentially inadmissible evidence, which would help to avoid the undue influence of such evidence on decision-making. This is also the conclusion reached by some legal scholars. For example, E. Sussman points out: "Counsel should carefully weigh the pros and cons in considering their alternatives. While no one would argue for turning an arbitration into a courtroom-style debate about the admissibility of every piece of evidence, a brief, one-word objection on critical pieces of evidence as to which a valid evidentiary objection can be lodged may be advisable in some circumstances." (Sussman, 2017, p. 52). Accordingly, parties, by raising, for example, questions of admissibility of a written witness or expert testimony (see **part 2.2.1.**), will force the arbitral tribunal to take into account the unreliability of such evidence and, even if it decides not to exclude such evidence, will potentially give it a lesser evidentiary weight (see also Radvany, 2016, p. 510–511).

Additionally, it is also important to note that the application of certain admissibility rules should not depend on arbitrators' inability to distance themselves from inadmissible information. In this respect, I am referring to the admissibility rules that exclude evidence because of its content or due to infringements of substantive law or procedural law (see **parts 1.1.3.2., 1.2.4.2.**). For example, as mentioned above, the exclusion of late evidence implements the principles of efficiency and expediency (see **part 1.1.3.2.4.**). Hence, the mere exclusion of such evidence, whether or not its content impacts

the arbitral tribunal, constitutes a prerequisite for the implementation of arbitration procedure principles since there is no need to investigate, analyse or further evaluate such evidence during the proceedings. The same applies, for example, to the exclusion of illegally obtained evidence or evidence containing communications between lawyer and client. Whether or not that evidence will influence the arbitrators' decision is a secondary question since the mere fact of exclusion implements legal values protected by these admissibility rules.

Therefore, the position that the liberal approach towards the admissibility rules is based on certain institutional aspect of the arbitral process, *i.e*. the arbitral tribunal's role as the sole entity that both determines the facts and applies the law, is not justified. As argued in this part above, the main antidote to the influence of inadmissible information on the arbitral tribunal is the admissibility issues raised by the parties during the arbitral proceedings. Moreover, some categories of admissibility rules already achieve their objectives simply by declaring the evidence inadmissible. In contrast, the influence of the content of the evidence on the arbitrator is only a secondary issue.

### 2.2.6. Disadvantages of Evidence Production Stage

The last reason for the liberal approach analysed in part 2.2 of this thesis is the shortcomings of the evidence production stage in international commercial arbitration. This reason relates to the claim that international commercial arbitration proceedings do not offer a wide range of opportunities for the party to obtain evidence from the opposing party or third parties. These shortcomings are often apparent when comparing the evidence production phase in arbitration with the evidence production phase in the US, which is usually referred to by the specific term "discovery".

The discovery phase in the US is characterised by very broad rights of the parties during the taking of evidence process. The main purpose of the taking of evidence process is to give the parties ample access to a wide range of information before the start of the trial. As explained in legal scholarship: "The word 'discovery' is a term of art used in the United States and some other common law countries (no longer in England, where the term was abolished under the Civil Procedure Rules 1996) to describe a process whereby the parties (and their lawyers) are legally obliged to produce documents that are 'relevant to the pleaded issues', even if they are prejudicial to that party's case." (Redfern *et al*., 2015, p. 76).

The broad scope of the discovery phase is determined by four factors, which are explained in the following paragraphs.

*Firstly*, contrary to the civil law tradition, the discovery phase in the US is, in the first place, focused not so much on the discovery of specific evidence that is useful to a party but rather on a wide range of information which contributes to the understanding of variety of facts that are not necessarily directly related to the facts of the case (see, *e.g.* Tercier, Bersheda, 2011, p. 81). In the common law tradition, the inquiry is not "What evidence is required to reach a justifiable decision?" but rather "What evidence should be heard to understand the whole case?" (Ahdab, Bouchenaki, 2011, p. 73). These different approaches to the civil law tradition and the common law tradition in the context of document production are clearly evident from the very beginning of proceedings. While most jurisdictions in the civil law tradition require the parties to submit specific evidence with the claim, a plaintiff in a US federal court is not obliged to do so. Rule 8(a)(2) of the Federal Rules of Civil Procedure only requires the plaintiff to produce "a short and plain statement of the claim showing that the pleader is entitled to relief." (Federal Rules of Civil Procedure, 1938; Reed, Hancock, 2009, p. 342).

*Secondly*, the discovery phase is characterised by only a very limited involvement of the court. The court usually does not even see the information exchanged between the parties at this stage since, due to the volume of information requested, only a very small amount of this information is used as evidence in civil proceedings. In this respect, the discovery of documents is conducted as a continuation of the private dispute according to specific procedural rules (Marghitola, 2015, p. 13).

*Thirdly*, the Federal Rules of Civil Procedure, which govern the discovery phase, do not impose high requirements for requests to provide information. Rule 26(b)(1) establishes that the scope of the discovery phase is limited to four main criteria: 1) the relevance of information; 2) the proportionality of the discovery phase; 3) legal privileges which protect the content of the requested information; 4) the information does not have to be admissible in court proceedings.[38] The broad scope of this stage is primarily

[38] Rule 26(b)(1) of the Federal Rules of Civil Procedure provides: "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery

due to the flexible and broad interpretation of criteria of relevance. The discovery process includes not only information that is relevant to the circumstances of the case but also information that is potentially relevant (Ahdab, Bouchenaki, 2011, p. 74). Such an interpretation of relevance is consistent with the essence of the discovery phase, which is not intended to obtain specific evidence, but to enable the parties to gather a wide range of information that would enable them to uncover and then present to the court the facts of the case as fully and reliably as possible (Radvany, 2016, p. 473). In addition, Rule 26(b)(1) provides that the discovery stage is not subject to the rules of admissibility of evidence, except for legal privileges. Hence, parties may request even inadmissible information at this stage, for example, evidence constituting opinion or information regarding person's character (see **part. 1.1.1.**).

*Fourthly*, the broad scope of the discovery phase is also due to the fact that the Federal Rules of Civil Procedure provide for various procedural instruments that are usually not known in the civil law tradition. For example, Rules 27 to 32 regulate the out-of-court deposition testimony, which, under certain circumstances, can later be used in court proceedings (Rule 32 of the Federal Rules of Civil Procedure). Rule 33 establishes another procedural instrument, *i.e.* the interrogatories, which allow one party to submit to the other party certain interrogatories relating to the plaintiff's or defendant's position in the case, to which the party has to reply in writing under oath. Rule 34 provides the discovery of documentary or physical evidence and the opportunity to conduct an inspection. This rule entitles the parties to request not only specific written evidence, which includes almost any written, recorded or digital information, but also categories of evidence. In addition, Rules 34(c) and 45 establish the right of the party to obtain evidence not only from the other party but also from other persons not involved in the proceedings (for more details on these procedural instruments, see Reed, Hancock, 2009, p. 343–345; Marghitola, 2015, p. 9).

The discovery phase of the US civil proceedings is not typical of international commercial arbitration. As one authoritative source of arbitration law points out: "Subject to any mandatory rules of the *lex arbitri*, or agreement of the parties, the process known as 'discovery' has no place in international arbitration." (Redfern *et al.*, 2015, ref. 75). Other arbitration lawyers take identical positions: "American or even English-style disclosure is not available in international arbitration (unless of course, the parties have agreed

outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

on it)." (Kaufmann–Kohler, Bärtsch, 2004, p. 17). The term "discovery phase" is not even commonly used in the context of arbitration proceedings since the taking of evidence in arbitration is most commonly described as document production (see Marghitola, 2015, p. 10) or, in some cases, by a more typical term for English civil procedure – disclosure of evidence (Born, 2021, p. 2493–2600). The IBA Rules also support this position. The IBA Rules commentary summarises the prevailing approach in international arbitration: "Expansive American- or English-style discovery is generally inappropriate in international arbitration. Rather, requests for documents to be produced should be carefully tailored to issues that are relevant and material to the determination of the case." (1999 IBA Working Party & 2010 IBA…, 2010, p. 7).

International arbitration is not familiar with the discovery phase mainly because the discovery phase is a fundamentally unfamiliar procedural law instrument for arbitration lawyers from the civil law tradition. Moreover, the volume of information requested during the discovery phase is often referred to by the distinct term "fishing expedition", which is characterised by an extremely broad, repetitive, often irrelevant and unreasonably expensive production of documents (see Ahdab, Bouchenaki, 2011, p. 98).

According to some scholars, the absence of a broad discovery procedure in the arbitration process determines and justifies the liberal approach towards the admissibility of evidence. As mentioned in this part above, the discovery phase gives the parties access to even inadmissible information. Hence, it not only provides the parties with specific evidence but also with additional sources of information for further discovery. In other words, a party that can request evidence at the discovery stage will have access to a significantly larger volume of information which provides a better opportunity to present one's case in the proceeding. For example, one scholar points out: "Parties can discover evidence in an inadmissible form through wide discovery, but they can also use that knowledge to find the same evidence in an admissible form or otherwise find a means of admitting the evidence within the FRE" (Radvany, 2016, p. 506).

Meanwhile, since arbitration proceedings cannot be characterised by a discovery phase, the parties' access to information which is held by the other party or by third parties is considerably reduced. This decreases the possibilities of both obtaining admissible evidence and attempting to introduce various, albeit originally inadmissible, information by the admissible means in the arbitration. Hence, since the arbitration process makes it more difficult for a party to prove its case, it leads to a greater risk of

applying the admissibility rules that, in many cases, can further complicate the evidentiary process for both parties.

The absence of the discovery phase and, therefore, limited possibilities of obtaining evidence in arbitral proceedings manifest themselves in a number of ways: 1) a suspicious approach towards the application of the admissibility rules, which is often considered incompatible with the limited possibilities in the evidence production stage. For example, one scholar provides the following position: "[...] the narrow bounds of discovery are simply inconsistent with a narrow and structured regime of evidentiary admissibility; unless parties were able to conduct more thorough and probing discovery, rigorous attention to evidentiary admissibility would likely affect parties' ability to make their case [...]" (Radvany, 2016, p. 509–510); 2) a little attention to the specific admissibility rules. For example, while, in the context of evidence production, legal scholarship pays considerable attention to issues of legal privilege, other admissibility rules, such as the exclusion of evidence on the grounds of confidentiality or political sensitivity receive considerably less attention (see, *e.g*. Kaufmann–Kohler, Bärtsch, 2004, p. 19; this tendency has also been noted by other authors, see Marghitola, 2015, p. 90); 3) finally, this also leads to arbitral tribunal's tendency to allow the parties to submit even irrelevant or repetitive evidence in arbitration proceedings (see, *e.g*. Born, 2021, p. 2485).

Similarly to other reasons for the liberal approach outlined above, the stage of evidence production in arbitration until now has not been critically assessed in legal scholarship. Thus, the following paragraphs contain an analysis of four arguments which not only provide a critique of the reason for the liberal approach but also explain the need for an opposite approach towards the admissibility rules, *i.e*. stricter application of the admissibility rules.

*Firstly*, contrary to some beliefs, the arbitration process is not inherently characterised by a limited evidence production phase. Despite the fact that arbitral proceedings are not characterised by the US-style discovery phase, various sources of arbitration law do not suggest that the limited evidence production phase should lead to the limited application of the admissibility rules.

The evidence production stage in arbitration is often described as one of the most remarkable examples of a merger between different approaches of national civil procedure because it is able to reflect features of both the common law tradition and the civil law tradition (Tercier, Bersheda, 2011, p. 84). The evidence production stage in arbitral proceedings does not only focus on the civil law tradition but also takes a number of aspects from the common

law tradition and directly from the discovery phase itself (see, *e.g.* Waincymer, 2012, p. 841; Radvany, 2015, p. 742; Tercier, Bersheda, 2011, p. 85 – 86). Some scholars have described the taking of evidence in arbitration as follows: "It is narrower than discovery under the FRCP in the United States, similar in scope to disclosure in the United Kingdom and broader than disclosure in most civil law systems." (Ahdab, Bouchenaki, 2011, p. 94). In order to confirm these views, the following paraphs provide the analysis of various arbitration law sources. As in other parts of this thesis, the analysis includes the Model Law, three arbitration procedure rules and the IBA Rules.

The Model Law does not directly regulate the production of evidence in arbitration proceedings. Nevertheless, the right of the parties to agree on the production of evidence in arbitration proceedings derives from the already mentioned Art. 19(1) of the Model Law (see **part 1.2.1.**). In the absence of an agreement between the parties on this issue, the stage of the production of evidence is left to the broad discretion of arbitral tribunals, as set out in Art. 19(2) of the Model Law (see Born, 2021, p. 2499; Bantekas *et al*., 2020, p. 547).

The rules of arbitration are practically identical with regard to the production of evidence. Art. 27(3) of the UNCITRAL Arbitration Rules establishes the arbitral tribunal's right to require producing evidence: "At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine." In the absence of an agreement between the parties, the scope and criteria for the production of evidence are left to the broad discretion of arbitral tribunals (Caron, Caplan, 2012, p. 567).

Art. 25(1) of the ICC Arbitration Rules provides: "The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." (see **part 1.2.2.2.**). Paragraph 5 of the same article further states: "At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence." These provisions do not explicitly provide for the evidence production stage. Nevertheless, legal scholarship recognises the right of arbitral tribunals to obtain evidence from the parties (see, *e.g.* Webster, Bűhler, 2018, p. 420–421). The ICC arbitration case law also confirms this: "While the ICC Rules do not contain any provision dealing with 'discovery' properly speaking [...], 'the arbitrator shall proceed within as short a time as possible' to 'establish the facts of the case' by all appropriate measures [...] allows the arbitrators to ask the parties to produce the documents in their possession or control, which in their view are relevant to the case." (Order in ICC Case No. 5542, quoted Born, 2021, p. 2515).

The stage of evidence production is governed in more detail by the LCIA Arbitration Rules. Art. 22(1)(v) directly establishes the arbitral tribunal's right to order the production of evidence: "The Arbitral Tribunal shall have the power […]: to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant." The provision also gives the arbitral tribunal a fairly wide discretion in deciding the scope, procedure and other procedural aspects of the evidence production stage (Richman *et al*., 2021, p. 286–287).

As can be seen from the paragraphs above, the arbitration law sources generally provide for the possibility of the production of evidence in arbitral proceedings. However, the Model Law and rules of arbitration procedure leave the issue of production of evidence to the broad discretion of arbitral tribunals and do not detail the scope of production of evidence or extensive conditions for granting the requests to produce evidence. Hence, the analysis of the Model Law and arbitration rules do not provide for a proper assessment of the scope of the evidence production phase. Accordingly, as in the analysis of the conceptual approach towards the admissibility of evidence itself, the IBA Rules are of particular relevance here.

Art. 3 of the IBA Rules "Documents" deals in detail with the process of document production. Art. 3(2) of the IBA Rules provides: "Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce." The IBA Rules essentially set out five main criteria for the request for documents: 1) the document must be described in such a way that it can be identified, and if the category of documents is requested, it must be described narrowly and specifically (Art. 3(3)(a) of the IBA Rules); 2) the documents must be relevant and material to the case at hand (Art. 3(3)(b) of the IBA Rules); 3) the documents are not in the possession, custody or control of the requesting party or there are no reasons why it would be unreasonably difficult for the requesting party to produce them (Art. 3(3)(c) of the IBA Rules); 4) the requested documents are in the possession, custody or control of the other party (Art. 3(3)(c) of the IBA Rules); 5) the grounds for exclusion laid down in Art. 9 of the IBA Rules do not exist (see **parts 1.2.3.1., 1.2.3.2, 1.2.3.3., 1.2.3.4, 1.2.3.5.**).

The criteria outlined in the IBA Rules clearly imply higher requirements than the Federal Rules of Civil Procedure. For example, the IBA Rules not only stipulate that the requested documents should be relevant but also material to the case at hand, *i.e.* documents must allow completing consideration of the factual issues from which legal conclusions can be drawn

(Marghitola, 2015, p. 53). The introduction of the materiality criteria in the IBA Rules results from the influence of the civil law tradition rather than the common law tradition (Marghitola, 2015, p. 48).

Moreover, the criterion of relevance itself is interpreted much more narrowly in the context of the IBA Rules. A document will be considered relevant when it will assist the requesting party, either to establish the truth of the allegations of fact relied on to support its legal case or because it is inconsistent with the facts relied on by its opponent(s) (Khodykin *et al.*, 2019, p. 136). Thus, unlike at the discovery stage, a request for the production of a document should not include documents which are only likely to be relevant to the case or documents which would only allow the identification of other relevant evidence.

These are just some of many examples of the narrower scope of the evidence production stage in arbitration proceedings. After all, as mentioned above, the limited scope of the evidence production stage is also confirmed by the IBA itself (see 1999 IBA Working Party & 2010 IBA…, 2010, p. 7).

Nevertheless, although the evidence production stage of the IBA Rules is different from the US-style discovery process, it is sufficiently wide and detailed in its scope. As was aptly pointed out by one legal scholar: "The IBA Rules provide for broader document production than the procedural rules of virtually all civil law jurisdictions." (Marghitola, 2015, p. 18). This conclusion is supported by the following four features of the evidence production stage as established in the IBA Rules.

The first feature – the broad content of the term "document", which includes not only written evidence but also various electronic documents, audio or video recordings, photographs, *etc*. (see **part 1.2.3.**). Such a definition allows the process of document production to go beyond the written evidence.

The second feature – the IBA Rules allow for the production of not only specific documents but also categories of documents. This possibility enables parties to request not only specific documents but also documents whose author or title a party may not know but can nevertheless identify the nature of the documents sought and the general time frame in which they would have been prepared (1999 IBA Working Party & 2010 IBA…, 2010, p. 9). A party's right to request categories of documents allows parties to attempt to identify facts unknown to them, which is not usually the case in the civil law tradition (Marghitola, 2015, p. 18). For example, in contrast to Rule 34(b)(1)(a) of the Federal Rules of Civil Procedure, which gives the right to request the categories of documents, Lithuanian civil procedure does not provide for such a possibility (see Art. 199 of the LCPC).

The third feature – the IBA Rules provide for the possibility to request not only documents in possession of the other party but also documents or categories of documents under the control of the other party (Art. 3(3)(c) of the IBA Rules). This right of a party also derives from the US discovery[39] and determines that a document or a category of documents may be requested even if a party, although not in possession of the document, has the ability to obtain the document without any assistance from the tribunal or any other third party (Khodykin *et al*., 2019, p. 154, 156).

The fourth feature – the IBA Rules also allow ordering other party's "internal" documents. For example, various internal company reports, transcripts of internal meetings, *etc*. This feature is also mainly related to the US discovery process and is generally not known in the civil law tradition. This possibility also substantially extends the scope of evidence production in international arbitration proceedings: "The inclusion of internal documents has the consequence that facts unknown by the requesting party are regularly brought to light by way of document production. Accordingly, the IBA Rules allow a further search for truth than the mere proof of allegations." (Marghitola, 2015, p. 18).

Additionally to the provision of the IBA Rules, a relatively broad scope of evidence production stage in international arbitration is also supported by the broad discretion of arbitral tribunals. As mentioned, in the absence of an agreement to the contrary, issues related to the evidence production stage are left to the broad discretion of the arbitral tribunal. Such a broad discretion gives the arbitral tribunal a wide range of procedural tools that can be used during the evidence production stage. For example, according to G. Born, the broad discretion of arbitral tribunals allows the arbitral tribunal to apply various procedural instruments, which are generally only known in the US style discovery: "A number of evidence-taking mechanisms are potentially available in international arbitration. These include document disclosure, compelled attendance of witnesses at the evidentiary hearing, interrogatories, site inspections and oral depositions. These various means of evidence-taking are available, subject to the parties' agreement and tribunal's discretion, according to the circumstances and needs of the case." (Born, 2021, p. 2521).

The possibility to employ various procedural instruments during the evidence production stage is also confirmed by the fact that neither the Model Law nor the arbitration rules nor the IBA Rules expressly prohibit interrogatories, depositions, or other procedural instruments. The use of these instruments can also be found in arbitral awards. For example, in the ICC

[39] See Rule 26(a)(1)(ii) of the Federal Rules of Civil Procedure.

arbitration case, the arbitral tribunal issued a procedural order granting the claimant's request to allow the examination of a witness outside the arbitral procedure (Procedural Order in ICC Case No. 7170, quoted Born, 2021, p. 2529).

The use of these procedural instruments is indeed quite rare in practice, and the requests to apply these procedural instruments will most likely occur during arbitration proceedings, which are dominated by lawyers from the US (Ahdab, Bouchenaki, 2011, p. 73; Marghitola, 2015, p. 9). Nevertheless, the important aspect here is that due to the widely recognised broad discretion of arbitral tribunals, parties and arbitral tribunals have the possibility to apply these procedural instruments, which consequently expands the scope of evidence production in international commercial arbitration.

Another important feature that confirms the relatively broad evidence production stage is the possibility of obtaining evidence from persons not involved in arbitral proceedings. Neither the Model Law nor the rules of arbitration procedure expressly provide for such a right of the arbitral tribunal but limit itself to the document production only from the parties. This is essentially determined by the contractual nature of arbitration, which exclusively binds only the parties who have agreed to arbitrate their disputes. Nevertheless, the arbitral tribunals are not left completely out of options. In this context, the Model Law and the IBA Rules provide for the following three possibilities for obtaining documents from the third parties: 1) arguably, the most important possibility to obtain evidence from a third party is the right of the parties and arbitral tribunals to request assistance from national courts. As mentioned, this right is directly enshrined in Art. 27 of the Model Law: "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." (see **part 1.2.1.**). The introduction of Art. 27 in the Model Law was intended to compensate for the lack of power of arbitral tribunals to request to submit documents, inspect evidence, call a witness, *etc*. (Bantekas *et al*., 2020, p. 718). Moreover, the assistance of national courts is not limited to the courts of the place of arbitration. Some authors even suggest that national courts, when receiving a request for the taking of evidence outside the place of arbitration, are entitled to assist the arbitral tribunal by applying to a national court which is outside the place of arbitration (Born, 2021, p. 2600); 2) Art. 3(9) of the IBA Rules provides that a party may request the arbitral tribunal "to take whatever steps are legally available to obtain the requested Documents [...]." These legal steps include, for example, a formal request by the arbitral tribunal to the third party to produce documents; 3) Art.

3(9) of the IBA Rules also provides for the power of the arbitral tribunal to require any party to the arbitration to take such steps as the tribunal considers appropriate in order to obtain the relevant documents. This right includes a party's request to the arbitral tribunal to oblige another party to use its best efforts to obtain documents from the third party (Khodykin *et al*., 2019, p. 189–190, 192).

All of these features of evidence production in international commercial arbitration are far from always being effective and feasible. The production of evidence in arbitration proceedings depends not only on the Model Law, the IBA Rules or other legislation applicable to arbitral proceedings but also on the discretion of arbitral tribunals and, more importantly, on the willingness of the parties themselves to cooperate during the discovery phase. However, in this respect, it is also important to note that if one of the parties refuses to cooperate, the arbitral tribunal is entitled to draw adverse factual inferences against the non-cooperating party. This right of the arbitral tribunal is enshrined in Art. 9(6) of the IBA Rules: "If a Party fails without satisfactory explanation to make available any other relevant evidence […] the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party." Arbitral tribunals' right to draw adverse factual inferences against the non-cooperating party is also widely recognised in legal scholarship (see, *e.g*. Kaufmann–Kohler, Bärtsch, 2004, p. 21; Ahdab, Bouchenaki, 2011, p. 97; Born, 2021, p. 2565–2566).

Arbitral tribunals' right to draw adverse factual inferences not only encourages the parties to participate in the taking of evidence phase in good faith but also allows the arbitral tribunals to avoid a factual deadlock that may result from insufficient possibilities of obtaining the necessary evidence. As renowned arbitration law experts have pointed out in this respect: "While the arbitral tribunal may not have the power to order such a third party to produce documents, it may draw an adverse inference in respect of the evidence of the witness in question if it appears to the tribunal that the witness is withholding documents without good reason." (Redfern *et al*., 2015, p. 387).

Therefore, the analysis suggests that although the production of evidence in arbitration proceedings is not identical to the discovery process in the US, it has a relatively large scope and broad possibilities in order for the arbitral tribunal to obtain evidence. This is confirmed by the following four features of the evidence production stage in international commercial arbitration: 1) widely applicable IBA Rules provide four aspects that broaden the scope of the evidence production stage, *i.e.* the broad content of the term "document", possibility to request categories of documents, possibility to request documents or categories of documents under the control of the other party,

possibility to request other party's "internal" documents; 2) the broad discretion of arbitral tribunals allows using various procedural instruments known to the US-style discovery process; 3) both the Model Law and the IBA Rules provide for possibilities to obtain evidence from the third parties; 4) the arbitral tribunals are entitled to draw adverse factual inferences against the non-cooperating party. This sufficiently broad scope of the production of evidence stage should justifiably lead us to challenge the reasonableness of the liberal view towards the admissibility of evidence, which is in part based on the allegedly very limited scope of the production of evidence stage in international commercial arbitration.

*Secondly*, the second argument which confirms that the disadvantages of evidence production do not justify the liberal approach is that various jurisdictions in the civil law tradition cannot be characterised by the extensive evidence production stage. However, this does not lead to the liberal approach towards the admissibility of evidence.

Due to the limited scope of this thesis, it is not possible to analyse the approach to evidence production that exists in all jurisdictions that belong to the civil law tradition. Nevertheless, some of the abovementioned sources of legal scholarship allow us to argue that the evidence production stage in the civil law tradition is considerably less extensive than the evidence production stage found in arbitration proceedings (see, *e.g.* Ahdab, Bouchenaki, 2011, p. 83–84; Tercier, Bersheda, 2011, p. 81).

Notwithstanding the lesser importance of the evidence production stage, various jurisdictions of the civil law tradition can be characterised by different categories of admissibility rules, ranging from admissibility rules that improve fact-finding accuracy to admissibility rules that exclude evidence because of its content or due to infringements of substantive law or procedural law (see **parts 1.1.2., 1.1.3.1.**). This aspect allows us to question the justification of the argument that the limited scope of production of evidence in arbitration should supposedly lead to the lesser importance of the admissibility rules. As detailed in this part above, the arbitral process is characterised by a relatively wide range of possibilities in the production of evidence stage. Hence, a limited application of the admissibility rules in arbitration should not be considered justified while taking into account various types of admissibility rules found in the civil law tradition, which, as mentioned in this part above, is generally characterised by a significantly narrower scope of the evidence production phase than the arbitral process itself.

*Thirdly*, the justification for the liberal approach is essentially limited to the rules of admissibility of evidence known in the common law tradition.

The arguments in favour of the liberal approach towards the admissibility of evidence due to the limited scope of the evidence production stage in arbitration are usually related only to the liberal application of admissibility rules that are exclusively known in the common law tradition, *i.e.* the exclusion of hearsay, opinion evidence, character evidence, *etc*. (see **part 1.1.1**; see Radvany, 2016, p. 506).

This thesis does not seek to argue that the admissibility rules found exclusively in the common law tradition should be applied in international commercial arbitration. These admissibility rules are neither embodied in the Model Law nor in the rules of arbitration procedure nor – and most importantly – in the IBA Rules (see **part 1.2.**). Nevertheless, the liberal approach towards the common law tradition's rules should not be a ground for the same approach towards other admissibility rules embodied both in the IBA Rules and other sources of arbitration law. As has been repeatedly mentioned in this thesis, the admissibility rules not only ensure the fundamental procedural values but also, in certain cases, improve the accuracy of fact-finding in arbitration proceedings, which makes it impossible to ignore the importance of these rules in the arbitration process.

*Fourthly*, the purpose of the taking of evidence stage is not to establish the absolute or objective truth. One of the purposes of the taking of evidence is to enable the parties to present relevant facts and evidence, which consequently helps the arbitral tribunal to determine a truth in arbitral proceedings. Accordingly, the greater the obstacles at the evidence production stage, the greater the risk of failing to establish a truth in a particular case.

As detailed above, the arbitration process is not geared towards absolute or objective truth. On the contrary, the prevailing approach suggests that the arbitral tribunals are obliged to establish a legal, or otherwise formal, truth, which by its very nature is compatible with the rules of admissibility of evidence (see **part 2.2.2.**). The legal truth allows us to justify obstacles, such as the admissibility rules, at the stage of evidence production since the reasonable exclusion of one or other piece of evidence, unlike in the case of the objective truth, will usually not lead to substantial obstacles to the establishment of legal truth.

Therefore, to conclude, the allegedly limited scope of the production of evidence stage of the arbitration process should not justify the liberal approach towards the admissibility of evidence due to four arguments: 1) the production of evidence phase of the arbitration process is characterised by a sufficiently broad range of possibilities for the parties and arbitral tribunals to gather relevant evidence; 2) various jurisdictions of the civil law tradition, which are traditionally characterised by a narrower scope of evidence production than

arbitration, are known for different categories of admissibility rules; 3) the liberal approach towards the admissibility of evidence is usually exclusively associated with the rejection of the common law tradition's admissibility rules in arbitration, and 4) the stage of taking of evidence in arbitration proceedings involves the determination of legal rather than the objective truth.

## 2.3. The Critical Assessment of the Liberal Approach towards the Admissibility of Evidence: Concluding Remarks

To date, legal scholarship has not adequately and comprehensively assessed the main reasons for the liberal approach towards the admissibility rules in international commercial arbitration. Part 2.2 of this thesis provides for such a critical assessment. Part 2.3 of this thesis is intended to summarise the conclusions drawn from part 2.2 briefly.

A detailed analysis of the liberal approach towards the admissibility of evidence reveals that the liberal approach and the reasons justifying it have no clear and valid justification in arbitration proceedings. The liberal approach can be refuted by two procedural circumstances which best illustrate the criticism of the liberal approach provided above. These two circumstances are revealed below: firstly, this thesis explains circumstances that favour the application of admissibility rules in international commercial arbitration (see **part 2.3.1.**); secondly, this thesis reviews circumstances that encourage arbitral tribunals to apply admissibility rules in international commercial arbitration (see **part 2.3.2.**).

### 2.3.1. Circumstances that Favour the Application of Admissibility Rules in International Commercial Arbitration

Some of the above-given reasons, which supposedly support the liberal approach, do not, in fact, support but undermine the validity of the liberal approach. A detailed analysis of these reasons suggests that some of these reasons create favourable procedural conditions for the application of admissibility rules. Given that the relationship between these circumstances and the application of the rules of admissibility of evidence has already been discussed in detail, the following paragraphs are limited to a very brief discussion of five procedural circumstances which favour the application of admissibility rules in international commercial arbitration.

*Firstly*, the arbitration process does not focus on the objective truth but on the legal or sometimes referred to as formal truth. Arbitral tribunals are not required to and do not have to seek a full determination of relevant facts of the case. It is sufficient for arbitral tribunals to confine themselves exclusively to what is more probable from the evidence adduced by the parties. Thus, the reasonable exclusion of evidence from the arbitration case in no way undermines the arbitral tribunal's duty to establish the truth, *i.e.* an applicable degree of conviction in deciding whether or not a particular circumstance existed (see **part 2.2.2.**).

*Secondly*, arbitrators must achieve the preponderance of evidence or balance of probabilities standard. In arbitral proceedings, arbitral tribunals are not required to reach a reasonable conviction or beyond a reasonable doubt standard. On the contrary, the prevailing standard of proof in arbitral proceedings is the standard of the higher degree of probability, which only obliges the arbitral tribunal to obtain a probable view of the factual circumstances of the case. In other words, arbitral tribunals have to be 51% certain of the existence of the facts. Unlike other standards, this standard does not impose a particularly heavy burden on the parties or on the arbitral tribunal itself. For this reason, the application of admissibility rules and the exclusion of certain evidence should not, in many cases, lead to a risk of failing to meet the required standard of proof. Accordingly, the admissibility rules and their application do not substantially complicate the parties' position in evidentiary proceedings (see **part 2.2.3.**).

*Thirdly*, the threat of annulment of an arbitral award based on Art. V(1)(b) and V(2)(b) of the New York Convention in case of the exclusion of evidence is unfounded. Arbitral tribunals have the power to exclude evidence adduced by the parties. The case law of national courts does not allow drawing a conclusion that the exclusion of evidence results in a violation of a party's right to present its case or a breach of public policy. Of course, this does not mean that arbitral tribunals are completely free to declare evidence inadmissible. The interpretation and application of the New York Convention by national courts oblige the arbitral tribunals to comply with these requirements: 1) the arbitral tribunals must give clear reasons why the evidence is not admitted; 2) the arbitral tribunals must give the parties an opportunity to present arguments on the (in)admissibility of evidence; 3) the arbitral tribunals must not mislead the parties as to the rules governing the admissibility of evidence in a case; 4) the arbitral tribunals must exercise extreme caution when deciding on the admissibility of the only party's evidence in arbitration proceedings; 5) the arbitral tribunals must ensure that the exclusion of evidence does not make the entire arbitration process

fundamentally flawed. Subject to these specific requirements, arbitral tribunals may apply the rules on the admissibility of evidence in arbitral proceedings (see **part 2.2.4.1.**).

*Fourthly*, the absence of a right of appeal should not lead to the liberal approach towards the application of admissibility rules. As indicated above, when choosing arbitration for their dispute settlement, parties understand and weigh the risks associated with the waiver of the right to appeal. Moreover, arbitration is not unique in this respect. In various jurisdictions of the civil law tradition, the main and, in principle, the only fact-finding process takes place in the court of the first instance. Nevertheless, this does not preclude the application of the rules on the admissibility of evidence in these jurisdictions (see **part 2.2.5.1.**).

*Fifthly*, the parties and the arbitral tribunals have broad possibilities to obtain evidence at the evidence production stage. The arbitration process is not characterised by the US-style discovery process. Nevertheless, both various sources of arbitration law, the broad discretion of arbitral tribunals and authoritative positions in legal scholarship lead to quite broad possibilities in the production of evidence phase in arbitral proceedings. This inevitably has an impact on the application of admissibility rules. The possibility for the parties and the arbitral tribunals to require and obtain evidence relevant to the case in various ways and to use it to prove the factual and legal circumstances relevant to the case at hand means that the reasonable exclusion of evidence from the case does not substantially prejudice the evidentiary process in arbitration (see **part 2.2.6.**).

Therefore, each of the abovementioned reasons, which supposedly justify the liberal approach towards the admissibility of evidence, has the opposite effect of favouring the application of admissibility rules. Both the legal truth, the standard of balance of probabilities, the absence of appeal and the sufficiently broad options available to the parties and the arbitral tribunals during the evidence production stage essentially imply procedural conditions that allow the parties to raise issues of admissibility of evidence and the arbitral tribunals to apply the rules without risking possible adverse consequences.

### 2.3.2. Circumstances that Encourage Arbitral Tribunals to Apply Admissibility Rules in International Commercial Arbitration

Another and even more important aspect which can be identified from the analysis presented in part 2.2 of this thesis is that some reasons not only create

favourable procedural conditions for the application of admissibility rules but also, in a sense, encourage the arbitral tribunals to apply these rules. Five circumstances are briefly described in the following paragraphs.

*Firstly*, the principle of free evaluation of evidence has a negative impact on arbitrators. Arbitrators, like judges or people with no legal training, are prone to various cognitive errors in the legal process, *i.e.* overweighing irrelevant evidence, underweighting relevant evidence, *etc*. These problems also reveal a criticism of the principle of free evaluation of evidence, which is based on the widely held idea that arbitrators should not exclude evidence but rather give it appropriate weight. As described in part 2.2.1 of this thesis, these errors of arbitrators can be compensated by applying various rules on the admissibility of evidence during arbitral proceedings. For example, the application of certain admissibility rules in the majority of cases would allow reaching a better quality fact-finding process in arbitration (see **part 2.2.1.**).

*Secondly*, the New York Convention not only gives arbitral tribunals the right to exclude evidence but even – to some extent – obliges arbitrators to apply the admissibility rules. This is related to the interpretation of Art. V(2)(b) of the New York Convention, which implies that certain admissibility rules, such as admissibility rules that exclude evidence because of its content or due to infringements of substantive law or procedural law, may lead to a violation of public policy and therefore to the annulment of arbitral tribunal's award (see **part 2.2.4.1.**).

*Thirdly*, the refusal to apply the admissibility rules may undermine the popularity of the arbitration process within the business community. As it has been repeatedly mentioned, the purposive approach towards the admissibility rules gives effect to the most important legal values that are at the heart of the arbitration process, such as the principles of fairness, expedition, efficiency, *etc*. The tendency of arbitrators to issue decisions which allow the parties to submit evidence without restriction, thereby supposedly satisfying the interests of both parties and, thus, increasing the arbitrator's popularity in the market, is unjustified. It is not the arbitrators' attempt to satisfy the interests of both parties but the well-reasoned application of the admissibility rules will make the whole arbitration process and the arbitrator more popular (see **part 2.2.4.2.**).

*Fourthly*, the inability of arbitrators to distance themselves from the inadmissible information should lead to a greater focus on the rules on the admissibility of evidence. The institutional set-up of the arbitration process means that the admissibility of evidence and the determination of facts are decided by the same subject, *i.e.* the arbitrator. This means that arbitrators will often be unable to distance themselves from the content of inadmissible

evidence, particularly when the inadmissible evidence is relevant to the case. As indicated above, despite the possible institutional reform of the arbitration process, which is not analysed in this thesis, the only solution to this problem is the increase of importance of admissibility of evidence, both by raising questions as to the admissibility of evidence and the application of rules of admissibility of the evidence itself (see **part 2.2.5.2.**).

*Fifthly*, the parties and arbitrators have a wide range of opportunities at the evidence production stage. The scope of evidence production in arbitration proceedings is often considerably broader than that of various jurisdictions of the civil law tradition. A relatively broad scope of the evidence production stage is confirmed by four features of evidence production stage in international commercial arbitration: 1) widely applicable IBA Rules provide four aspects that broaden the scope of the evidence production stage; 2) the broad discretion of arbitral tribunals allows using various procedural instruments known to the US-style discovery process; 3) both the Model Law and the IBA Rules provide for possibilities to obtain evidence from third parties; 4) the arbitral tribunals are entitled to draw adverse factual inferences against the non-cooperating party. Accordingly, the scope of evidence production implies a greater need for the application of admissibility rules that would not only reasonably reduce the amount of information to be produced but, at the same time, preserve the fundamental requirements of the arbitral process during the broad evidence production stage (see **part 2.2.6.**).

Therefore, the reasons that supposedly support the liberal approach, in fact, justify both favourable conditions for the application of admissibility rules and, in a sense, encourages arbitrators to apply these rules:

| **Circumstances that favour the application of admissibility rules in international commercial arbitration** | **Circumstances that encourage arbitral tribunals to apply admissibility rules in international commercial arbitration** |
|---|---|
| 1. Arbitration proceedings do not focus on the objective truth but on the legal, or sometimes referred to as formal, truth | 1. The negative impact of the principle of free evaluation of evidence on arbitrators |
| 2. Arbitrators must achieve the balance of probabilities standard | 2. The threat of annulment of an arbitral award on the basis of Art. V(2)(b) of the New York Convention |

| | | | |
|---|---|---|---|
| 3. | The unfounded threat of annulment of arbitral awards on the basis of Art. V(1)(b) of the New York Convention | 3. | The refusal to apply the admissibility rules could undermine the popularity of arbitration in the business community |
| 4. | The lack of appeal in arbitration proceedings | 4. | Arbitrators' inability to distance themselves from inadmissible information |
| 5. | Broad opportunities for the parties and arbitral tribunals at the evidence production stage | 5. | Broad opportunities for the parties and arbitral tribunals at the evidence production stage |

In light of the analysis in this part of the thesis, we can conclude that the prevailing liberal approach towards the admissibility of evidence is unjustified. The criticism of the liberal approach reveals not only that the approach itself is flawed but also that various legal circumstances imply a duty to increase the importance of admissibility rules in arbitral proceedings considerably. This conclusion indicates that arbitrators' discretion in deciding on the admissibility of evidence is, in principle, not properly exercised. This is not to argue that arbitrators err in all cases while they exercise their broad discretion to apply the admissibility rules. The above analysis, for the reasons already stated, has only assessed the prevailing attitude of arbitral tribunals towards the admissibility of evidence. Nevertheless, a critical analysis of the prevailing liberal approach provides a general and, as it turned out, fundamentally flawed view towards the admissibility rules. All of this inevitably raises reasonable doubts about the *status quo* of admissibility rules in international commercial arbitration.

# 3. CHANGES TO THE *STATUS QUO* OF ADMISSIBILITY OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

Part 2 of this thesis not only refutes the prevailing liberal approach towards the application of admissibility rules but also reveals two crucial aspects, namely, both circumstances that favour the application of admissibility rules and circumstances that encourage arbitral tribunals to apply the admissibility rules. As mentioned above, these two circumstances mean that, at least in general, the arbitrators' discretion in deciding on the admissibility of evidence is exercised improperly (see **part 2.3.**). This conclusion inevitably raises the question: how can we ensure a more appropriate application of admissibility rules in international commercial arbitration? This is the question analysed in the third and final part of this thesis.

The detailed analysis of the admissibility rules in part 1 of this thesis has substantiated that the admissibility rules are essentially formulated as discretionary provisions and not as *ex ante* legal rules. In other words, a fundamental and essential aspect of the admissibility rules is the wide discretion of arbitral tribunals (see **part 1.2.4.2**.).

Hence, any attempt to ensure a more appropriate application of admissibility rules in arbitral proceedings must involve the discretion of arbitral tribunals. On the one hand, one of the simplest ways to improve the application of the rules could be a stricter rather than a more liberal application of admissibility rules in international commercial arbitration. The above-analysed purposive approach towards the admissibility of evidence and the critique of the liberal approach would seem to lead to a stricter approach towards the admissibility rules that, in turn, would lead to the abandonment of the liberal approach.

Unfortunately, this conclusion would be too optimistic since the liberal approach is so ingrained in the practice of international commercial arbitration that it is considered to be an integral part of the whole evidentiary process of arbitration (see **part 2.1**.). It would be naive to expect that a detailed critique of reasons for the liberal approach would negate its influence on arbitrators. Even if the arbitration community is aware of the risks associated with the liberal approach, the approach will not necessarily be changed. A good example of this is the discussion at the 2016 Vienna Arbitration Days event, during which various arbitration law experts made the following observation: "[...] arbitral tribunals seem to be generally reluctant to reject late submissions or additional pieces of evidence fearing the risk of the award being challenged

for the violation of the right to be heard. When confronted with this issue, almost none of the table participants had experienced a rejection of a late submission or late evidence by an arbitral tribunal so far. This seems to be alarming as delaying tactics are the most common form of trial by ambush." (Pitkowitz, 2017, p. 158). As can be seen from the provided example, even if the problems related to the liberal approach, such as in this case, the inexpedient handling of arbitration cases, are identified, they are often not adequately addressed by a more rigorous application of rules on the admissibility of evidence (see **part 1.1.3.2.4.**).

If the discretion of arbitral tribunals itself, or rather a different exercise of the discretion, is not an effective way of ensuring the application of admissibility rules, perhaps the problem lies in the discretion itself. Perhaps the wide discretion of arbitral tribunals in the context of the admissibility of evidence is not really justified and only causes more legal problems than it brings benefits. Perhaps the very enshrinement of admissibility rules as discretionary provisions in various sources of arbitration law is misguided. It is the answers to these, and other questions will be sought in the following parts of this thesis. These answers will allow us to scientifically assess the validity of a key aspect of the *status quo* of admissibility of evidence, *i.e.* the discretion of arbitral tribunals.

As detailed in the introduction to this thesis, part 3, first of all, highlights the main shortcomings of discretion in the context of the admissibility of evidence: 1) the legal uncertainty (see **part 3.1.1**); 2) the contradictory practice of arbitral tribunals (see **part 3.1.2.**); 3) the decision-making based on subjective beliefs (see **part 3.1.3**.); and 4) the inefficiency of arbitral tribunals' discretion (see **part 3.1.4**.). And secondly, once these problems have been identified, substantiated and addressed, this thesis turns to an assessment of the *status quo* of admissibility of evidence in the light of L. Fuller's eight criteria which constitute the "good law" (see **part 3.1.5.**). Finally, at the end of part 3 of this thesis, some concrete suggestions are made as to how the *status quo* of admissibility of evidence in international commercial arbitration could be changed (see **part 3.2.**).

## 3.1. The Critical Assessment of Arbitral Tribunals' Discretion to Apply Admissibility Rules

Before assessing arbitral tribunals' discretion, it is of the essence to understand the importance of discretion in arbitration proceedings. It has already been mentioned that discretion is often understood as a legal crossroads where the

judge must decide, in the absence of any clear and precise directive, which legal path to take (Barak, 2005a, p. 22; see **part 1.1.2.3.**). Practically in every legal system, there are situations where the law does not provide an answer, and judges are therefore obliged to make a choice, *i.e.* to exercise judicial discretion (Dworkin, 1963, p. 23). International commercial arbitration is no exception in this respect; on the contrary, discretion is an integral part of international commercial arbitration.

Both the Model Law and the rules of arbitration procedure establish a liberal system that leaves all procedural issues to the broad discretion of arbitrators (Herrmann, 1996, p. 43). A perfect example of this is the main object of this dissertation, *i.e.* the admissibility rules. In part 1 of this thesis, two types of discretion were distinguished – discretion in a general sense and discretion in a narrow sense. The discretion in a general sense is manifested in the sources of arbitration law, which provide that the arbitral tribunal is the sole subject of arbitral proceedings with the power to decide on the admissibility of evidence (see Art. 19(2) of the Model Law, Art. 27(4) of the UNCITRAL Rules, Art. 19 of the ICC Rules of Arbitration, Art. 22(1)(vi) of the LCIA Arbitration Rules, Art. 9(1) of the IBA Rules). By contrast, discretion, in a narrow sense, gives the arbitral tribunal not only the power to decide on the admissibility of evidence but also the power to decide how specific admissibility rules will be applied. In other words, the arbitral tribunals' discretion extends not only to a decision of whether to apply a particular rule of admissibility of evidence but also to a decision of how to apply that rule (see **part 1.2.4.2.**).

The UNCITRAL Secretariat details the main objectives of establishing this liberal system: "This enables the arbitral tribunal to meet the needs of the particular case and to select the most suitable procedure when organising the arbitration, conducting individual hearings or other meetings and determining the important specifics of taking and evaluating evidence. In practical terms, the arbitrators would be able to adopt the procedural features familiar, or at least acceptable, to the parties (and to them)." (Holtzmann, Neuhaus, 1989, p. 584).

In legal scholarship, the wide discretion of arbitral tribunals and the resulting flexibility of the arbitral process are considered the "prevailing orthodoxy" (Park, 2006, p. 148) or even acknowledged as the "essence" of the entire arbitral process (Lane, 1999, p. 424). The wide discretion of arbitral tribunals is often considered not only a desirable but also an unavoidable necessity, which keeps the international arbitration process international, *i.e.* independent from the provisions of a particular national law, sufficiently informal and flexible to adapt to the needs of a particular case (Fortier, 1999,

p. 399). Moreover, according to some authors, these characteristics of the arbitration process, particularly the flexibility of the process, have contributed to the success of arbitration as an alternative dispute resolution method (see Veeder, 2009, p. 322).

The Model Law, the rules of arbitration procedure and legal scholarship give the impression that the discretion of arbitral tribunals is like an unshakable value of the arbitration process. On the other hand, like many legal phenomena, arbitral tribunals' discretion has been subject to criticism. Admittedly, such criticism, while providing useful insights and arguments in the context of this thesis, is mostly limited to rather general observations, *i.e.*, the identification of general threats arising from the discretion of arbitral tribunals (see, *e.g.* Park, 2003; Park, 2006).

The following parts 3.1.1 – 3.1.4 of this thesis will attempt to accomplish a rather challenging task of uncovering, in the terminology of George Lucas's famous Star Wars franchise, the dark side of arbitral tribunals' discretion. In contrast to what has been done so far, the following critique of discretion concerns the admissibility of evidence exclusively. The present research does not seek to identify the negative drawbacks of discretion in the context of the arbitration process as a whole.

### 3.1.1. The Discretion of Arbitral Tribunals to Apply Admissibility Rules Does Not Ensure Legal Certainty

Legal certainty is a key component of the rule of law. Although the concept of the rule of law itself could be a subject of a separate thesis, legal scholarship, at least in the opinion of some authors, is quite clear on the basic requirements of the rule of law. These requirements can be traced back to classical works. For example, John Locke's Second Treatise of Government points out that in the natural state of humans: "there wants an established, settled and known law, received and allowed by... common measure to decide all controversies between [men]." (Locke, 1690, quoted Epstein, 2011, p. 17). A more recent concept of the rule of law that is consistent with these considerations is provided by economist F. von Hayek: "Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge" (von Hayek, 2002, p. 51). Identical requirements are also

identified in legal scholarship of the 21st century (see, *e.g.* Epstein, 2011, p. 14–15).

The abovementioned ideas suggest that legal certainty is an integral part of the rule of law principle, which ensures not only that persons have a clear knowledge and understanding of their rights and obligations but also that this knowledge enables them to plan their actions accordingly, to understand what they are required to do, and to act in accordance with the pre-established legal rules or principles of law. As the aforementioned von Hayek has famously pointed out in this respect: "In order to use their knowledge effectively in making plans, individuals must be able to foresee the actions of the state which may affect those plans. But in order to be foreseeable, state action must be constrained by rules established independently of specific unforeseeable and unquantifiable circumstances [...]" (von Hayek, 2002, p. 53).

Not surprisingly, the rule of law and legal certainty is often contrasted with the authorities which exercise their power, not on the basis of *ex ante* established, clear, intelligible legal rules but on the basis of the broad, often unlimited and abused discretion (see, *e.g.* Dicey, 1915, quoted Epstein, 2011, p. 17). Thus, one of the main ways to ensure the rule of law is to minimise the discretionary power of a government (see von Hayek, 2002, p. 51).

Arbitration cannot be an exception in this respect. Legal certainty must also be one of the main objectives of international commercial arbitration. Legal scholarship distinguishes between two aspects of legal certainty in arbitration: 1) legal certainty in procedural law; 2) legal certainty in substantive law. In the context of this thesis, legal certainty in terms of procedural law is relevant. Legal certainty is understood as "a clear understanding of the conduct of the proceedings", which includes a clear timetable for the proceedings, a clear understanding of the admissible evidence and the admissible methods of collecting the evidence, as well as an accurate calculation of the costs (Hanefeld, Hombeck, 2015, p. 20).

In this respect, legal certainty in arbitration proceedings is in line with the requirements of the rule of law as identified by Locke, von Hayek and others. In other words, legal certainty requires that it must be sufficiently clear to parties and arbitrators what specific rules of law are and how they govern arbitral proceedings. The ability of the parties to anticipate the requirements of the arbitral process is a prerequisite for effective participation in the process. In the context of arbitral proceedings, to paraphrase the idea of von Hayek quoted above, the condition for effective participation in proceedings is that the rules of law governing proceedings are established independently of unforeseeable and unquantifiable circumstances (von Hayek, 2002, p. 53). Otherwise, the process itself and the requirements it imposes become

unpredictable, which, in turn, puts both the parties and the arbitral tribunal itself in a rather difficult position.

As will be shown below, the discretion of arbitral tribunals to decide on the admissibility of evidence, as enshrined in the arbitration law sources, does not ensure one of the fundamental requirements of the rule of law – legal certainty. The following parts 3.1.1.1 – 3.1.1.3 of this thesis provide three arguments supporting this conclusion.

### 3.1.1.1. The Parties Cannot Predict which Evidence is Admissible in International Commercial Arbitration Proceedings

The broad discretion of arbitral tribunals does not provide a clear answer to the question – will the evidence submitted by the parties be admissible in international commercial arbitration? It has already been mentioned that the admissibility rules in international commercial arbitration are formulated as *ex post* rather than *ex ante* legal rules. In other words, the admissibility rules are formulated on the basis of the phrase "I know it when I see it", expressed by Justice Potter Stewart of the US Supreme Court, *i.e.* evidence will be ruled inadmissible not on the basis of an *ex ante* legal rule, but after the arbitrator decides that submitted evidence is inadmissible (see **part 1.2.4.2.**).

Legal uncertainty caused by discretion becomes immediately apparent when confronted with various admissibility rules established in sources of arbitration law. For example, already reviewed Art. 9(2)(g) of the IBA Rules provides for the arbitral tribunal's right to exclude evidence on the grounds of procedural economy, proportionality, fairness or equality of parties, which the arbitral tribunal considers compelling (see **part 1.2.3.4**.). What kind of admissibility rules are implicit in this provision? What kind of exclusion of evidence is required by the principle of fairness, economy or equality of arms? We can probably agree that the principle of procedural economy in certain cases obliges the exclusion of late evidence, but is the principle of economy limited to that? Could this principle lead to the emergence of additional rules on the admissibility of evidence? Furthermore, most importantly, how could the parties to proceedings foresee whether their evidence would be deemed inadmissible on the grounds of procedural economy or equality of parties? Unfortunately, we do not have an answer to these questions.

Legal uncertainty is also apparent in the analysis of arbitration case law. For example, in the ICC arbitration case No. 16369, the issue of admissibility of *amicus curiae* briefs arose (Buyer (Switzerland) v. Seller (Kosovo)…). Admissibility disputes do not usually arise in cases where parties rely on

traditional means of proof, such as witness testimony or documentary evidence, but how should an arbitral tribunal proceed when the submitted evidence is not common in international commercial arbitration proceedings? Can a party rely on this type of evidence? What specific criteria would the arbitral tribunal consider in assessing the admissibility of such evidence? Could the parties have foreseen that such evidence would be admissible in arbitration proceedings? We do not have clear answers to these questions since the answers are left to the discretion of arbitrators. This is not to argue that we should set out an exhaustive list of means of proof in the arbitration law. This example is intended only to demonstrate that the broad discretion of arbitral tribunals requires parties to operate in a "grey area".

Other arbitral decisions also illustrate existing legal uncertainty. For example, the analysis of arbitral awards suggests that, in some cases, arbitral tribunals themselves create the rules of admissibility of evidence. In the ICC arbitration case No. 11760/KGA/CCO/JRF, the arbitral tribunal decided not to admit parts of the expert report because neither the opposing party nor the arbitral tribunal itself was in a position to verify the correctness of these parts of the report (Conproca, S.A. De C.V. v. Petroleos Mexicanos...). In the LCIA arbitration case No. 5665, the arbitral tribunal decided to exclude a letter forwarded by a party to the arbitral tribunal that was originally sent to a person who did not participate in the arbitral proceeding. Subsequently, the division, constituted by the LCIA to rule on the arbitral tribunal's bias and independence, stated: "The decision to exclude the letter before action had been highly unusual in that there was, as a general rule, no prohibition in international arbitration on the admission of materials and documents upon which a party relied." (Parties Not Indicated, LCIA Reference No. 5665...). In yet another international commercial arbitration case, the arbitral tribunal applied the admissibility rule generally known in the civil law tradition, *i.e.* the proof by the necessary means of proof (see **part 1.1.2.1.**). The arbitral tribunal took the position that certain facts relevant to the case could, in principle, be proven only by the expert evidence: "That not only does providing inaccurate and incorrect information to the expert deprive the expert's investigation of all value as a means of evidence, but it also divests Defendant of the right to invoke any quality complaints, because these can only be established by way of an expert's investigation." (Chambre Arbitrale Pour Les Fruits...).

Whether the abovementioned admissibility rules applied by arbitral tribunals are reasonable is a secondary question. The main point is that various sources of international arbitration law simply do not lay down such admissibility rules (see **part 1.2.**). In the absence of an agreement between the

parties on the application of such rules, the parties cannot in any way foresee that the arbitral tribunal, while exercising its broad discretion, will decide to apply these particular rules. This necessarily leads to the conclusion that the parties to arbitration proceedings cannot foresee whether the evidence submitted by a party will, in fact, be considered admissible evidence.

The lack of legal certainty will be further illustrated by an analysis of three categories of admissibility rules: 1) admissibility rules designed to improve fact-finding accuracy; 2) admissibility rules that exclude evidence because of its content; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law (see **part 1.2.4.1.**).

*Firstly*, the lack of legal certainty is illustrated by the analysis of the admissibility rules designed to improve fact-finding accuracy. As indicated in more detail in the introduction of this thesis, due to the limited scope of this thesis, and given that all the admissibility rules analysed above are formulated in the same way, *i.e.* as discretionary provisions (see **part 1.2.4.1.**), the analysis in the following paragraphs will focus on only one admissibility rule designed to improve fact-finding accuracy, namely Art. 4(7) of the IBA Rules.

Art. 4(7) of the IBA Rules establishes: "If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise." A linguistic interpretation of this article provides a quite clear rule – in the presence of certain circumstances, "the Arbitral Tribunal shall disregard", in other words, declare inadmissible, the written testimony of a witness. Nevertheless, a more detailed elaboration of this admissibility rule leads to an entirely different result – legal uncertainty.

As mentioned in part 1.2.3.5.2 of this thesis, in order to exclude written testimony arbitral tribunals must establish two essential conditions: 1) a witness does not provide a valid reason for not appearing at the evidentiary hearing, and 2) there are no exceptional circumstances under which the arbitral tribunal would rule otherwise. These two conditions give the arbitral tribunal a very wide margin of discretion. What constitutes a valid reason? Could the illness of a witness be considered a valid reason? Probably yes, but is it any illness? The COVID-19 virus? Most likely, yes? What about a severe cold? Or a minor cold? What is a severe or non-severe cold in any way? The same applies to exceptional circumstances. What is an exceptional circumstance? Is it an exceptional circumstance that the written testimony of a witness is relevant to a case? Is it an exceptional circumstance that the parties in an arbitration proceeding have not provided other sufficient evidence? Perhaps

so, or perhaps it simply means that the party with the burden of proof has simply failed to meet that burden? The answers to these questions may be very different. Most importantly, neither the IBA Rules nor the arbitral case law nor legal scholarship provides a specific and clear answer to these questions (see O'Malley, 2019, p. 136).

It is true, however, that it is not only difficult but impossible to determine in advance what should constitute a valid reason or exceptional circumstances in a given case. The reasons for the absence of witnesses can be very diverse, and not necessarily only the reasons identified in advance should be considered valid. Nevertheless, the major problem of legal uncertainty appears in the fact that even if two essential conditions of Art. 4(7) of the IBA Rules are established, the arbitral tribunal's discretion does not become limited, *i.e.* the arbitral tribunal is left with the discretion not to exclude the written testimony. For example, the arbitral tribunal may decide not to exclude the evidence but to give it a lesser evidentiary weight (Khodykin *et al*., 2019, p. 259). The right of arbitral tribunals to evaluate and not exclude evidence is flawed (see **part 2.2.1.**). However, the key point here is that arbitral tribunals have such a right in any event, which further limits the parties' ability to predict whether a party's written witness statement will be admitted or excluded from the evidence file.

The same criticism can be applied to other admissibility rules that improve fact-finding in arbitration (see **part 1.2.4.1.**). For example, as already mentioned, the arbitral tribunal has the broad discretion and reserves the right to exclude the opinion of an unqualified and biased expert submitted by a party (Art. 6(2) of the IBA Rules; Zuberbühler *et al*., 2012, p. 136; see **part 1.2.3.5.2.**). In the present instance, the parties would also have only a very limited idea in which cases and on what specific basis the arbitral tribunal should exclude the opinion of a biased and/or unqualified expert.

*Secondly*, the lack of legal certainty is illustrated by analysing the admissibility rules that exclude evidence because of its content. The following paragraphs contain an analysis of two admissibility rules, *i.e.* the admissibility of evidence on the grounds of commercial, technical confidentiality, which the arbitral tribunal finds compelling (Art. 9(2)(e) of the IBA Rules), and the admissibility of evidence on the grounds of special political or institutional sensitivity, which the arbitral tribunal finds compelling (Art. 9(2)(f) of the IBA Rules). Nevertheless, the criticisms levelled at these rules are also relevant to other rules of admissibility of evidence which exclude evidence because of its content. For example, as detailed above, legal immunities and privileges in arbitration are often characterised by the following statement:

"The only thing that is clear is that nothing is clear in this area" (Berger, 2006, p. 501; see **part 1.2.3.1.**).

Both Art. 9(2)(e) and (f) of the IBA Rules do not explicitly answer the question – in which cases confidential or politically sensitive evidence should be considered inadmissible evidence? An analysis of Art. 9(2)(e) of the IBA Rules does not lead to any clear answers to the fundamental questions for the application of this rule: 1) what should be considered commercial or technical information; 2) what constitutes compelling commercial or technical confidentiality (see **part 1.2.3.3.**). These questions are not left to *ex ante* established legal rules but exclusively to arbitrators' discretion.

For example, legal scholarship indicates that in order to decide whether confidential information should be excluded, the arbitral tribunal should consider a non-exhaustive list of criteria: 1) the sensitivity of confidential information; 2) the extent to which the disclosure of such evidence may affect the interests of third parties; 3) the interest in preserving the confidentiality of private communications; 4) the broader interest that may be deemed to exist in preserving the confidentiality of information; 5) the evidentiary value of confidential information (Ashford, 2013, p. 165; O'Malley, 2019, p. 315). Should the arbitral tribunal follow all these criteria in each case? Perhaps it would be sufficient for the arbitral tribunal to consider only one criterion, such as the sensitivity of confidential information. Perhaps the arbitral tribunal could additionally assess the interest in establishing the truth in the arbitration. The parties will not find clear answers to these questions either when parties submit potentially confidential evidence to the arbitration or when they present specific arguments on the possible (in)admissibility of such evidence.

The same situation is apparent in the analysis of Art. 9(f) of the IBA Rules. The answers to the questions of what should be considered politically or institutionally sensitive information and what constitutes compelling political or institutional sensitivity are also left to the discretion of arbitral tribunals. According to legal scholarship, this discretion should be exercised by balancing a non-exhaustive list of criteria. The arbitral tribunal should take into account: 1) the provisions of national law which protect the confidentiality of politically or institutionally sensitive information; 2) the content of the document itself (in other words, whether the content of the document is of a nature that should be protected under the applicable national law); 3) whether the interest in maintaining the confidentiality of evidence is compelling in relation to other competing public interests, such as the due administration of justice, the equality of arms or the principle of fairness, *etc*. (O'Malley, 2019, p. 316–327). In this respect, the parties are also faced with a situation of legal uncertainty and insecurity. Which (or maybe all) of these

criteria will the arbitral tribunal follow? Perhaps an additional assessment should be made concerning the probative value of evidence to the case. We do not have a clear answer to these questions.

*Thirdly*, the lack of legal certainty is illustrated by the analysis of the admissibility rules that exclude illegally obtained, submitted, presented or evaluated evidence. As already mentioned, this category of admissibility rules can be divided into two groups: 1) admissibility rules that exclude evidence due to infringements of substantive law; and 2) admissibility rules that exclude evidence due to infringements of procedural law (see **part 1.1.2.3.**). As indicated in the introduction of this thesis, this thesis analyses two admissibility rules, which are inherent parts of one of the two groups. The first group consists of admissibility rules that determine the admissibility of illegally obtained evidence (Art. 9(3) of the IBA Rules). The second group consists of admissibility rules that determine the admissibility of late evidence (Art. 9(2)(g) of the IBA Rules).

The rule regarding the admissibility of illegally obtained evidence is explicitly established in Art. 9(3) of the IBA Rules. Can illegally obtained evidence be relied upon in international commercial arbitration, and if so, in what circumstances? Art. 9(3) of the IBA Rules does not provide an answer. A mere linguistic analysis of Art. 9(3) suggests that the arbitral tribunal has a very wide discretion: "The Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally." As mentioned above, neither the rules of arbitration nor the case law of arbitral tribunals provides a beforehand answer as to whether illegally obtained evidence should be admissible (see **part 1.2.3.5.1.**).

Legal scholarship proposes a balancing test between various different criteria. In this context, the situation becomes extremely uncertain and complicated. The analysis of various sources of legal scholarship allows us to distinguish more than 19 criteria: 1) whether the party itself has participated in the unlawful collection of evidence, *i.e.* the so-called "unclean hands" doctrine; 2) whether the public interest favours the admission of evidence; 3) whether the interest of justice favours the admission of evidence; 4) the circumstances of the infringed rights; 5) whether the infringement was a deliberate attempt to gather evidence, or whether the evidence was gathered only incidentally; 6) whether the evidence was publicly available prior to the commencement of proceedings; 7) whether the evidence is related to the subject-matter of the dispute; 8) whether the evidence has a probative value to the dispute; 9) whether it is possible to collect the evidence without committing an unlawful act; 10) the nature of proceedings; 11) the subject-matter of proceedings; 12) the cause of action brought in arbitration

proceedings; 13) the interest of parties in establishing the truth in arbitration proceedings; 14) the interest of the public as a whole in establishing the truth; 15) the interest of persons not participating in arbitration proceedings; 16) the interest in protecting rights which are violated by the unlawful act; 17) the requirements of principle of proportionality; 18) whether the evidence was unlawfully obtained from the other party to proceedings; 19) whether the evidence has been leaked to the public domain (Bartkus, 2021b, p. 70–73; see **part 1.2.3.5.1.**). How can the parties confidently predict which criteria the arbitral tribunal will use and whether their illegally obtained evidence will be deemed inadmissible? Given the wide discretion and the multiplicity of balancing criteria, this question is not answerable.

The admissibility rule of late evidence derives from the principle of procedural economy enshrined in Art. 9(2)(g) of the IBA Rules. It is true that, as the abstract wording of Art. 9(2)(g) makes clear, paragraph (g) does not provide sufficient legal clarity as to when late evidence could be declared inadmissible. The wording of Art. 9(2)(g) "that the Arbitral Tribunal determines to be compelling" is in itself a clear indication of the broad discretion of arbitral tribunals to decide on the conditions for the application of this rule (see **part 1.2.3.4.**).

Legal scholarship is also of little use in this respect. The prevailing view is that in this instance, too, arbitrators' discretion must be exercised by balancing a non-exhaustive list of criteria: 1) the probative value and nature of the evidence; 2) the prejudice that the opposing party would suffer as a result of the admissibility of evidence (this includes an assessment of overall disruption of proceedings); 3) reasons for the delay, in particular, whether those reasons were legitimate and reasonable; 4) any other need and the context of the case that the arbitral tribunal has decided to take into account (O'Malley, 2019, p. 331). There is also a clear lack of legal clarity while applying this admissibility rule. For example, what is the other need or context of the case that the arbitral tribunal should consider? The litigants can only speculate.

In this context, it is worth recalling that other sources of arbitration law also lay down rules on the admissibility of late evidence (Art. 23(2) of the Model Law; Art. 27(3) of the UNCITRAL Arbitration Rules; Art. 25(1) and 27 of the ICC Arbitration Rules; Art. 22(1)(i) of the LCIA Arbitration Rules). However, the application of these rules is also based on the broad discretion of arbitrators and on the balancing test of a non-exhaustive list of criteria (see **parts 1.2.1., 1.2.2.**).

The analysis in this part leads to the conclusion that the broad discretion of arbitral tribunals in the context of the admissibility of evidence results in

that the parties are neither aware of nor, indeed, able to foresee what evidence is admissible in international commercial arbitration. As mentioned in this part above, one of the elements of the principle of the rule of law – legal certainty – is manifested in arbitration proceedings by the fundamental idea that the parties must have a "clear understanding of the conduct of the proceeding", which includes, among other things, a clear understanding of admissible evidence and the permissible methods of gathering evidence (Hanefeld, Hombeck, 2015, p. 20; see also Voser, 2005, p. 115).

One of the general drawbacks of discretion, according to W. W. Park, is "the discomfort that a litigant may feel when arbitrators make up the rules as they go along, divorced from any precise procedural canons set in advance." (Park, 2003, p. 286). This inconvenience is revealed in the context of the admissibility of evidence. The broad discretion of arbitral tribunals and various balancing tests make it impossible for the parties to either clearly understand how a particular rule on the admissibility of evidence should be applied or, ultimately, whether their submitted evidence will be admissible in arbitration proceedings. Meanwhile, all of these aspects may also lead to the image of an arbitral process as an unfair and arbitrary dispute resolution mechanism.

#### 3.1.1.2. The Arbitral Tribunal Cannot Predict Which Evidence is Admissible in International Commercial Arbitration Proceedings

Legal uncertainty is not only manifested by the parties' inability to clearly predict what evidence should be admissible but also by the fact that arbitrators themselves are placed in intolerable legal uncertainty. The arbitrators' broad discretion prevents them from clearly identifying how the rules on the admissibility of evidence should be applied and, consequently, what evidence should be considered admissible. This problem is supported by three arguments explained in the following paragraphs.

*Firstly*, the international commercial arbitration procedure rejects the purposive approach towards the admissibility of evidence. The purposive approach towards the rules of admissibility of evidence, as detailed in part 1 of this thesis, is based essentially on two aspects: 1) arbitrators or judges, like all human beings, in some instances, unfortunately, but cannot avoid various errors in the fact-finding process; 2) admissibility rules protect against sometimes inevitable shortcomings and errors of fact-finders. In this respect, admissibility rules act as a guideline, which helps to ensure not only the

accuracy of fact-finding but also other procedural values and principles (see **parts 1.1.3.2., 1.2.4.2.**).

In international commercial arbitration, we can speak of the purposive approach in a very relative sense. Due to the wide discretion of arbitral tribunals, the admissibility rules no longer function as a set of predefined rules that help the arbitral tribunal avoid misleading evidence or ensure efficient, fair proceedings. On the contrary, it is up to the arbitrators themselves to decide when and how they should exclude misleading information from the process or when the process based on illegally obtained evidence will undermine the principle of fairness or the legitimacy of an award. In other words, it is not the admissibility rules themselves that ensure and perform functions of admissibility of evidence in arbitration proceedings, but the arbitral tribunals are left with the task of the fulfilment of those functions (see **part 1.2.4.2.**).

This "I will know it when I see it" approach makes the position of arbitrator very difficult. For example, an arbitrator confronted with the question of the admissibility of illegally obtained evidence is faced with important but unanswerable questions. Which of the 19 (or even more) criteria should be used to decide on the admissibility of such evidence? Could it be that the liberal approach towards the admissibility of evidence *per se* dictates the admissibility of such evidence? Or perhaps, on the contrary, does the fair trial imperative dictate the inadmissibility of such evidence? (see **parts 1.1.3.2., 2.1., 3.1.1.2**.). In this case, the burden that should fall on the *ex ante* established legal rules shifts to the arbitral tribunal, which is left without clear and predetermined answers.

*Secondly*, an arbitrator is not an ideal dispute resolution body. The shortcomings of legal certainty highlighted above could be avoided by an arbitrator who can ideally understand, grasp and resolve various procedural issues. The image of an arbitrator as R. Dworkin's Hercules is adhered to by some sources of legal scholarship (see, *e.g*. Radvany, 2016, p. 504; Sourgens *et al.*, 2018, p. 238; **parts 1.2.4.2, 2.2.1.**). In this thesis, this image of arbitrators has been refuted. Like any other human being, the arbitrator inevitably sometimes makes cognitive and procedural mistakes. Moreover, the arbitrators are influenced, even unconsciously, by factors related to their education, age, cultural background, *etc*. (see **part 2.2.1**.).

In this context, it must be noted that one of the main reasons for this unjustified image of ideal arbitrators is the popularity of the antonym of legal uncertainty – procedural flexibility. The wide discretion, procedural flexibility, and discretionary provisions in arbitral proceedings are linked to a particular historical era in arbitration. This historical era, which lasted until

the 1980s, was characterised by highly educated, internationally renowned arbitrators with invaluable experience. These arbitrators, often referred to in legal scholarship as the "Grand Old Men", tended to specialise in fields other than arbitration. However, their comprehensive legal knowledge and social status led to their appointments in arbitration cases (Schultz, Kovacs, 2012, p. 162). The impeccable status of this generation of arbitrators determined the arbitration community's confidence in their abilities, while specific procedural rules only constrained their potential. Granting broad discretion to these arbitrators seemed to be a natural and appropriate step. Not surprisingly, this historical phase of arbitration is sometimes described as a phase when the rules in a given situation are dictated by the people, not by the law (Landolt, 2015, p. 153).

The era of "Grand Old Men" is long over. The first generation of arbitrators was replaced by the second generation of arbitrators, sometimes referred to as the "Technocrat generation", as a direct result of the popularity and internationalisation of arbitration. Arbitrators who belong to the generation of technocrats tend not to have the impressive experience, social status and comprehensive legal education of "Grand Old Men". The technocrat generation is exclusively specialised in international arbitration and is interested in providing arbitration services to the business community (Dezalay, Garth, 1995, p. 38). Some authors have even identified the emergence of a third generation of arbitrators, *i.e.* the "Managers of Dispute Resolution Process", who focus not only on high qualifications in arbitration law but also pay particular attention to organisational skills to manage the process in an efficient and responsive manner (Schultz, Kovacs, 2012, p. 162).

The emergence of the second and third generations of arbitrators has expanded the availability of arbitration services. Nowadays, arbitrators are not just "Grand Old Men". On the contrary, arbitrators can be persons with very different experiences and even without a legal background (see **part 2.2.1.**). In most cases, the modern arbitrator does not have the social status, experience or abilities of the first generation arbitrators, that would allow him or her to use his or her own wisdom, judgment and intuition developed over many years of experience to resolve the procedural issues at hand in a fair and equitable manner. To discover the content of some of the balancing criteria, such as the "public interest to establish the truth" or the principles of fairness and proportionality as established in Art. 9(2)(g) of the IBA Rules may be an easy task for a "Grand Old Man" but a difficult for a modern arbitrator without such an impressive experience.

This problem has also been illustrated by Y. Dezalay and B. Grant, who, in their analysis of different generations of arbitrators, use a quote from an

arbitration expert: "[I]t's something that can be subject to abuse where an arbitrator doesn't feel like going through a difficult choice of law [...] or simply decides that something is *lex mercatoria* because that's an answer he feels is right [...]. The question is [...] whether commercial parties feel that it provides sufficient security and predictability. And how well arbitrators who don't have the abilities of [Berthold] Goldman [a senior French professor and the "father" of the *lex mercatoria*] are able to apply the theory and come up with suitable answers that are perceived as fair and reasonable by both parties." (Dezalay, Garth, 1995, p. 40).

Accordingly, the broad discretion, discretionary provisions and the trust that suited the "Grand Old Men" are not so acceptable to a modern arbitrator who simply does not have the same abilities. As legal scholarship aptly points out, it is a short step from discretionary procedural flexibility to arbitrariness in modern arbitration (Pickrahn, 2016, p. 175). In some cases in modern arbitration, the arbitrator may not even have the inclination to overanalyse authoritative sources of arbitration law that could help him or her to find a way out of a procedural problem (for an example of such an arbitrator, see Park, 2003, p. 292). In the context of the admissibility of evidence, a wide discretion could probably be justified in arbitration proceedings in which the arbitrator is G. Born, Y. Derains, B. Hanotiou or M. Scherer. Nevertheless, international commercial arbitration proceedings, for better or worse, are not limited to those arbitrators. As mentioned, arbitrators may be distinguished by a wide range of backgrounds, specialisations and experience and, in most modern arbitration proceedings, the presiding arbitrator will not be an arbitration "star" of impeccable knowledge, experience and qualifications.

*Thirdly*, the parties to an arbitration are not willing to agree on the applicable admissibility rules. The problem of legal uncertainty could be resolved by an agreement of the parties on clear rules on the admissibility of evidence in arbitration proceedings. As mentioned above, international commercial arbitration is contractual in nature, and various sources of arbitration law confirm this since legal sources allow the parties themselves to agree on what evidence should be admissible (see **part 1.2.**).

It has already been discussed in part 1 of this thesis that the parties are not willing to agree on the admissibility rules either during the negotiation of arbitration clauses or after the start of arbitration proceedings (see **parts 1.2.1., 1.2.4.**). In this respect, I can only refer in addition to the position found in legal scholarship: "once the arbitration begins, litigants almost by definition are more like a bickering old couple than an amorous two-some, and thus may not agree on much. The arbitrator is left to make up rules as he or she goes along, with the potential consequence that one side may receive procedure never

expected and never really bargained for." (Park, 2003, p. 289). Hence, the final decision-makers on the admissibility of evidence are almost always the arbitrators, which puts them in a rather delicate situation of legal uncertainty.

#### 3.1.1.3. The Parties to Arbitration Expect and Want More Legal Certainty in the Arbitration Process

The arbitration process must respond to the needs of the main user of arbitration – the business community. International commercial arbitration is designed to resolve disputes in the business community in an efficient, expeditious, qualified and, in most cases, confidential manner. The expectations of the business community must be respected not only by the arbitral institutions but also by the arbitrators themselves, who have a vested interest in satisfying the expectations of the parties to proceedings (see **part 2.2.4.**). If international commercial arbitration fails to meet expectations, the business community will turn to other alternative or traditional forms of dispute resolution. In this context, we must inevitably ask whether the business community really lacks legal certainty in the arbitration process. Perhaps the broad discretion that determines the flexibility of the arbitration process enjoys a broad support in the business community. Suppose the answer to this question is in the affirmative. In that case, it should be acknowledged that the broad discretion of arbitrators, even with its inherent flaws, should also be recognised in the context of the admissibility of evidence.

The choice between legal certainty and legal flexibility has been analysed both in legal scholarship and in various empirical studies. Some authors have even assumed that the choice between these two values will mostly be determined by a simple sympathy for one of them (Kaufmann-Kohler, 2010, p. 16). However, both empirical studies and legal scholarship suggest that parties to arbitration proceedings are more and more often missing legal certainty in the arbitration process. This statement is substantiated by two arguments which are described in the following paragraphs.

*Firstly*, various empirical studies confirm that parties to arbitration both expect and miss legal certainty in the arbitration process. The study of publicly available sources has led to the conclusion that parties not only expect but also want more legal clarity from the arbitration process. A summary of the empirical sources studied in this thesis is presented below.

Comprehensive surveys of the business community are regularly conducted by The School of International Arbitration of Queen Mary

University. Some of the findings of these studies support the need for greater legal certainty. For example, in a study published as early as 2006 entitled "International Arbitration: Corporate Attitudes and Practices", one indication of the need for legal clarity is that 76% of respondents said they would choose institutional rather than *ad hoc* arbitration (School of International Arbitration at Queen…, 2006, p. 12).

In the 2010 survey "2010 International Arbitration Survey: Choices in International Arbitration", respondents indicated that one of the reasons why they would choose arbitration, even if proceedings were not confidential, was legal certainty (School of International Arbitration at Queen…, 2010, p. 30). Furthermore, and very importantly, the study revealed that the second most important reason why companies were frustrated with the arbitration process was that it was too flexible and uncontrolled (School of International Arbitration at Queen…, 2010, p. 26).

In the 2013 study "Corporate Choices in International Arbitration Industry Perspectives", some respondents identified the need for legal certainty when determining costs in arbitration proceedings (School of International Arbitration at Queen…, 2013, p. 20). In the 2015 study "Improvements and Innovations in International Arbitration" and the 2018 study "The Evolution of International Arbitration", the need for greater flexibility in the process was identified as the least significant issue in international commercial arbitration (School of International Arbitration at Queen…, 2015, p. 7; School of International Arbitration at Queen…, 2018, p. 8). This point is supported by the fact that in the 2018 survey, only 5% of respondents indicated that the existing arbitration procedural rules are too detailed (School of International Arbitration at Queen…, 2018, p. 33).

Admittedly, the flexibility of the process is still considered one of the main advantages of arbitration. For example, in the 2018 study "Improvements and Innovations in International Arbitration", when asked to identify the best features of international arbitration, respondents ranked procedural flexibility in the third place, after enforceability of the arbitral award and the ability to avoid national legal systems and national courts (School of International Arbitration at Queen…, 2018, p. 7). On the other hand, we can also observe a decrease in the influence of procedural flexibility. This is not only supported by the abovementioned results but also by the fact that, in contrast to the 2006 study, where procedural flexibility was ranked as the most important value of the arbitration process, in the 2018 study, as mentioned, procedural flexibility was ranked only in the third place (School of International Arbitration at Queen…, 2006, p. 2; School of International Arbitration at Queen…, 2018, p. 7).

Moreover, the growing importance of legal certainty rather than flexibility is confirmed by other studies. For example, a study relevant to the context of this thesis was carried out by I. Hanefeld and J. Hombeck, who interviewed 20 different multinational companies that have been involved or were currently involved in international arbitration. The findings of the study revealed the growing importance of legal certainty: 1) respondents prefer institutional rather than *ad hoc* arbitration since "Institutions provide for more legal certainty"; 2) some participants in the study pointed out that there are not enough written rules on international arbitration that are easily accessible to corporate lawyers: "More written rules easily accessible to in-house lawyers are required"; 3) when asked "Which do you think is more important – procedural certainty or flexibility?", as many as 87% of the participants indicated that legal certainty is more important; 4) the majority of respondents considered that the arbitration process is particularly lacking legal certainty in the taking of evidence stage. One respondent even stated that: "Judges know what they are doing [...] arbitrators often don't." (Hanefeld, Hombeck, 2015, p. 23–24).

*Secondly*, in addition to the empirical studies reviewed in paragraphs above, various sources of legal scholarship have noted that there is a growing need for more legal certainty in international arbitration.

For example, some authors take the position that parties not only like legal certainty but also expect it and that providing legal certainty to the parties should be a common goal of the international arbitration community as a whole (Pickrahn, 2016, p. 173, 175). In addition, W. Park states: "it is not at all surprising that litigants expect ordered arbitral proceedings. Few business managers want a lottery of inconsistent results." We can imagine the difficult situation for a lawyer or representatives of a party to a dispute who, at the request of the company's managers, have to try to predict the admissibility of evidence in an arbitration proceeding or who have to explain why the evidence that is highly advantageous to the company has been excluded from the arbitration process.

An essential source of legal scholarship is the Oxford Handbook of International Arbitration. This 2020 handbook reflects contemporary trends in international arbitration. Interestingly the handbook does not contain a chapter on procedural flexibility. On the contrary, one of the book's chapters, "Legal Certainty and Arbitration", focuses specifically on legal certainty. The chapter provides the following relevant findings in the context of this thesis: 1) authors argue that we can see an increasing need for legal certainty in international commercial arbitration proceedings: "While legal flexibility surely continues to deserve a place among the core values of international arbitration, it is legal

certainty's stock that has been on the rise in recent years. The shift can be felt throughout the international arbitration system, and it is mainly driven by an increased awareness that too much flexibility can ultimately imperil arbitration's legitimacy." (Bachand, Gélinas, 2020, p. 377); 2) this change is not only natural but also purposeful: "Therefore, it seems plausible, at the very least, that the contemporary shift in the balance between certainty and flexibility is nothing more than a natural and predictable, and perhaps in some respects even desirable, consequence of the evolution in the sociocultural make-up of the international commercial arbitration community." (Bachand, Gélinas, 2020, p. 386).

Therefore, as can be seen from part 3.1.1 of this thesis, the broad discretion of arbitral tribunals in the context of the admissibility of evidence gives rise to the following legal problems: 1) the parties to arbitration proceedings cannot predict what evidence is admissible in international commercial arbitration proceedings; 2) arbitrators cannot predict what evidence is admissible in international commercial arbitration proceedings. Moreover, these problems are even more relevant when one considers that both the parties to arbitration proceedings and the international community are increasingly expressing the need for more legal certainty in international commercial arbitration.

### 3.1.2. The Discretion of Arbitral Tribunals to Decide on the Application of Admissibility Rules Leads to Contradictions in the Arbitral Case Law

Another problem, which is closely related to legal uncertainty, is that discretion leads to contradictory decisions of arbitral tribunals in deciding on the admissibility of evidence. The principle that similar cases should be decided in a similar manner has its origins in the teachings of Aristotle (Johnson, Jordan, 2017, p. 2). This principle has its place not only in the concept of justice or the rule of law but is also closely linked to the court's duty to follow precedents. This duty, according to the renowned precedent scholar R. Cross, manifests itself in three aspects: 1) all courts are obliged to take into account relevant case law; 2) lower courts are obliged to follow the decisions of courts higher up in the hierarchy; and 3) appeal courts are generally bound by their own decisions (Cross, 1977, p. 5–8).

International commercial arbitration has its own specificities in this respect. Arbitral tribunals are not part of a hierarchical system, *i.e.* tribunals are not obliged to follow the decisions of higher courts or tribunals. Moreover, due to the confidential nature of arbitral proceedings, arbitral awards are often

not even publicly available. Nevertheless, some scholars identify a tendency of arbitral tribunals to follow previous arbitral tribunal decisions rendered in the context of similar factual circumstances. This tendency goes beyond the fact that previous arbitral awards are instructive, useful, informative, illustrative, and provide guidance or inspiration (Bentolila, 2017, p. 166). In addition, taking into account previous decisions of arbitral tribunals ensures the decisions' legitimacy and, more importantly, fulfils the requirements of equality and fairness between the parties (Bentolila, 2017, p. 168–169; Landolt, 2015, p. 158–159). Thus, although the principle that similar cases should be decided similarly does not translate into a direct obligation, the implementation of this principle helps arbitral tribunals in future cases and, accordingly, fulfils other fundamental principles.

While the principle that similar cases should be resolved in a similar way guarantees many positive aspects of the arbitration process, it must be acknowledged that broad discretion is often fraught with the risk of violating this principle. Discretion is often incapable of ensuring consistency. For example, in contrast to discretion, *ex ante* legal rules are capable of reducing the number of opinions on which law should apply to which facts, how it should be applied and, in general, what is needed to achieve justice (Gumbis, 2018, p. 203). Hence, as will be shown below, the broad discretion in deciding on the admissibility of evidence does not ensure uniformity of arbitral case law. The analysis in this part of the thesis demonstrates that arbitral tribunals in similar cases tend to both exclude and, on the contrary, admit the evidence. Moreover, in some cases, it is not only the result itself that differs but also the way in which arbitral tribunals try to arrive at the result, *i.e.* what criteria are used to determine the admissibility of evidence.

The following analysis is divided into four parts. The first part analyses two contradictions that are found in the arbitral case law and are not related to the application of the three categories of admissibility rules. These two contradictions are different views on the impact of the law of the place of arbitration on the admissibility of evidence and different positions on the application of national admissibility rules that are not found in arbitration law sources discussed above (see **part 3.1.2.1.**). It was decided not to limit this thesis exclusively to a review of three categories of admissibility rules in order to more clearly demonstrate and justify the contradictions in the arbitral case law caused by the discretion of arbitral tribunals. The remaining three parts, as in part 3.1.1, are based on an analysis of three specific categories of the admissibility rules: 1) admissibility rules designed to improve fact-finding accuracy (see **part 3.1.2.2.**); 2) admissibility rules that exclude evidence because of its content (see **part 3.1.2.3.**); and 3) admissibility rules that

exclude evidence due to infringements of substantive law or procedural law (see **part 3.1.2.4.**).

### 3.1.2.1. Arbitral Case Law Contradictions Related to the Impact of the Law of the Place of Arbitration on the Admissibility of Evidence and to the Application of National Admissibility Rules

The divergent case law of arbitral tribunals manifests itself in a wide range of ways. The analysis in this part focuses on two important issues of admissibility of evidence that are not directly related to three specific categories of admissibility rules analysed in parts 3.1.2.2, 3.1.2.3 and 3.1.2.4 of this thesis. As mentioned, this part explains two contradictions identified during the analysis of the arbitral case law.

*Firstly*, arbitral tribunals have different views on the impact of the civil procedural law of the place of arbitration on the admissibility of evidence. As discussed above, the law of the place of arbitration should not have a direct legal influence on international commercial arbitration proceedings. Arbitral tribunals are not obliged to follow the rules applicable to evidence before the courts of the place of arbitration (see **part 1**; Poudret, Besson, 2007, p. 551). This means that the (in)admissibility of one or another piece of evidence under the civil procedural law of the place of arbitration should be irrelevant in international commercial arbitration.

The case law of arbitral tribunals confirms this conclusion. For example, in the already mentioned ICC arbitration case No. 7626, the arbitral tribunal stated: "This is an international arbitration procedure. The strict rules of evidence, as they apply in England where the Tribunal is sitting, or in India, do not apply." (Technical know-how buyer P v. Engineer/seller A...).

Another international commercial arbitration case gave a similar interpretation. The interim award in the *ad hoc* arbitration stated: "While I entirely accept that arbitrators (and umpires) are bound to have regard to certain fundamental evidential precepts they are clearly not in my view bound either by the letter of the Code of Civil Procedure or by the strictly procedural rules of evidence which may apply elsewhere." (The Western Company of North America v. Oil and Natural...; see also Licensor Company B v. Licensee Company H2...).

In this respect, the case law of arbitral tribunals is quite clear – the arbitral tribunal should not be concerned with national civil procedure provisions that determine the inadmissibility of specific evidence in court proceedings. When faced with the question of admissibility of evidence, the arbitral tribunal

should be guided not by national civil procedural rules but by the sources of arbitration law which apply to the arbitration, such as the arbitration law (*e.g.* the Model Law), the applicable arbitration rules, or the IBA Rules.

That would be clear enough, but the analysis reveals a problem: in other arbitral decisions, arbitrators come to a completely different conclusion and rely on national civil procedure rules to decide on the admissibility of evidence. For example, in the ICC arbitration case No. 16394, the arbitral tribunal relied on the provision of the national code of civil procedure in order to decide on the admissibility of the expert's report: "Firstly, it should be noted that there is no question of the admissibility of the reports by Mr. D. R., technical advisor to the Respondent. Because, according to Article 391 of the Code of Civil Procedure, reports by persons having special knowledge, such as the scientist Mr. D. R., an expert on electronics, constitute admissible evidence to be used during the regular process […]." (Science Applications International Corp. v. Greece...). In the ICC arbitration case No. 7722, the arbitral tribunal assessed the compliance of the arbitration process with the national law: "Another point which needs mentioning here is that though the Evidence Act expressly provides that it is not applicable to proceedings before an arbitrator, the procedure the tribunal has followed is generally consistent with the principles of that Act." (Contractor (France) v. Client (country X)…). We can also find similar examples in the case law of other arbitral tribunals. For example, the arbitral tribunal seated in Romania has emphasised that a party may only submit evidence that is admissible under the national law (Agent v. Seller...).

The arbitral tribunals' decisions to follow civil procedural law raise reasonable doubts. International arbitration is an autonomous system that is not subject to any national law. A good example is the position of drafters of the Model Law. As mentioned, drafters were quite clear in their position that arbitral tribunals are not and should not be bound by national rules on the admissibility of evidence (see **part 1.2.1.**).

However, in the context of this thesis, the main problem lies elsewhere. The wide discretion of arbitral tribunals means that this fundamental question – whether the admissibility of evidence in arbitration proceedings is affected by national law provisions – has no clear-cut answer. Some arbitral tribunals take the position that the admissibility of evidence is not and cannot be affected by provisions of national law, while others refer to, or at least take into account, provisions of national civil procedure law.

*Secondly*, arbitral tribunals also differ in their positions when confronted with national admissibility rules that are not found in arbitration law sources discussed above. One example is the admissibility of hearsay evidence. The

hearsay rule is found in the common law tradition, while the sources of arbitration law do not directly prohibit relying on hearsay in arbitration proceedings (see **parts 1.1.1., 1.2.**). Some arbitrators support the liberal approach and find that hearsay is admissible but should be given appropriate, *i.e.* usually lesser, evidentiary weight. For example, in the ICC arbitration case No. 20097, the arbitral tribunal accepted hearsay evidence submitted by the parties (Inversiones y Procesadora Tropical INPROTSA...). The admissibility of hearsay is explained in more detail in another international commercial arbitration case: "The Respondent argued that the Tribunal should reject Mr. Franklin's version of the alleged discussions in Year X+22 as 'hearsay'. [...] The appropriate approach in international arbitration is to assess the credibility of the witness and the weight that should be given to his or her evidence. A witness's evidence will not be dismissed as 'hearsay' merely because it is not corroborated by other witnesses, although a witness's evidence will generally be given more weight if it is corroborated." (Joint Venture Participant No. 1, Joint Venture Participant...; see also American Steamship Company v. Thai Transportation...). The Iran-United States Claims Tribunal has also accepted the hearsay evidence in its case law (Gloria Jean Cherafat, Roxanne June Cherafat...).

These decisions of arbitral tribunals are well-founded – the sources of arbitration law simply do not contain an admissibility rule that prevents parties from relying on hearsay. Moreover, a similar position is upheld in legal scholarship (see, *e.g.* Strong, Dries, 2005, p. 307–308).

Nevertheless, due to the wide discretion, arbitral tribunals tend to arrive at a completely different conclusion. A good example of this is the decision of the same Iran-United States Claims Tribunal, where the Tribunal not only declared hearsay evidence inadmissible but also formulated a completely opposite admissibility rule, *i.e.* hearsay evidence is inadmissible evidence unless corroborated by other evidence in the case: "The Tribunal considers this to be hearsay evidence, on which it cannot rely, unless the evidence is substantiated. Such substantiation is missing." (Jalal Moin v. The Government of the Islamic...).

Therefore, as can be seen from part 3.1.2.1 of this thesis, the arbitral tribunals not only reach different conclusions on aspects such as the impact of national law on the admissibility of evidence but also on the application of national admissibility rules. This divergence of arbitrators' views is also reflected in the following analysis of three categories of admissibility rules.

### 3.1.2.2. The Admissibility Rules Designed to Improve Fact-finding Accuracy in Arbitration Proceedings

As part 3.1.1.1, this part is limited to the admissibility rule, which gives arbitral tribunals the power to exclude the written witness's testimony if the witness is not examined at the hearing (see Art. 4(7) of the IBA Rules). However, as a further illustration of the difference in arbitral case law, reference will also be made to Art. 5(5) of the IBA Rules, which sets out an identical rule to Art. 4(7) only concerning the admissibility of written expert witness (see **part 1.2.3.5.2.**)

The UNCITRAL arbitration case *S.D. Myers Inc. v. Canada* raised the issue of the admissibility of the testimony of witness who was not examined at the hearing. The arbitral tribunal found two essential points. Firstly, the arbitral tribunal emphasised the general principle that the written testimony of witness should not be declared inadmissible and should be given an appropriate probative value. Secondly, the arbitral tribunal acknowledged that the testimony might be declared inadmissible in exceptional circumstances. These circumstances were attributed to the arbitral tribunal's desire or a need to hear the witness live: "However, exceptional circumstances may justify exceptional measures, especially where the Tribunal itself wishes to have the benefit of hearing a particular witness 'live'." (S.D. Myers Inc. v. Canada...).

However, in other arbitral cases, unlike in *S.D. Myers Inc. v. Canada*, the arbitral tribunals applied completely different criteria for the admissibility of evidence and did not follow either the so-called general principle or did mention the arbitral tribunal's own desire to hear the witness live. For example, in the UNCITRAL arbitration case *Passport Special Opportunities Master Fund, L.P. v. ARY Communications Ltd*., the arbitral tribunal took the opposite approach towards the general principle of evaluation rather than exclusion of the written testimony and decided to exclude written testimony without even taking into account its need to hear the witness: "The Tribunal is aware of the reason why Mr Cunningham and Mr Arshad Ashraf decided not to attend the hearing but does not accept that the mere threat of contempt proceedings constitutes exceptional circumstances or a valid reason to justify their non-appearance at the hearing. Consistent with international good practice, this Tribunal would disregard their respective Witness Statements." (Passport Special Opportunities Master Fund....).

Meanwhile, in the ICC arbitration case No. 15892/JEM/MLK/ARP, the following aspects were taken into account: 1) the witness's place of residence; 2) the witness's financial situation; 3) the probative value of the witness's testimony in the case; 4) other evidence in the case. In the view of the arbitral

tribunal, these aspects constituted exceptional circumstances which made it possible to admit the written testimony.

In the same arbitration case, the written testimony of another witness was declared inadmissible evidence. With regard to the second testimony, the arbitral tribunal only took into account the witness's place of residence when assessing whether exceptional circumstances existed: "Further there were no exceptional circumstances justifying the Tribunal nonetheless having regard to Mr Midgen's statement. Mr Midgen was in the United Kingdom and could apparently have attended the hearing if he had so wished." (Injazat Technology Fund B.S.C. v. Najafi...). In other words, the arbitral tribunal, when faced with the same legal issue in the same case, has chosen in one instance to assess one set of criteria and in another instance to limit itself to a single criterion.

The arbitral tribunals' different interpretations of admissibility rules are also evident when the arbitral tribunals are confronted with the written testimony of expert who did not appear at the hearing. Both legal scholarship and the arbitral case law recognise the opposing party's right to examine the expert, while a violation of this right, as evidenced by Art. 5(5) of the IBA Rules, should usually lead to the exclusion of the expert's written report from the arbitration file (O'Malley, 2019, p. 161, see also Aguas del Tunari SA v. Republic of Bolivia...).

Nevertheless, the arbitration case law also contains decisions to the contrary. For example, in one UNCITRAL arbitration case, the arbitral tribunal held that, unlike the witness testimony, the rule of admissibility of evidence does not apply to the expert's report: "In case a witness whose presence at the hearing was requested does not show up, his or her written statement shall be disregarded. This rule will not apply to expert reports." (Award of arbitral tribunal of 18 December 2000...; Caron *et al*., 2006, p. 649–650).

Therefore, the analysis of the arbitral decisions suggests that arbitral tribunals differently apply admissibility rules designed to improve fact-finding in arbitration proceedings. This divergent interpretation is characterised by two aspects: 1) different approaches towards the general principle of whether evidence should be excluded or merely given an appropriate weight; 2) different assessments of balancing criteria to be applied in deciding on the admissibility of evidence.

### 3.1.2.3. The Admissibility Rules that Exclude Evidence Because of its Content

As part 3.1.1.1, this part is limited to two admissibility rules – the admissibility of confidential evidence and the admissibility of politically or institutionally sensitive evidence (see **part 1.2.3.3.**).

*Firstly*, the arbitral tribunals are divided on certain aspects of the admissibility rule that exclude evidence because of commercial or technical confidentiality.

In one type of case, the arbitral tribunals decide to exclude the confidential evidence, while in similar cases, tribunals do not exclude the evidence but only decide to redact and remove the confidential information contained in the document. For example, in the ICC arbitration case No. 18728, the admissibility of a confidential award of another arbitral tribunal was at issue. The arbitral tribunal declared the award inadmissible while taking into account that the principle of confidentiality is widely recognised and respected in international commercial arbitration (Purchaser (Xanadu) v. (1) Seller...).

Faced with a similar situation, the arbitral tribunal in the LCIA arbitration did the exact opposite and did not exclude the evidence but allowed the party to submit specific and non-confidential provisions of the arbitral award: "At the procedural hearing on 5 and 6 February 2013, the Sole Arbitrator rejected the Claimant's applications to admit the documents from the Previous Arbitration on the grounds that they were either confidential or privileged. The Claimant was, however, permitted to provide information from the Previous Arbitration provided that the information was confined to specific and narrow passages from the documents in question, but not the documents in their entirety." (Parties Not Indicated, LCIA Reference No. 122039...).

Arbitral tribunals have also differently applied the balancing test related to the admissibility rule that excludes evidence because of commercial or technical confidentiality. For example, legal scholarship refers to evidence which has not been admitted on the sole ground of its confidential nature: 1) a company specialising in credit card security in dispute with a credit card company regarding the quality of its services cannot be expected to disclose its highly secret security mechanisms, even to its client; 2) a chocolate manufacturer in a dispute with a distributor regarding the quality of the chocolate cannot be expected to disclose a secret recipe (see, *e.g.* Khodykin *et al.*, 2019; Marghitola, 2015, p. 93).

On the other hand, in other arbitral cases, arbitrators have not limited themselves to the confidentiality of information but have also considered other

criteria, such as the relevance of confidential evidence to the arbitration case. This approach is well illustrated by the arbitration case *Euroflon Tekniska Produkter AB (Euroflon) v. Flexiboys*, in which the arbitral tribunal held: "Flexiboys has claimed, in this respect, that the documents contain information on customers, customer sizes, customer volumes and prices. Disclosure of information of this kind is typically detrimental from a competition perspective for the trader. It can also be assumed that the invoices contain information of this nature. Thus, they contain confidential information (citation omitted). This means that Flexiboys cannot be ordered to disclose them unless extraordinary circumstances are at hand. The interests to be weighed in the test of whether extraordinary circumstances for disclosure of the relevant documents are at hand are their relevance as evidence, on the one hand, and the financial value of the confidential information, on the other." (Euroflon Tekniska Produkter..., quoted O'Malley, 2019, p. 313–314). Arbitral tribunals have also followed this balancing test in several other ICC arbitration cases (see, *e.g.* Purchaser (Xanadu) v. (1) Seller...; Gujarat State Petroleum Corporation LTD...).

Arbitral tribunals also differ in their approach when the confidentiality obligation applies not only to a party of proceedings but also to a third party not involved in the arbitration. In the ICC arbitration case No. 7047/JJA, the arbitral tribunal took the position that the respondent's confidentiality obligations towards the third party were irrelevant to the case and therefore admitted confidential evidence into the arbitration procedure (W., a Corporation organized and...). In yet another ICC arbitration case No. 19299/MCP, the arbitral tribunal also saw no obstacle to the admissibility of document bearing confidentiality obligations of a third party: "According to the Tribunal, on the basis of the evidence presently before it, at this juncture, it would not be appropriate to exclude evidence on the basis of a contractual confidentiality obligation that is external to the dispute before the Tribunal, especially when the evidence in question appears to be relevant." (Gujarat State Petroleum Corporation LTD...).

However, arbitral tribunals also take a different position. For example, in the UNCITRAL arbitration case, the arbitral tribunal stated that the confidentiality obligation of a third party is sufficient grounds for the exclusion of such evidence: "[t]he parties have refused the production of a number of documents on the ground of them containing confidential commercial information. To the extent that some such refusals are based on the nature of the transaction or information contained in the pertinent document, particularly if it relates to intra-company information or business

transactions involving third parties, a refusal might be well justified on these grounds" (Merrill & Ring Forestry v. Canada...).

*Secondly*, the admissibility rule that excludes evidence because of political or institutional sensitivity is also applied differently in arbitral case law.

We can notice disagreements on one of the fundamental issues in the application of this rule: does the content of the evidence submitted constitute a sensitive information? For example, in the UNCITRAL arbitration case *Merrill & Ring Forestry v. Canada*, it was held that the admissibility rule does not extend to secret documents which, although do not reflect the content of a high-level government cabinet meeting, were prepared in preparation for that meeting or even relied upon in the course of that meeting (Merrill & Ring Forestry v. Canada ...).

On the other hand, in another UNCITRAL arbitration case *Glamis Gold, Ltd. V. The United States of America*, the arbitral tribunal provided a different interpretation of this rule. In this case, the arbitral tribunal did not rule out the possibility that the admissibility rule could extend to documents prepared in preparation for or relied upon during a government meeting. The arbitral tribunal took the position that the only documents not covered by the admissibility rule are documents containing purely administrative information, such as the timetable of the cabinet meeting *etc*. In contrast, any other documents relating to government meetings may be excluded (Glamis Gold, Ltd. V. The United States...).

Another example of disagreement concerns the admissibility of confidential pre-trial investigation documents. In the UNCITRAL arbitration case *Churchill Mining PLC and Planet Mining Pty Ltd v. Indonesia*, the arbitral tribunal held that police pre-trial investigation documents are inadmissible evidence in arbitration proceedings: "This being so, for greater clarity, the Tribunal adds that it accepts the invocation of privilege by the Respondent in relation to the police files concerning investigations into the alleged forgery [...] since they are covered by the secrecy of criminal investigations" (Churchill Mining PLC and Planet...). On the contrary, in another UNCITRAL arbitration case, the arbitral tribunal ordered the production of all the evidence gathered during the pre-trial investigation relating to one of the parties to the arbitration proceeding (European Investor v. Asian State..., quoted O'Malley, 2019, p. 327).

In addition to the different approaches towards the answer to the question of what constitutes sensitive information, the arbitral tribunals also differ on specific criteria that the arbitral tribunal should balance when deciding whether the political or institutional sensitivity of the evidence is compelling.

In some arbitration cases, the assessment is limited to whether the relevance of evidence in the case is such as to allow the admissibility of confidential evidence. For example, in the UNCITRAL arbitration case *Vito Gallo v. Canada*, the arbitral tribunal ordered the party to submit evidence due to its relevance to the case: "This document does concern the AMLA directly, and the Arbitral Tribunal is of the opinion that it may be relevant to compare the draft version of the memorandum with its final version, since variations could reflect changes in the government of Ontario's opinion. Thus, document no. 663 shall be produced." (Vito Gallo v. Canada...).

On the other hand, some arbitral tribunals not only do not assess the relevance of evidence but even refuse to do so. For example, in the UNCITRAL arbitration case *United Parcel Service of America Inc. v. Canada*, the arbitral tribunal took the position that the relevance of confidential information related to national security or military secrets is not a relevant criterion. Although the parties, in this case, cited more than 6 cases in which the relevance of the evidence was assessed, the arbitral tribunal refused to consider the criterion of relevance (United Parcel Service of America Inc...).

Therefore, arbitral tribunals differently apply admissibility rules that exclude evidence because of its content. The case law of arbitral tribunals is substantially divided, both on the question of what evidence should be considered confidential or politically, institutionally sensitive and on the question of what specific criteria should be used to assess whether the confidentiality or political, institutional sensitivity of evidence are compelling.

### 3.1.2.4. The Admissibility Rules that Exclude Illegally Obtained, Submitted, Presented or Evaluated Evidence

The final category of admissibility of evidence is the rules that exclude evidence due to infringements of substantive law or procedural law. As in part 3.1.1.1, this part of the thesis is limited to two main admissibility rules: 1) admissibility rules that exclude evidence on the ground that it was illegally obtained (see **part 1.2.3.5.1.**); 2) admissibility rules that exclude evidence due to the late submission of such evidence (see **parts 1.2.2., 1.2.1., 1.2.3.4., 1.2.3.5.2.**).

*Firstly*, there is a clear lack of a uniform approach towards the admissibility of illegally obtained evidence. As noted above, arbitration law does not provide a uniform approach to the admissibility of illegally obtained

evidence. The different approaches have led to the usage of the term arbitral tribunal "may" rather than "must" or "shall" exclude illegally obtained evidence in Art. 9(3) of the IBA Rules (see **part 1.2.3.5.2.**).

Unfortunately, the analysis of the arbitral tribunal case law did not reveal any specific decisions of international commercial arbitration tribunals that contained detailed rulings on the admissibility of illegally obtained evidence. Nevertheless, the different application of this admissibility rule is reflected in the practice of other international courts and tribunals. Hence, the following paragraphs provide a comprehensive analysis of the decisions of international courts and tribunals.

One of the main cases which involve illegally obtained evidence is the Corfu Channel case of the International Court of Justice, which dealt with the United Kingdom's claim against Albania. The case concerned Albania's liability because the mines located in the Albania territory blew up two British ships. During the proceedings, the Court found that the United Kingdom had illegally gathered relevant evidence in violation of Albanian sovereignty. Nevertheless, the Court did not declare such evidence inadmissible. In other words, the judgment confirmed that the illegally gathered evidence could be admissible and relied upon by the Court (Judgment of the International Court of Justice…).

The International Court of Justice took the opposite position in the dispute between the US and Iran over the occupation of the US embassy in Tehran by Iranian nationals. Although Iran refused to participate in the case itself, its representatives indicated that they could base their position on diplomatic documents in the illegally seized embassy. The International Court of Justice ordered the immediate return of these diplomatic documents to the US. This order, according to legal scholarship, suggests that the Court would have ruled in the opposite direction to the Corfu Channel case and would have declared the seized diplomatic documents inadmissible (Reisman, Freedman, 1982, p. 751; Bartkus, 2021b, p. 69).

Investment arbitration tribunals also take different positions on this issue. For example, in the UNCITRAL arbitration case *Methanex Corporation v. United States of America*, the issue of admissibility of evidence arose in relation to Methanex's documents that were illegally gathered from trash bins on private property. The arbitral tribunal made a detailed assessment of the following criteria: 1) the principles of fairness and equality enshrined in the UNCITRAL Arbitration Rules, which are fundamentally contradicted by a party's unlawful gathering of evidence; 2) the fact that the evidence was gathered by unlawful acts by Methanex; 3) the relevance of the evidence; and 4) various subsidiary circumstances of the case, *i.e.* the time of the collection

of evidence and the principle of justice. Considering all these criteria, the arbitral tribunal declared Methanex's illegally obtained evidence inadmissible (Methanex Corporation v. United States of America...).

Another investment arbitration case, *EDF (Service) v. Romania*, raised the issue of the admissibility of an audio recording made in violation of Romanian national law. The arbitral tribunal took into account the following aspects: 1) the audio recording was made in violation of Romanian national law; 2) the principle of good faith enshrined in the UNCITRAL Rules, which, according to the tribunal, essentially entails the inadmissibility of illegally obtained evidence. Taking into account all of these aspects, the arbitral tribunal concluded as follows: "Admitting the evidence represented by the audio recording of the conversation held in Ms. Iacob's home, without her consent in breach of her right to privacy, would be contrary to the principles of good faith and fair dealing required in international arbitration. In that regard, the Tribunal shares the position of the Methanex award." (EDF Service v. Romania...). However, in the present case, the arbitral tribunal did not completely follow the Methanex's balancing test. For example, the arbitral tribunal did not assess and completely disregarded the relevance or importance of the evidence to the case.

Other arbitral tribunals have applied different criteria as well. In the case of *Libananco Holdings Co. Limited v. the Republic of Turkey*, the question of the admissibility of illegally collected evidence was raised. In addition to the criteria already mentioned in previous cases, such as the principle of fairness, the arbitral tribunal took into account other aspects. For example, the arbitral tribunal introduced another evaluation criterion, namely the criterion of the respect for the arbitral tribunal, which is potentially violated by the unlawful gathering and subsequent submission of evidence by one of the parties to arbitral proceedings. Specifically, the arbitral tribunal stated: "For its own part, the Tribunal would add to the list respect for the Tribunal itself, as the organ freely chosen by the Parties for the binding settlement of their dispute in accordance with the ICSID Convention." (Libananco Holdings Co. Limited...).

The contradictory positions of arbitral tribunals towards the application of different criteria when deciding on illegally obtained evidence can also be seen in other arbitral cases. For example, legal scholarship states that, contrary to *EDF (Service) v. Romania*, in some arbitral awards, a video taken illegally by a party has been declared as admissible evidence (Schlaepfer, Bärtsch, 2010 quoted Khodykin *et al*., 2019, p. 41; see also Caratube International Oil Company LLP…).

The analysis in the paragraphs above suggests that the wide discretion of international courts and arbitral tribunals in deciding on the admissibility of illegally obtained evidence leads to different positions. The main disagreements are manifested both in the question of whether illegally obtained evidence should be excluded in general and in the application of different balancing criteria.

*Secondly*, there is a clear lack of a uniform approach towards the admissibility of late evidence in international commercial arbitration. The following analysis of the arbitral awards demonstrates that arbitral tribunals are generally inconsistent in their approach to the admissibility of late evidence.

Arbitral tribunals tend to assess different balancing criteria. For example, in the ICC arbitration case No. 18671, the arbitral tribunal declared late evidence admissible and took into account three factors: 1) the relevance of evidence in the case; 2) the existence of justifiable reasons for the delay in submitting it; 3) the impact of admissibility of late evidence on the "arbitral due process", which requires an opportunity for the other party to be heard in respect to the late evidence (Buyer (Taiwan) v. Seller (Germany)...). This three-criteria balancing test is broadly in line with the IBA Rules, which reflects the best practice in this field (see **part 1.2.3.4.**).

Nevertheless, in other ICC arbitration cases, arbitral tribunals have applied different criteria. In the ICC arbitration case No. 20198/RD, the arbitral tribunal took into account only two criteria, *i.e.* the reasons for the delay and the relevance of evidence, and did not even mention requirements of due process, *i.e.* whether, for example, the late submission of evidence violates other party's right to be heard (Bamberger Rosenheim Ltd. v. OA Development...). Arbitral tribunals have also assessed these two criteria in other cases: "The Arbitral Tribunal, upon concluding that there are no substantial grounds for the belated submission of the aforementioned documents, declares as inadmissible such documents which are not considered in this Arbitral Award. However, the Arbitral Tribunal considers that even if said documents had been considered, they would not change the sense of this Arbitral Award." (De Rendon *et al.* v. Ventura…).

We can find additional ICC arbitration cases in which the arbitral tribunals apply different criteria. For example, in the ICC arbitration case No. 13856/AVH/EC/GZ, the arbitral tribunal only assessed the relevance of the submitted evidence and did not consider circumstances of delay or imperatives of due process (Sonera Holding B.V. v. Cukurova...). In other cases, the arbitral tribunals have considered only one criterion – the fact that evidence was submitted too late. For example, in ICC arbitration case No. ICC-FA-

2021-068, the arbitral tribunal stated: "The Sole Arbitrator decided to dismiss some of the submissions of Claimant and in particular did not admit the written witness statement of Mr. Brown (submitted as Exhibit 'C-WS-2'), since the cut-off-date for the filing of documents, including, but not limited to, written witness statements, was…" (Buyer (Utopia) v. Seller (Germany)...; see also First Investor, in liquidation (EU country)...).

In UNCITRAL arbitration cases law, we can also find different approaches towards the admissibility of late evidence. In some cases, the arbitral tribunal has declared evidence inadmissible on the sole criterion of its relevant value in the arbitration: "The Tribunal has also decided to dismiss BCLC's application to introduce new evidence, exercising its discretion on the basis that such evidence is unnecessary to the Tribunal's decisions in this Award [...]" (Barracuda and Caratinga Leasing Company B.V...; see also Huntington Ingalis v. Ministry of Defense...).

Meanwhile, in other UNCITRAL arbitration cases, the relevance of late evidence is not even assessed. For example, in one UNCITRAL arbitration, the tribunal referred to the following arguments: "[…] the Claimant had ample opportunity to provide evidence in support of its damages calculation during the course of the arbitration. Admitting such documents into the record would compromise the right of defense of the opposing party." (Balkan Energy Limited *et al*. v. the Republic...; see also Zeevi Holdings v. the Republic of Bulgaria...).

However, the most obvious contradictions in the arbitral case law are evident in the case law of Iran-United States Claims Tribunal. Specific criteria to be evaluated by the arbitral tribunal were developed in the case *Harris International Telecommunications, Inc. v. The Islamic Republic of Iran*. In *Harris International*, the arbitral tribunals have stated that the arbitral tribunal, in order to ensure the equality of the parties, the fairness and the orderly conduct of proceedings, must consider: 1) the content of submitted evidence; 2) the duration and reasons for the delay; 3) whether the admission of the evidence would prejudice the other party; and 4) whether the admission of the evidence would substantially disrupt entire arbitral proceedings (Harris International Telecommunications...; Agrostruct International, Inc. v. Iran State...).

Despite this rather clearly established practice, some Iran-United States Claims Tribunal awards have either modified or simply ignored the criteria of *Harris International*. For example, in arbitration case No. 319 (554-319-1), the arbitral tribunal found the parties' late submission of evidence inadmissible and considered only the parties' failure to provide a reason for the late submission of evidence: "The Tribunal finds that neither Party has

shown the existence of exceptional circumstances which could have justified the late submission of these documents only a few days before the Hearing. Therefore, the Tribunal considers these filings inadmissible" (Catherine Etezadi v. The Government of the Islamic...). Meanwhile, other criteria identified in the *Harris International* case were not even considered. This was noted, among other things, by the dissenting arbitrator Richard R. Mosk: "I believe that the decision to exclude this evidence was incorrect. There was no showing that the admission of the evidence was prejudicial to Respondent. Indeed, Respondent was able to reply to the evidence. Generally in judicial and arbitral proceedings, otherwise admissible and material evidence is not rejected on the basis of lack of timeliness unless there is such prejudice." (Catherine Etezadi v. The Government of the Islamic...).

The departure from *Harris International* is also evident in the Iran-United States Claims Tribunal case No. 213. In this case, at first, the arbitral tribunal found that the present procedural situation, *i.e.* evidence was submitted five months too late, was identical to situations in past cases where evidence was excluded: "In short, the Golzar affidavit appeared to present the very difficulties that generally have led the Tribunal to reject late-filed evidence – the presentation of new facts, a likelihood of prejudice to the other party, disruption of the arbitral process and an inadequate explanation for the delay." Nevertheless, the arbitral tribunal ignored all of these criteria and decided to admit the evidence based on an allegedly unusual situation which is unlikely to recur: "Notwithstanding these substantial difficulties and deficiencies, the Tribunal was ultimately persuaded to admit the Golzar affidavit into evidence." (Dadras International, Per-Am Construction...). Unsurprisingly, the position of the arbitral tribunal was the subject of a dissenting arbitrator's opinion in which Richard C. Allison stated: "While, on the one hand, the arbitral tribunal must provide reasonable opportunities to each party, this does not mean that it must sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party. For example,… [Art. 15(1) of the UNCITRAL Rules] does not entitle a party to obstruct the proceedings by dilatory tactics, such as by offering objections, amendments, or evidence on the eve of the award. [...] This is precisely what has happened in the present Cases. Mr. Golzar's highly material testimony was admitted into evidence well over five months ago." (Order of Iran-US Claims Tribunal of 22 July 1994…...).

In yet another Iran-United States Claims Tribunal arbitration case No. 131, the arbitral tribunal departed from the established practice without providing any detailed explanations. In this case, the arbitral tribunal provided only the following brief explanation on the exclusion of evidence: "The

Tribunal finds that this tardy statement, which in any event lacked corroborating documentary evidence, is inadmissibly late and cannot be accepted." (Petrolane, Inc., Eastman Whipstock...).

Therefore, to summarise the whole part 3.1.2, the analysis of the arbitral case law demonstrates that arbitral tribunals have contradictory and divergent views on the admissibility rules that fall under the main three categories of admissibility rules in international commercial arbitration. Indeed, the analysis above does not reveal the inconsistent application of all the admissibility rules in arbitral practice. It would not be possible to do so, both because of the multiplicity of these rules and because of the limited publicly available information. However, the analysis covers essentially the main and most widely known admissibility rules that fall within all three categories of admissibility rules.

The arbitral tribunals have quite different views on whether the admissibility rules should apply at all (see, *e.g.* **parts 3.1.2.1., 3.1.2.2.**). However, the main problem is that arbitral tribunals have different positions on how the admissibility rules should be applied. More precisely, arbitral tribunals have different views on which specific criteria should be assessed by the arbitral tribunal when deciding on the admissibility of one or another piece of evidence. This disparity in the arbitral tribunals' case law not only creates a conflict with the principle that similar cases should be decided similarly. There are other aspects of this problem. Applying different criteria inevitably leads to a sense of inequality between the parties. Imagine yourself in the shoes of a party when the evidence submitted by that party has been declared inadmissible because the arbitral tribunal decided to assess an additional criterion or depart from the practice developed in other arbitration cases.

Another related and relevant problem is that divergent practices give rise to different approaches to legal issues. The conflicting case law of arbitral tribunals in the context of the admissibility of evidence gives rise to a wide range of solutions to the issue of admissibility of evidence. For example, an arbitrator confronted with illegally obtained evidence will often find legal arguments both for such evidence to be excluded as well as to be admitted. This problem has been aptly identified in the context of national courts by the US judge and academic Frank H. Easterbrook: "Worse, once these judges begin making inconsistent decisions, contradictions enter the stock of precedents; and with contradictory premises one can "prove" any conclusion." (Easterbrook, 2004, p. 7).

### 3.1.3. The Discretion of Arbitral Tribunals Leads to Subjective Decision-making

Another problem related to the wide discretion of arbitral tribunals is that discretion in the context of the admissibility of evidence leads to subjective decision-making in international commercial arbitration. In other words, discretion entails a risk that arbitrators will make decisions based not on the law, *i.e.* on legal rules on the admissibility of evidence, but on the *ad hoc* subjective interpretation of legal circumstances.

This problem manifests itself in two independent aspects: 1) the process of international commercial arbitration as a process of the rule of men rather than of law (see **part 3.1.3.1.**); 2) the influence of national legal systems in international commercial arbitration, *i.e.* the nationalisation of international commercial arbitration (see **part 3.1.3.2.**). Each of these aspects is discussed in more detail in the following parts.

#### 3.1.3.1. International Commercial Arbitration as a Process of the Rule of Men and not of the Rule of Law

As the linguistic expression of the rule of law suggests, this principle requires that people's social relationships and the processes of the state should be governed by the law rather than by people's own opinions, personal beliefs and attitudes. Although in today's democratic societies, we usually take this principle for granted, the opposite of the rule of law, *i.e.* the rule of men, has prevailed in various historical periods.

The principle of the rule of the men rather than the rule of law is most often associated with kings and emperors. In ancient Roman times, there was a well-known legal principle: "Quod principi placuit legis vigorem habet", *i.e.* "What is fitting for a prince has the force of law." This principle is well illustrated by the process by which the King Louis IX of France, who had no legal training, settled legal disputes: "In summer, after hearing mass, the king often went to the wood of Vincennes, where he would sit down with his back against an oak, and make us all sit round him. Those who had any suit to present could come to speak to him without hin- drance from an usher or any other person. The king would address them directly, and ask: "Is there anyone here who has a case to be settled?" Those who had one would stand up. Then he would say: "Keep silent all of you, and you shall be heard in turn, one after the other." (de Joinville, 1963, quoted Scalia, 1989, p. 1175).

Another good example of this principle is the brief description of a period in continental Europe, dating back to the 18th century, during which judges resolved virtually any dispute by answering a single question: how would a good person resolve such a dispute? Some authors describe this and similar procedures with the term "Die Gefühlsjurisprudenz", *i.e.* the jurisprudence of sentiments or feelings (Cardozo, 2018, p. 102, 135; see **part 1.1.**).

The principle of the rule of men rather than the rule of law is still well established in certain jurisdictions. However, at least in the Western legal tradition, the rule of men and not of law has been the subject of considerable criticism. Historically, this criticism has been linked to the need to limit the monarchs' excessive powers, which have been used as a tool of social oppression during various historical periods (Epstein, 2011, p. 13). Many eminent thinkers have criticised the principle of the rule of men. As early as Ancient Greece, Aristotle stated: "Rightly constituted laws should be the final sovereign [...]." (Aristotle, 1946 quoted Scalia, 1989, p. 1176). The US Founding Fathers were also critics of this principle. For example, T. Paine said: "[L]et a day be solemnly set apart for proclaiming the charter; let it be brought forth ... [so] the world may know, that so far we approve of monarchy, that in America the law is king." (Paine, 1953 quoted Scalia, 1989, p. 1176). Meanwhile, James Madison considered the law created by judges to be a flagrant violation of the principle of separation of powers: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator." (Madison, 1961, quoted Scalia, 1997, p. 10).

Despite this criticism, the arbitration process, at least in the context of the admissibility of evidence, can be characterised as a process of the rule of men rather than the rule of law. The broad discretion of arbitral tribunals to decide on the admissibility of evidence means that the arbitral tribunals' decisions on the admissibility of evidence will not be based on the specific legal rule but on its own discretion. It has already been disclosed in part 3.1.2 of this thesis that arbitral tribunals apply the admissibility rules differently. For example, some arbitrators decide to exclude evidence, while others decide to evaluate it. Some arbitrators balance one set of criteria, while others balance completely different criteria. These are clear examples of subjective decision-making since the decision on the fate of evidence does not depend on the law applicable to the proceedings but on the attitude of a person, *i.e.* an arbitrator. The influence of the principle of the rule of men in the arbitration process is further substantiated by two aspects detailed in the following paragraphs.

*Firstly*, the case law of arbitral tribunals confirms the influence of the principle of the rule of men in the arbitral process. The analysis of the case

law allowed the identification of arbitration cases in which arbitrators have taken the position that when faced with the issue of admissibility of evidence, it is necessary to take into account not only the admissibility rules themselves but also various legal phenomena without a clear content.

For example, in the ICC arbitration case No. 1512, the arbitral tribunal stated that when deciding on the admissibility of evidence, the ICC Arbitration Rules must be interpreted: "in keeping with their spirit and in accordance with the nature and essence of international business arbitration, the arbitrator cannot avoid the duty of abiding by the general fundamental principles of procedure." (Indian company v. Pakistani bank…). In another *ad hoc* arbitration case, the arbitral tribunal, while ruling on the admissibility of evidence, stated: "It is the observance of the rules of natural justice that is paramount in the proper conduct of a reference to arbitration." (The Western Company of North America v. Oil and Natural…).

Notions used by arbitral tribunals, such as "the spirit of the arbitration rules", "the nature and essence of international business arbitration", "the general fundamental principles of procedure", or "the rules of natural justice", sound inspiring. However, it is virtually impossible to answer the question of what is the real content of these notions. What rules could be considered the rules of natural justice? Is there an exhaustive list of these rules anywhere? What does the spirit of the rules of arbitration say to the arbitrator? How should the arbitral tribunal identify this spirit? What are these general guiding principles of the process? Fairness? Efficiency? Or perhaps the goal of truth-finding?

The situation is further complicated when arbitrators have to determine the content of these notions while deciding on the admissibility of specific evidence. For example, what do the rules of natural justice say about the admissibility of written testimony of a witness who has not been questioned at a hearing? What sources of law should the parties or the arbitral tribunal analyse in order to answer this question? The natural law representatives such as St Thomas Aquinas or Cicero were certainly not confronted with questions of admissibility of evidence in arbitration. Arbitrators would not benefit much from the "spirit of the arbitration rules" or the "nature and essence of international business arbitration" either when dealing with other admissibility rules, such as the admissibility of illegally obtained evidence or late evidence. The spirit of the arbitration rules and the nature of arbitration could lead to a duty on the part of arbitrators to resolve a business dispute efficiently and expeditiously, which would seem to imply the exclusion of late-filed evidence. Nevertheless, the same nature and spirit may also extend

to the truthful resolution of the arbitral case, which would lead to the opposite conclusion – the admissibility of late evidence.

These broad and vague notions only invite arbitrators to delve into the search for the content of the natural law or the spirit of the rules, which will inevitably lead to the subjective interpretation of these notions. One arbitrator will have one view on the content of these notions, and another will have the opposite view. In this respect, the observation by US Judge J. M. Harlan II fits perfectly: "one man's vulgarity is another's lyric." (Cohen v. California, 403 U.S. 15...). This quote also applies to arbitrators in cases where questions of admissibility of evidence are decided based on phenomena that has no clear content and only invites exploration of the arbitrators' subjective beliefs.

*Secondly*, the subjective decision-making of arbitrators is also influenced by the widely recognised balancing test. As the renowned legal theorist H. Kelsen has pointed out: "[...] the principle called "weighing of interests" is merely a formulation of the problem, not a solution. It does not supply the objective measure or standard for comparing conflicting interests with each other and does not make it possible to solve, on this basis, the conflict." (Kelsen, 2005, p. 352). In other words, the balancing test does not answer the fundamental question of a balancing test itself – how to balance the balancing criteria? This is also acknowledged by one of the main proponents of balancing, Aharon Barak, who argues that there is no precise and scientifically sound answer to the question of which of the balancing criteria should be considered more important in a given case. Accordingly, the balancing that is carried out may vary substantially from case to case, and while balancing different criteria, the judge must be guided by the views of the society of which he or she is a part (Barak, 2006, p. 169).

The problems with the balancing test are even more evident in the context of the admissibility of evidence. Both legal scholarship and arbitral case law require to balance various criteria: 1) in the case of written testimony, there may be a need to balance the relevance of witness's testimony and the reason for the witness's absence against the relevance of other party's right to cross-examine the witness (see **parts 1.2.3.5.2., 3.1.1.1.1.**); 2) in deciding the admissibility of confidential information, the probative value of confidential information, the interests of third parties and the wider interest in preserving the confidential information (see **parts 1.2.3.3., 3.1.1.1.**); 3) in the case of illegally obtained evidence, the public interest in upholding the inadmissibility of such evidence, the importance of evidence to the case, and the parties interest in ascertaining the truth (see **parts 1.2.3.5.1., 3.1.1.1.**). How should the arbitral tribunal balance all of these criteria? How should the arbitral tribunal balance the public interest in declaring the evidence inadmissible

against the relevance of the submitted evidence in the arbitration case? Or how should the arbitrator balance the probative value of confidential information with the broader interest in preserving confidential information? It is not possible to balance these criteria. To use Scalia's words, "It is more like judging whether a particular line is longer than a particular rock is heavy." (Bendix Autolite Corp. v. Midwesco Enterprises, Inc...).

Barak's suggestion to consider the public's views on the importance of criteria to be balanced does little for the arbitration process either. Which society's view should an arbitrator in international commercial arbitration take into account? The views of the society of the arbitrators, of the parties, or of the place of arbitration? What if the arbitrators are from different countries? After all, even if it is decided to consider a particular society's view, how to determine this view? It is doubtful whether arbitrators would be able to find publicly available statistical information on what part of the public would support the admissibility of illegally made audio recording in international commercial arbitration.

If the arbitration law sources do not provide a clear answer to the question of how the arbitrators should weigh the balancing criteria and which criterion should prevail, the arbitral tribunal inevitably has to rely on the only remaining thing – its subjective interpretation of the weight of these criteria. In an arbitration case, one arbitrator may feel that it is essential to establish the truth. In contrast, another arbitrator may feel that the case is dominated by the public interest not to admit unlawful evidence. Accordingly, arbitrators will not base their decisions on a pre-determined rule or principle of law but on their personal views, beliefs and experience. This is not the rule of law. It is a perfect example of the rule of men.

The principle of the rule of men should not be tolerated. A process that is not based on the law but on the subjective views of men is not only inconsistent with the principle of the rule of law, which is a fundamental principle of the Western legal tradition but also puts the arbitrators above the law and thus completely ignores the equality of people. On the other hand, we can also find opposing positions. Some authors consider this *status quo* to be welcome. For example, in legal scholarship, we can find the following position: "We should neither pretend to be judges, nor clothe ourselves in powers and procedures such as those which judges must follow. Otherwise, this attitude of mind will lead us more and more into detailed rules of arbitral procedure and lengthy and learned commentaries purporting to tell practitioners and arbitrators what to do in every given procedural situation. Procedure is the servant of arbitration and not its master. Our guiding principle must be to follow the rules of natural justice or due process so as to ensure

that parties are treated equally and fairly." (Marriot, 1996, p. 71). We cannot accept this position for the following three reasons.

*Firstly*, the law of arbitration, including the rules and principles governing the arbitral process, is, first and foremost – the law. The arbitral process cannot be considered a *sui generis* system which ignores the rule of law and aims to serve a single entity, *i.e.* arbitrators. We can accept that procedural law may be the servant of substantive law, but procedural law, like any area of law, cannot be regarded as a servant who allows the whole process to run according to the masters', *i.e.* the arbitrators', personal habits or subjective beliefs.

*Secondly*, subjective decision-making creates a risk of arbitrator's abuse. Arbitrators' discretion is far from absolute. As has been repeatedly mentioned in this thesis, various sources of arbitration law, including the New York Convention, do not allow the arbitral tribunal to act in any arbitrary manner (**see parts 1.2., 2.2.4.**). Nevertheless, these safeguards certainly do not, in all cases, prevent abuses arising from subjective decision-making.

*Ad hoc* rule-making in arbitration has already been demonstrated above. As mentioned, arbitral case law is characterised by arbitral cases in which the arbitrators decide which criteria should be assessed, or the arbitrators themselves create and apply the admissibility rules (see **parts 3.1.1. 3.1.3.**). Problems do not end there. In some cases, arbitral tribunals entirely ignore the idea of the exclusion of evidence altogether. For example, in one UNCITRAL arbitration case, the admissibility of late evidence came into question. The arbitral tribunal took into account the relative relevance of the evidence submitted and declared the evidence inadmissible: "Therefore, the Arbitral Tribunal sees no reasonable justification to reopen the record at this juncture with a view to admitting the documents Respondent annexed to its note." Nevertheless, in the very next paragraph of the award, the arbitral tribunal arbitrarily began to assess the inadmissible evidence: "Despite dismissing the request submitted by Respondent, the Arbitral Tribunal anticipates that it shall determine the weight to be afforded to the opinions of Mr. Duque-Corredor in light of the circumstances and the significant amount of evidence contained in the record." (Huntington Ingalis v. Ministry of Defense...; see also Sonera Holding B.V. v. Cukurova…; Entes Industrial Plants Construction and…).

*Thirdly*, arbitrators in international commercial arbitration will not necessarily be lawyers with impressive professional and life experience. If the parties to arbitration could exclusively appoint lawyers with extraordinary professional and life experience, we would probably not encounter the problems described in this part. In such a case, we might even be able to tolerate a certain amount of subjective decision-making and allow the

arbitrators with extraordinary credentials to explain the content of natural law or the nature of the whole international arbitration process.

Unfortunately, the reality is very different. As already mentioned, the days when only the "Grand Old Men" were appointed as arbitrators are long gone. In modern arbitration, arbitrators can come from various backgrounds and experiences. In modern international commercial arbitration cases, it would be very difficult for a construction law expert to identify the true meaning of the "spirit of the rules of arbitration", the "nature and essence of international business arbitration", or to accurately weigh the public's interest in the admissibility of illegally obtained evidence. This *status quo* of arbitration makes subjective decision-making in arbitration even more likely.

Therefore, the analysis suggests that the broad discretion of arbitral tribunals, at least in the context of the admissibility of evidence, fundamentally undermines the principle of the rule of law and renders the arbitral process a system based not on the rule of law, but rather on the rule of men.

### 3.1.3.2. The Nationalisation of International Commercial Arbitration Process

Another problem related to subjective decision-making is the nationalisation of the international commercial arbitration process. The subjective decision-making caused by arbitrators' broad discretion, which is based not on the legal rules or legal principles but on personal perceptions, habits and beliefs, is a problem *per se*. However, this subjectivity leads to an additional problem: the influence of national law in international commercial arbitration.

In the modern international commercial arbitration theory, the influence of national law is generally unwelcome. As revealed above, the modern theory of international arbitration is dominated by the autonomous concept of international arbitration, which is not based on the national law of the parties or the arbitrators but on the autonomous legal order. In contrast, the concept of international arbitration based on specific national law, whether the law of the place of arbitration or otherwise, is considered to be either outdated or out of touch with the legal reality (see **part 2.2.4.**). This has a direct impact on the arbitration process. The modern idea of arbitration is based on dissociation from provisions of the national law of the place of arbitration. This dissociation is well described by G. Born: "The arbitration legislation adopted by most developed states during the 20$^{th}$ and early 21$^{st}$ century has progressively dispensed with obligations that international arbitrators follow local procedural codes, and instead granted parties and arbitral tribunals

substantial freedom to conduct arbitral proceedings in the manner they deemed best." (Born, 2021, p. 1721).

On the other hand, the ideas behind the autonomous concept of international arbitration are not always implemented in the arbitral practice. National laws still have a strong influence on the arbitration process, and both parties and arbitrators tend to rely on various provisions of national law with which they are familiar. This problem was identified as early as 1995 by renowned arbitrator P. Lalive: "one important way is to increase our efforts, both in basic legal education and in permanent training of practitioners to remedy the existing lack of "international and comparative outlook" of too many practitioners, who merely transpose into international arbitration proceedings their traditional national recipes and the "aggressive" tactics which they use in their own courts." (Lalive, 1995, p. 52).

One of the main reasons for this problem is not only the lack of specific training but also the discretion of arbitral tribunals themselves. The lack of specific rules and the broad discretion in the place of the rules leads to arbitrators' biases (Landolt, 2015, p. 157). In other words, discretion opens the door to arbitrators' bias, which manifests itself not only in decision-making based on personal beliefs and habits but also in various other aspects. One of these aspects is the influence of the national law, which is well-known to the arbitrator. For example, the arbitrator who has received legal training in a specific country will be inclined to exercise his or her discretion while even unconsciously taking into account the system of law with which he or she is most familiar.

This problem also exists in the context of the admissibility of evidence. An arbitrator who has a wide discretion but does not find clear answers in the sources of arbitration law will tend to look to national law. Unfortunately, this point is confirmed and even encouraged by legal scholarship and arbitral case law. For example, some authors suggest that arbitrators should use national legislation governing the admissibility of evidence (Waincymer, 2012, p. 795; see also Radvany, 2016). The influence of national law is further evident from the arbitral awards discussed above. In the analysed awards, arbitrators have referred to national law when deciding on the admissibility of evidence (Contractor (France) v. Client (country X)...; Agent v. Seller...; see **part 3.1.2.1.**).

This trend is not without its problems. One of them is the erosion of the autonomous arbitration system. The nationalisation of international commercial arbitration is fraught with the risk that the different influences of national law may lead to completely different procedural solutions. It also hinders the development of transnational arbitration rules, which should form

the core of the autonomous international arbitration system. In a 2015 article, E. Gaillard pointed out that arbitration is increasingly becoming fragmented due to the divergent views and values of the participants of international arbitration (Gaillard, 2015, p. 1). The basis for this diversity of views is the arbitrators' broad discretion, which allows arbitrators to base, even indirectly, their decisions on the national law closest to a specific arbitrator. This tendency towards fragmentation and misunderstanding, at least in the context of the admissibility of evidence, should continue as long as arbitrators have the broad discretion that indirectly allows them to consider various legal sources of national law.

Therefore, the analysis provided in part 3.1.3 of this thesis identifies another very important problem caused by the discretion of arbitral tribunals. The broad discretion in the context of the admissibility of evidence leads arbitrators to base their decisions on the admissibility of evidence on their subjective beliefs. This aspect leads to two distinct problems that should not be tolerated in international commercial arbitration: 1) the arbitration process becomes the process based on the rule of men rather than on the rule of law; and 2) the international commercial arbitration process is in danger of becoming the nationalised alternative dispute resolution mechanism rather than the autonomous legal system.

### 3.1.4. The Discretion of Arbitral Tribunals is an Ineffective Way to Resolve Issues Related to the Admissibility of Evidence

In addition to the above, discretion has an additional problem which is relevant to the arbitration process. Arbitral tribunals' discretion is an ineffective means of resolving issues related to the admissibility of evidence in international commercial arbitration proceedings.

As discussed above, the sources of arbitration law establish the obligation of both the arbitral tribunal and the parties to proceedings to ensure the efficient and cost-effective resolution of the arbitration case (see **part 1.2.**). Efficient and cost-effective proceedings are one of the main expectations from the business community. Nevertheless, these are the qualities that the business community most often misses in international arbitration. Various empirical studies confirm this. For example, a 2006 study carried out by Queen Mary University substantiates that, from the business community's point of view, the high costs and the length of arbitration proceedings are two of the main drawbacks of international arbitration (School of International Arbitration at Queen…, 2006, p. 7). In studies conducted in 2008 and 2013, the costs and

length of the arbitration process also remained the major problems of arbitration (School of International Arbitration at Queen…, 2008, p. 2; School of International Arbitration at Queen…, 2013, p. 9). In a 2015 survey, the majority of respondents, as many as 65%, identified the cost of the arbitration process as the main problem for arbitration, while 36% of respondents identified the long duration of arbitration proceedings (School of International Arbitration at Queen…, 2015, p. 7). The figures were unchanged in a 2018 survey, where an even higher proportion, 67% of respondents, cited the cost of the arbitration process as the main problem of international arbitration (School of International Arbitration at Queen…, 2018, p. 8). All of these surveys lead to an important conclusion – the cost and duration of the arbitral process are among the main problems of arbitration that are not being adequately addressed.

One of the reasons for these problems is the wide discretion of arbitral tribunals in the context of the admissibility of evidence. This is confirmed by two aspects, which are explained in the following paragraphs: 1) the discretion does not ensure adequate prevention against the introduction of inadmissible evidence into arbitral proceedings; 2) the discretion is an inefficient, *i.e.* time-consuming and costly way of deciding issues related to the admissibility of evidence.

*Firstly*, the discretion does not ensure adequate prevention against the introduction of inadmissible evidence into arbitral proceedings. This aspect relates to the principle of legal certainty. As mentioned above, the broad discretion and various balancing tests do not allow the parties to have a clear understanding of what evidence should be considered admissible in arbitration proceedings (see **part 3.1.1.1**.). The party considering whether to submit potentially inadmissible evidence in arbitration will generally choose to submit such evidence because, in the absence of a concrete answer on the admissibility of such evidence, the party will tend to believe or hope that such evidence will be admitted. In such cases, the party generally loses nothing by submitting evidence that is later declared inadmissible.

This behaviour of the parties can be observed in other contexts. For example, due to vague and unclear criminal laws, potential offenders will be inclined to commit criminal acts not only because of the belief that they will not be caught but also because of their belief that their actions might not be considered a crime due to the unclear nature of the law (see, *e.g*. Posner, 1986, p. 513). We can see a similar trend in court proceedings. For example, a 2005 study on the ability of judges to ignore inadmissible evidence concludes that: "these results suggest that clear rules of evidence (such as the blanket prohibition on admissibility of privileged information, absent crime or fraud)

have an advantage over standards for admissibility (such as the rule allowing old criminal convictions to be admitted if they are highly relevant). Standards encourage parties to present evidence to the judge in an effort to have it admitted, whereas rules might discourage such activity." (Wistrich *et al*., 2005, p. 1327–1328).

These trends are also relevant in the context of international commercial arbitration. Due to abstract and vaguely formulated rules on the admissibility of evidence, parties will be tempted to present all sorts of evidence. For example, a party that has unlawfully gathered evidence by its own or others' illegal conduct will be inclined to produce it simply because the sources of arbitration law do not provide a clear answer as to how the admissibility of such evidence should be addressed (see **parts 1.2.3.5.1., 3.1.2.4.**).

All this inevitably leads to a longer arbitration process, as both arbitrators and parties will have to analyse subsequently inadmissible evidence submitted by one of the parties. This also has an impact on the costs of the arbitration process, which in such a case will include a search for and analysis of the legal arguments, an organisation of additional hearings to resolve the issue, or a work of arbitrators themselves on the procedural decision on the admissibility of such evidence. The exact opposite would be the case if the arbitration law applicable in arbitral proceedings would form a specific rule on the admissibility of evidence. For example, as mentioned above, in some civil law jurisdictions, illegally obtained evidence is considered to be *per se* inadmissible evidence (see **part 1.1.2.3.**). While this rule does not absolutely eliminate the introduction of illegally obtained evidence, it does at least send a clear message to the parties as to the fate of such evidence. Thus, the stricter application of such a rule will undoubtedly play a more effective preventive role in the long run.

Moreover, the broad discretion is also incapable of providing preventive protection of various procedural values. This is related to the purposive approach towards the admissibility of evidence, which demonstrates that admissibility rules safeguard fundamental procedural values such as fairness, efficiency, cost-effectiveness, *etc*. (see **parts 1.1.3.2., 1.2.4.2.**).

The broad discretion and the open-ended nature of admissibility rules mean that they do not effectively preclude a breach of these fundamental values. For example, parties may decide to illegally gather evidence relevant to the arbitration case while knowing that such evidence may be considered admissible. The tendency of parties to introduce unreliable and unclear evidence in high-stakes cases has also been noted by some authors in legal scholarship (see, *e.g*. Damaška, 1997, p. 84). This should not be surprising: in some cases, consequences for the party arising from the illegal acts committed

by collecting useful evidence may be of less importance than a granted million-dollar claim against that party in international commercial arbitration.

Similar problems arise with regard to other admissibility rules. For example, the parties to arbitration proceedings have a fairly limited ability to predict when the late evidence will be admissible and when the arbitrators will decide not to admit it (see **part 3.1.1.1.**). This uncertainty will make it more likely that the parties will be tempted to submit evidence even though the time limit for the submission of evidence has already been missed. In such instances, a party will be more inclined to take a risk and hope that arbitrators will exercise their discretion in a way that is favourable to that party. While beneficial to the late party, such a position will be detrimental to the efficient and expeditious arbitration process. The other party will have the right to respond on the admissibility and the nature of late evidence, while the arbitrators will have to analyse further the admissibility of late evidence, all of which would make the arbitration process even more costly and expensive.

*Secondly*, the discretion does not guarantee an efficient way of solving a question of admissibility. As mentioned, the broad discretion is incapable of performing its preventive function effectively and thus leads to higher costs and longer proceedings. However, this statement immediately poses the question – more costs and longer proceedings compared to what? Perhaps the discretion, to paraphrase W. Churchill's quote about democracy, is the worst solution to the problem of the admissibility of evidence, apart from all the others that have been tried.

Another possible solution to the problem is the legal rules. The issue of the relationship between legal rules and discretionary provisions has already been mentioned several times in this thesis (see, *e.g.* part **1.2.4.2.**). In this part, it will be argued in more detail that, compared to legal rules, the discretion is not an efficient, but on the contrary, a more costly way of dealing with the problem of admissibility of evidence.

Arbitrators' discretion is costly because discretion does not allow participants of arbitration proceedings to answer a simple question – should a particular piece of evidence be admissible in arbitration proceedings? In order to answer this question, the parties, their representatives and the arbitrators will always be required to undertake a detailed analysis of various sources of arbitration law, including the analysis of legal scholarship and the case law of arbitral tribunals. Moreover, even if all the necessary material has been gathered, the answer will still not be readily available. Both parties and arbitrators will have to immerse themselves in a complex balancing exercise in which they will have to uncover, assess and weigh abstract and rather vague legal values. One can only imagine the arbitrator dealing with the admissibility

of illegally obtained evidence who would not only have to identify more than 19 criteria found in legal scholarship and the case law but also engage in the task of discovering, evaluating and, ultimately, weighing their significance.

All of this results in high information costs, *i.e.* the time and financial costs for the parties and arbitrators to search for information to resolve the issue of admissibility of evidence. Although not in the context of arbitration, the problem related to discretion is observed in the economic analysis of law. R. Posner and I. Ehrlich point out: "The choice of rule versus standard affects the speed, and hence indirectly the costs and benefits, of legal dispute resolution. Decision by standard therefore increases the interval between an incident giving rise to a legal dispute and final judicial resolution of the dispute." (Ehrlich, Posner, 1974, p. 265–266).

On the other hand, the legal rule which clearly establishes the inadmissibility of evidence does not suffer from these problems. The time between the submission of evidence and its exclusion in arbitration would be significantly shorter, as the arbitrator would not have to identify and then try to weigh the balancing criteria or exercise their discretion in different ways.

Moreover, the legislators of legal rules in arbitration laws, procedural rules or soft law instruments will often be in a much better position than the arbitrators with their discretionary powers over a particular case. Legislators often have significantly more information at their disposal, which allows them to better target and adopt appropriate legal rules that are able to transpose past experience (see, *e.g*. Gumbis, 2018, p. 203). In contrast, arbitrators or judges tend to see only a relatively small number of disputes, and the information at their disposal does not allow them to ensure a more efficient resolution of the legal problem (see Depoorter, Rubin, 2017, p. 132). In this respect, *ex ante* legal rules reduce the amount of information needed to resolve the admissibility issue and thus reduce both the length and the cost of the arbitration process (see also Posner, 1986, p. 513; Epstein, 2011, p. 33).

A common counter-argument to the criticism of discretion is that the application of discretionary provisions in practice helps eventually to establish specific criteria and conditions for the application of these provisions, which in the long run significantly reduce the cost of information for both parties and arbitrators. For example, the US judge and scholar O. W. Holmes was convinced that the negligence standard in tort law, which gives the judge the discretion to decide whether a particular conduct was tortious, should sooner or later be transformed into a specific legal rule. He believed that, in the long run, a uniformly developed case law would form a general rule applicable to all tort cases (Holmes, 1881 quoted Ehrlich, Posner, 1974, p. 266).

O. W. Holmes' conviction has not been borne out, and it is even less likely that something similar could happen in international commercial arbitration. Throughout the long history of arbitration law, arbitral case law has failed to develop clear rules on the admissibility of evidence. In fact, the main reason for this is the confidentiality of arbitral awards. As already mentioned, many arbitral awards and procedural decisions are not public and are not accessible to participants in other arbitration proceedings or to the general public. This, among other things, leads to very limited possibilities to follow previous precedents (see Bentolila, 2017, p. 158). Accordingly, the development of arbitrators-made legal rules that avoid costs associated with the discretion is practically impossible.

Therefore, the analysis in part 3.1.4 of this thesis identifies the fourth shortcoming of arbitrators' discretion in the context of the admissibility of evidence, *i.e.* the ineffectiveness. This drawback is manifested in two aspects: 1) arbitrators' broad discretion is not capable of effectively both preventing the submission of inadmissible evidence into arbitral proceedings and preventing the conduct of the parties that violates fundamental legal values protected by the admissibility rules; 2) arbitrators' broad discretion is not an effective way to address the problem of admissibility of evidence. In contrast to *ex ante* legal rules, the discretion imposes high information costs, which, in turn, prolong and further increase the cost of the international commercial arbitration process.

### 3.1.5. The Critical Assessment of Arbitral Tribunals' Discretion to Apply Admissibility Rules: Concluding Remarks

The research of various sources of arbitration law has led to the identification of four problems caused by the discretion of arbitral tribunals: 1) the discretion of arbitral tribunals does not ensure legal certainty (see **part 3.1.1.**); 2) the discretion of arbitral tribunals leads to contradictory arbitral case law (see **part 3.1.2.**); 3) the discretion of arbitral tribunals leads to subjective decision-making (see **part 3.1.3.**); 4) the discretion of arbitral tribunals is an ineffective mean of dealing with issues related to the admissibility of evidence (see **part 3.1.4.**).

These four problems should be taken seriously. While there are many criticisms of various aspects related to the arbitration procedure in legal scholarship, the abovementioned criticisms of arbitrators' discretion should rightly be a cause for concern. It is true that just because one or another procedural law aspect has serious problems does not mean that it should be

changed. Nevertheless, the problems of discretion do not end there. As will be summarised below, the problems of discretion that have been identified allow us to argue that the *status quo* of admissibility of evidence does not meet all the criteria of the "good law" as identified by scholar L. L. Fuller. Accordingly, the following paragraphs argue that the *status quo* of admissibility of evidence does not meet all eight Fuller's criteria.

*Firstly*, the law must be sufficiently general. This requirement is quite easily understood: the law must be characterised by clearly formulated and generally applicable legal provisions. Fuller argued that this requirement presupposes the formulation of specific legal provisions of general application (Fuller, 1964, p. 46).

The sources of arbitration law analysed above fail to do so. Neither the arbitration law nor the rules of procedure nor the case law of arbitral tribunals has so far formulated clear and generally applicable legal provisions governing the admissibility of evidence in international arbitration proceedings (see **parts 3.1.1., 3.1.2.**). It is true that the fact that some legal issues are left exclusively to the discretion of adjudicators does not *per se* contradict this criterion. Nevertheless, the decision-maker should, in the long term, develop certain common and uniform practices based on the exercise of discretion, which would allow him or her to answer how discretion should be exercised in one or another procedural situation. Unfortunately, as detailed above, the same cannot be said in the context of the admissibility rules in international commercial arbitration proceedings (see **parts 3.1.2.**, **3.1.4.**).

*Secondly*, the law must be publicly promulgated. This requirement is also quite clear: legislation must be made public. In response to critics who do not see the practical importance of publishing all legislation in force, Fuller points out: "Even if one man in a hundred takes the pains to inform himself concerning, say, the laws applicable to the practice of his calling, this is enough to justify the trouble taken to make the laws generally available." (Fuller, 1964, p. 51). Moreover, Fuller raised an additional argument: "The laws should also be given adequate publication so that they may be subject to public criticism […]. It is also plain that if laws are not made readily available, there is no check against a disregard of them by those charged by their application and enforcement." (Fuller, 1964, p. 51).

In the context of the admissibility of evidence, the sources of arbitration law do not fulfil this requirement either. The admissibility of evidence is left to the arbitrators' discretion, but what exactly guides the arbitrators in the exercise of this discretion is not clear. In other words, neither the legal sources applicable to arbitral proceedings nor the case law of arbitral tribunals allows us to clearly determine the content of admissibility rules. The provision "The

Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally" does not answer the question of how this rule should be applied, while the contradictory positions expressed in the arbitral case law make this admissibility rule virtually unknown (see **parts 3.1.1., 3.1.2.**). In this respect, the admissibility rules in arbitration are like Roman Emperor Nero's edicts, which were placed so high on columns that practically no one could read them. Nero's edicts, like the rules of admissibility of evidence, seemed to exist, *i.e.* they were formally published, but nobody knew their specific requirements.

*Thirdly*, the law must be prospective. Another element of the genuine law by Fuller is the prohibition of retroactive application of the law (*lex retro non agit*). Fuller identifies retroactive legislation as one of the greatest evils of any legal system: "Taken by itself, and in abstraction from its possible function in a system of laws that are largely prospective, a retroactive law is truly monstrosity. Laws have to do with the governance of human conduct by rules. [...] To ask how we should appraise an imaginary legal system consisting exclusively of laws that are retroactive, and retroactive only, is like asking how much air pressure there is in a perfect vacuum." (Fuller, 1964, p. 53). The prohibition of retroactive legislation ensures that people's behaviour is governed by the rules of law that were established at the time of the behaviour and not, for a variety of reasons, by rules of law that were only established later (see also Epstein, 2011, p. 21).

The broad discretion of arbitral tribunals to decide on the admissibility of evidence does not reconcile with this "good law" criterion. Some scholars take the position that the discretion and various vague standards create a high risk of retroactive application of the law that the parties could not have foreseen in advance (Mnookin, 1975 quoted Gumbis, 2018, p. 204). This risk is also revealed in the application of admissibility rules in international commercial arbitration.

As explained above, the admissibility rules not only do not provide a clear answer as to what evidence is admissible but also do not provide a clear understanding of how these rules should be applied. Balancing tests without specific criteria can be applied in a wide variety of ways, *i.e.* to assess one, several or many criteria. Moreover, in some cases, even when the conditions for the application of the admissibility rule have been established, arbitrators still retain the broad discretion to apply the rule differently (see **parts 3.1.1.1., 3.1.1.2.**). All of this necessarily implies a retroactive effect of admissibility rules. For example, nothing prevents an arbitral tribunal, when faced with the question of admissibility of illegally obtained evidence, from applying not the 19 criteria listed in legal scholarship but rather from taking into account only

two criteria, *i.e.* on the one hand, the importance of rights infringed by the unlawful act, on the other hand, the interest in establishing the truth in the case. Whether the parties to the proceeding were aware in advance of the admissibility rule that requires balancing these two specific criteria? Were the parties aware of this rule when they gathered evidence for the arbitration? Perhaps the parties had a reasonable belief that the arbitral tribunal would decide exclusively to adopt the liberal approach towards the admissibility of evidence. In many cases, the parties cannot foresee how the arbitral tribunal will apply specific admissibility rules (see **part 3.1.1.1.**). This, accordingly, means that the admissibility rules are often applied retroactively, *i.e.* after the party has already gathered and submitted the evidence.

*Fourthly*, the law must be clear. The importance of legal certainty as a component of the rule of law has already been discussed in detail. It is not surprising that Fuller considers that: "The desideratum of clarity represents one of the most essential ingredients of legality." (Fuller, 1964, p. 63). Legal certainty and its relation to the discretion of arbitral tribunals have already been discussed above. The above analysis leads to the conclusion that the discretion of arbitrators in deciding on the admissibility of evidence does not provide for legal certainty for the parties or for the arbitrators themselves (see **part 3.1.1.**).

*Fifthly*, the law must be free of contradictions. In other words, the law must have certain, clear coherence and consistency among itself, while its application and interpretation must not be contradictory (Fuller, 1964, p. 65–70).

The discretion of arbitral tribunals does not satisfy this requirement either. As indicated above, the broad powers of arbitrators and the absence of clear criteria for balancing tests lead to contradictions in the arbitral case law (see **part 3.1.2.**). Subjective decision-making also contributes to the different application of admissibility rules by arbitral tribunals. Arbitrators inevitably tend to come to different conclusions based on their personal beliefs, views or experiences, which creates further inconsistencies in the arbitration process (see **part 3.1.3.**).

*Sixthly*, the law must not be relatively constant. This criterion is quite closely linked to the retrospective application of the law. Fuller did not advocate strict time limits for the amendment of legislation but saw a major problem when legislation was amended too frequently (Fuller, 1964, p. 79–81).

This problem is also reflected in international commercial arbitration. Due to the broad discretion of arbitrators, the admissibility rules can be changed in every single arbitration case. The problems of legal certainty, lack

of uniformity in the arbitral case law and subjective decision-making only confirm constant changes. These problems lead to the conclusion that arbitral tribunals will often arrive at different applications of admissibility rules. Consequently, such application prevents the establishment of constant legal provisions that regulate the admissibility of specific evidence (see **parts 3.1.1., 3.1.2., 3.1.3.**).

Moreover, changes to the admissibility rules often occur over a relatively short period. Although we cannot answer the question of exactly how often the rules of law should be changed. The fact that arbitrators had changed the admissibility rules when there was no need to do so is an additional reason to establish noncompliance with Fuller's sixth criterion. A good example is the issue of the admissibility of late evidence in the Iran-United States Claims Tribunal. Arbitral tribunals have reversed the precedent established in the 1987 case of *Harris International* in 1991, 1994 and 1995 (see **part 3.1.2.4.**).

*Seventhly*, the law must be possible to obey. Fuller argued that this requirement is so self-evident that even the worst dictator would not pass legislation that requires the impossible (Fuller, 1964, p. 70). Nevertheless, the violation of this requirement is more frequent than it might seem. Fuller attributed the violation of this requirement to legal principles or rules that impose requirements that are simply impossible for legal actors to fulfil (Fuller, 1964, p. 71). In the context of the admissibility of evidence, one of the essential aspects of this requirement should be that the arbitration law sources must lay down conditions under which the parties can produce admissible evidence. In other words, the arbitration law sources must lay down the admissibility rules that the parties can follow and, thus, fulfil.

Unfortunately, the arbitrators' wide discretion leads to the fact that the parties are not able to meet the requirements posed by the admissibility rules. The vague and uncertain nature of admissibility rules, which are not uniformly applied by various arbitral tribunals, prevents the parties from complying with the requirements of these rules, *i.e.* from introducing admissible evidence into arbitral proceedings. The admissibility rules are so complicated and unclear that it is simply impossible for the party, and in some cases even for the arbitrator, to understand their requirements. For example, what criteria must be satisfied for the confidential evidence to be admissible? Or under what circumstances will the party be able to make a late submission of relevant evidence? As explained above, we do not have unambiguous answers to these questions (see **parts 3.1.1., 3.1.2.**). Accordingly, it is usually impossible for the parties to comply with the admissibility rules since the content of these rules will only be revealed in a given case after the arbitrator has decided on the admissibility of evidence submitted by the party.

*Eighthly*, the law must be administered in a way that is consistent with its obvious and apparent meaning. The discrepancy between official action and established law can arise for a wide variety of reasons – misinterpretation, bribery or even stupidity on the part of officials applying the law. Moreover, this requirement relates not only to the executive branch but also to the judiciary. According to Fuller, courts violate this requirement when they fail to establish clear rules of law, uniform case law or frequently change the rules that are already established (Fuller, 1964, p. 81–82).

All of these problems are inherent in the arbitrators' discretion (see **parts 3.1.1., 3.1.2., 3.1.3.**). In addition, this discrepancy between the admissibility rule that is found in the arbitration law source and its application in arbitral proceedings can be illustrated by several examples. For instance, the discrepancy is manifested in arbitral cases where the arbitral tribunal retains the discretion not to apply the admissibility rule, even if the conditions for its application, as set out in the source of law, are satisfied. In this respect, Art. 4(7) of the IBA Rules is relevant. As detailed above, even if two essential conditions of application are met, the arbitral tribunal reserves the right not to exclude the written witness testimony (see **part 3.1.1.1.**).

Another example that has been mentioned several times is when arbitral tribunals ignore the application of admissibility rules already established by previous arbitral tribunals. A good example of this is the Iran-United States Claims Tribunal. Although balancing criteria for admissibility of late evidence formulated in *Harris International* has been adopted in Iran-United States Claims Tribunal's cases, as shown above, other arbitral tribunals have ignored and applied the admissibility rule in completely different ways on more than one occasion (see **part 3.1.2.4.**).

Therefore, to conclude part 3.1 of this thesis, the abovementioned discretion problems, *i.e.* the legal uncertainty, the inconsistency of arbitral case law, the subjectivity and the ineffectiveness, justify that the discretion of arbitral tribunals and eventually the whole *status quo* of admissibility of evidence are contrary to all eight requirements of "good law" as set out by Fuller. All of this leads to the main conclusion of part 3.1 – there is a clear need to change the *status quo* of admissibility of evidence in international commercial arbitration.

## 3.2. Proposals to Change the *Status Quo* of Admissibility of Evidence in International Commercial Arbitration

The purposive approach towards the admissibility of evidence (see **parts 1.1.3.2, 1.2.4.2**.), the criticism of the liberal approach (see **part 2.2.**) and the incompatibility of arbitral tribunals' broad discretion with the fundamental criteria of the "good law" (see **part 3.1.**) point to the need to change the *status quo* of admissibility of evidence in international commercial arbitration. The last part of this thesis aims to analyse and present alternative ways of changing this *status quo*.

As explained in the introduction of this thesis, part 3.2 essentially aims to answer two questions. The first sub-part focuses on the object of the amendment of the *status quo*, *i.e.* the question – what should be amended or, in other words, which source of arbitration law should be changed? (see **part 3.2.1.**). The second sub-part analyses the equally important question: how should this object be changed (see **part 3.2.2.**)? The second part proposes and evaluates two alternative ways of improving the existing framework of admissibility of evidence in international commercial arbitration.

### 3.2.1. The Object of Changes to the *Status Quo* of Admissibility of Evidence in International Commercial Arbitration

It is essential not only to understand and identify the need for a change itself but also to determine what exactly should be changed. The admissibility of evidence in international commercial arbitration is essentially established by three sources of arbitration law: 1) arbitration laws (*e.g.* the Model Law); 2) rules of arbitration procedure (*e.g.* the UNCITRAL Arbitration Rules, the ICC Arbitration Rules and the LCIA Arbitration Rules); and 3) the soft law (*e.g.* the IBA Rules).

In this thesis, the position is taken that the object of change of the *status quo* of admissibility of evidence should not be the Model Law or the rules of arbitration procedure but a soft law instrument, such as the IBA Rules. Six arguments in support of this view are presented in the following paragraphs.

*Firstly*, the parties must remain the primary masters of the arbitration process. As revealed above, the contractual nature of the arbitral process is at the heart of both the Model Law and the rules of arbitration procedure. The contractual nature allows the parties themselves to agree on the application of specific admissibility rules. Only in the absence of an agreement between the

parties the issue of admissibility of evidence is left to the discretion of arbitral tribunals (see **part 1.2.4.**).

This fundamental rule should remain. Parties, not arbitrators, arbitral institutions or arbitration law experts, are the main clients of the arbitration process, and they should retain the right to modify arbitration proceedings to adapt it to their own needs or expectations if they deem it necessary. If the parties wish to apply one or another admissibility rule, the sources of arbitration law must provide them with this possibility. Proposing any changes to the admissibility rules, such as the introduction of more detailed admissibility rules, in the Model Law or the rules of arbitration procedure, may unbalance this fundamental right of the parties.

*Secondly*, the main arbitration institutions and organisations, including the UNCITRAL, the ICC and the LCIA, tend not to overregulate procedural rules applicable to arbitration proceedings. The changes analysed in part 3.2.2 of this thesis relate to the narrowing of arbitral tribunals' discretion. Such changes inevitably imply the introduction of additional rules or principles of law. However, even if the need and rationale for these changes are justified, various arbitral institutions are unlikely to be willing to implement such amendments.

Both the Model Law and the rules of arbitration set a minimum standard of regulation in the context of evidence. These sources of law do not provide detailed coverage of various procedural issues. These sources do not contain detailed legal rules on the relevance of evidence, the standard of proof, the burden of proof or other evidentiary issues. As detailed above, these sources of law also do not contain detailed rules on the admissibility of evidence (see **part 1.2.1., 1.2.2.**).

The rationale for this minimum standard of regulation is sufficiently clear. The Model Law aims to harmonise arbitration law between different countries. The introduction of additional procedural rules in the Model Law risks failing to achieve these objectives since any amendments which introduce more detailed rules on the admissibility of evidence may prove unattractive to countries considering transplanting the Model Law into their national law. Meanwhile, the purpose of the rules of arbitration procedure is to provide the parties and the arbitration community as a whole with procedural rules that allow for a fair, expeditious and efficient resolution of arbitration proceedings. Additional admissibility rules in arbitration may discourage parties and the rest of the arbitration community from choosing these rules for their dispute. The inclusion of various rules could inevitably lead to a decline in an institution's popularity in the market. As legal scholarship aptly puts it: "Generally speaking, the arbitration institutions are

not particularly eager to introduce more precise default procedural rules and thus assist in reducing the unpredictability, since they aspire to market their services globally." (Voser, 2005, p. 115). Thus, even if the changes to the arbitration process were the right thing to do, various arbitral institutions would simply be unwilling to risk their marketability within the arbitration community.

*Thirdly*, the IBA Rules are the source of arbitration law that establishes, in principle, the most detailed rules of evidence in international arbitration. Unlike the Model Law or the rules of arbitration procedure, the IBA Rules are characterised by detailed provisions on evidence. These provisions not only cover aspects such as the definition of the term "document", the stage of the document production, and the examination of witnesses and experts but also provide detailed rules on the admissibility of evidence (see **part 1.2.3.**). The unique status of these rules in arbitration is also characterised by the fact that they are often cited as a "faute de mieux" (*i.e.* for the lack of a better word) (Park, 2006, p. 142).

Accordingly, it is much more appropriate to change the source of law which already governs the admissibility of evidence in international arbitration. The proposal to include in both the Model Law and the rules of arbitration procedure completely new procedural rules, which are simply not present in these sources so far, would be considerably more difficult than modifying the already existing regulation in the IBA Rules.

*Fourthly*, the IBA Rules have an unprecedented influence on the arbitration process. These rules affect the process even if the parties or the arbitral tribunal do not decide to apply them directly. As legal scholarship aptly observes: "Yet, practitioners know how influential the IBA Rules on the Taking of Evidence are. Even if the parties do not refer to them, the Rules have become standard practice and arbitrators routinely seek guidance from them, whether they state so or not." (Kaufmann-Kohler, 2010, p. 14; see also **part 1.2.3.**).

The general acceptance of the IBA Rules will make it likely that appropriate amendments to the IBA Rules would have a significant impact on the development of arbitration proceedings. Unlike the Model Law, which the legislator would have to transpose in a particular jurisdiction, or the rules of arbitration procedure, which the parties would have to agree to apply in the arbitration, changes to the IBA Rules could have an immediate impact on the evidentiary process in international commercial arbitration.

*Fifthly*, appropriate amendments would help to further increase the success of the IBA Rules. As mentioned, the IBA Rules have achieved unprecedented success in the arbitration community. However, one of the

objectives of the IBA Rules has not been achieved to date. This objective is legal certainty in the evidentiary process.

For example, both the 1983 version and the 1999 version of the IBA Rules were aimed at avoiding procedural surprises and ensuring legal certainty in the evidentiary process (Zuberbühler *et al*., 2022, p. 7; Helmer, 2003, p. 59). In 2010, a major update of the IBA Rules was made with the main objective of providing even more clarity and predictability than under the previous IBA Rules (see Kaufmann-Kohler, 2010, p. 7). Some refer to this process of rule-making by the term "objectivisation" of the arbitration process (Park, 2003, p. 290). The objectivisation of the process can be understood as the introduction of more detailed procedural rules, which allow the evidentiary process to avoid subjective *ad hoc* rule-making and to become clearer and more concrete.

This objective of the IBA Rules, at least in the context of the admissibility of evidence, is far from being achieved. On the contrary, the system of rules on the admissibility of evidence established by the IBA Rules not only does not ensure the legal certainty or the uniformity of arbitral practice but has so far failed to prevent subjective decision-making (see **parts 3.1.1., 3.1.2., 3.1.3.**). From this perspective, there are no grounds to talk about the "objectivisation" of rules on the admissibility of evidence.

Although it was not done in the context of the admissibility rules, a similar shortcoming of the IBA Rules has been noted by other scholars. For example, a renowned arbitration expert Howard M. Holtzmann, who proposed to bring more legal clarity to the arbitration process, gave the following description of the IBA Rules: "The illusory character of the Rules is worth noting. While they include a rigid regime that appears at first reading to assure certainty, they also contain express qualifications stating that the procedures are all subject to being varied – or ignored – by the arbitral tribunal at its discretion. Thus, the IBA Supplementary Rules incorporate an overriding principle of flexibility, and, read as a whole, provide no more certainty than the UNCITRAL Rules." (Holtzmann, 1994, p. 11).

Hence, the incomplete fulfilment of the objective to ensure greater legal certainty in the evidentiary process means that changes to the *status quo* of admissibility of evidence should focus on the IBA Rules themselves. As will be seen in part 3.2.2 of this thesis, the proposed changes aim to bring the evidentiary process closer to the main objective of the IBA Rules.

*Sixthly*, the admissibility rules in the IBA Rules have not been substantially amended since 1999. Although the IBA Rules themselves have been amended several times, the admissibility rules have not been subject to

general amendments or adjustments. For example, Art. 4(7) and 9(2) of the IBA Rules have remained virtually identical since 1999.

The mere fact that a source of law has not been amended for a long time should not be a ground for amending it. However, given the rapid growth in the popularity of arbitration, and the abundance of legal scholarship and arbitral case law, it is rather suspicious that many of the rules on the admissibility of evidence in the IBA Rules have not been amended in more than 20 years.

Therefore, the six arguments set out above justify that the object of changes to the *status quo* of admissibility of evidence should not be the Model Law or the rules of arbitration procedure but a soft law instrument, such as the IBA Rules. It is true that the possible object of amendments should not be limited exclusively to the IBA Rules. While as can be seen from the arguments above, the most appropriate way is to amend the IBA Rules, various other objects of amendments may be considered in the future as well. For example, the creation of additional soft law instruments on the admissibility of evidence or additional annexe or explanation on the application of admissibility rules established in the IBA Rules. In this respect, we should not limit ourselves solely to the IBA Rules. Nevertheless, as shown, the main conclusion of part 3.2.1 of this thesis is that the object of proposed amendments should be a soft law instrument, whether it be the IBA Rules, supplementary documents to the IBA Rules or a completely new soft law instrument.

### 3.2.2. Different Ways to Change the *Status Quo* of Admissibility of Evidence in International Commercial Arbitration

Once the object of the change has been identified, it is time to move on to the possible ways to change the *status quo*. Part 3.2.2 of this thesis will look at three aspects of possible amendments. Firstly, part 3.2.2.1 presents some general aspects that future legislators must take into account (see **part 3.2.2.1.**). Secondly, part 3.2.2.2 analyses the first way of changing the *status quo* of admissibility of evidence, *i.e.* the introduction of specific legal rules governing the admissibility of evidence (see **part 3.2.2.2.**). Thirdly, part 3.2.2.3 presents a second way of changing the *status quo* of admissibility of evidence, *i.e.* the introduction of balancing tests with specific balancing criteria (see **part 3.2.2.3.**).

### 3.2.2.1. General Aspects that Future Legislators Must Take into Account when Amending the Admissibility Rules

Future legislators of the IBA Rules or other soft law instruments must follow specific general aspects when they will decide to change the rules on the admissibility of evidence. The analysis of this thesis allows us to present and explain four general aspects that future legislators must take into account. These four general aspects are discussed in the following paragraphs.

*Firstly*, with one exception, the IBA Rules should not be supplemented by new rules on the admissibility of evidence. The IBA Rules reflect a certain compromise that is acceptable to legal practitioners from different legal traditions in international commercial arbitration. In addition to a certain degree of compromise, the IBA Rules reflect international best practices in international commercial arbitration. Reflection of these practices in the IBA Rules ensures the most efficient level of harmonisation that can bring more legal clarity (Voser, 2005, p. 113).

Due to the nature of the IBA Rules, as an example of international consensus and international best practice, it would not be appropriate to introduce or apply additional admissibility rules. While the application of one or another admissibility rule may be useful and justified in certain arbitration cases, the wording of Art. 9 and other provisions of the IBA Rules as of today reflect the admissibility rules that are accepted in international arbitration community (see **part 1.2.3.**). For this reason, this thesis proposes to limit the scope of the amendments only to the already established rules on the admissibility of evidence.

However, one important exception should be considered in this respect. The IBA Rules do not contain a general provision on the admissibility of late evidence. As explained above, the arbitral tribunal's power to refuse to admit late evidence derives both from the principle of procedural economy (Art. 9(2)(g) of the IBA Rules) and from other more specific articles of the IBA Rules (Art. 4(6), Art. 5(3) of the IBA Rules; see **parts 1.2.3.4., 1.2.3.5.2.**).

The reasons to establish the general provision dealing with the admissibility of late evidence are threefold: 1) all major sources of arbitration law recognise this rule in international commercial arbitration (see **parts 1.2.1., 1.2.2., 1.2.3.4., 3.1.2.4.**); 2) similar provisions are recognised in both the civil law tradition and the common law tradition (see **parts 1.1.1.2., 1.1.2.3., 1.1.3.2.4.**); 3) the most important reason is that the establishment of a general rule on the admissibility of late evidence would also make it possible to outline clear conditions for the application of such a rule. The establishment

would avoid many of the problems associated with the wide discretion of arbitrators (see **part 3.1.**).

In addition to these three reasons, it could also be mentioned that an analogous decision was taken in the context of illegally obtained evidence. The admissibility rule of illegally obtained evidence was derived from the principle of fairness established in Art. 9(g) of the IBA Rules (see **part 1.2.3.4.**). However, with the 2020 revision of the IBA Rules, Art. 9 has been supplemented by paragraph 3, which focuses exclusively on the admissibility of illegally obtained evidence (see **part 1.2.3.5.1.**). A similar change should be made with regard to the admissibility of late evidence.

*Secondly*, future legislators must always keep in mind the purposive approach towards the admissibility of evidence. The admissibility of evidence is not limited to specific rules. For future legislators to properly understand the essence and objectives of the admissibility rules, they must look and analyse these rules from the purposive approach (see **parts 1.1.3.2., 1.2.4.2.**). As mentioned, the purposive approach allows the identification of the objectives of admissibility rules, such as ensuring a fair, efficient and expeditious proceeding. These objectives of admissibility rules must always be taken into account. Only by adopting the purposive approach, the future legislators will be able to formulate provisions that reflect the fundamental objectives of the admissibility of evidence.

*Thirdly*, the liberal approach towards the admissibility of evidence must be abandoned. The liberal approach is widely accepted both in legal scholarship, in arbitral case law, and in a major part of the arbitration community in general (see **part 2.1.**). As the research carried out in this thesis demonstrates, the liberal approach is not the correct approach towards the admissibility of evidence. On the contrary, the reasons supposedly justifying the liberal approach either create favourable conditions for the application of admissibility rules or, in some cases, even encourages arbitral tribunals to apply the admissibility rules (see **parts 2.2., 2.3.**).

The criticism towards the liberal approach means that the amendments to the *status quo* of admissibility of evidence in international commercial arbitration should not in any way reflect the liberal approach towards the admissibility of evidence. Amendments to the IBA Rules, or should it be decided to do so, amendments to any other soft law instrument, must be made without prejudice to the supposedly sound liberal approach and its consequence – the declaratory approach to the admissibility of evidence in international commercial arbitration.

*Fourthly*, the requirements of Art. V(1)(b) and V(2)(b) of the New York Convention must be taken into account when amending the admissibility

rules. The influence of the New York Convention on international commercial arbitration cannot be overestimated. Already in 1999, eminent arbitration lawyer P. Sanders took the position that "We are approaching a global system of arbitration. The main driving forces behind this development are the New York Convention 1958 and the Model Law of UNCITRAL." (Sanders, 1999 quoted Helmer, 2003, p. 66).

The above-detailed analysis of the national courts' decisions in part 2 of this thesis allows us to identify the essential New York Convention imperatives that must be borne in mind, both when trying to amend the admissibility rules and when applying these rules in the subsequent case law: 1) the arbitral tribunals must provide clear reasons why the evidence is inadmissible; 2) the arbitral tribunals must allow the parties to present arguments on the (in)admissibility of evidence; 3) the arbitral tribunals must not mislead the parties as to the rules governing the (in)admissibility of evidence in arbitration proceedings; 4) the arbitral tribunals must exercise extreme caution when deciding on the admissibility of the only party's evidence in arbitration proceedings; 5) the arbitral tribunals must ensure that the exclusion of evidence does not make the entire arbitration process fundamentally flawed (see **parts 2.2.4.1., 2.3.1.**).

Therefore, the research presented in this thesis allows us to identify four fundamental requirements that must be kept in mind by future legislators: 1) with one exception, *i.e.* a rule on the admissibility of late evidence, the IBA Rules should not be supplemented by new rules on the admissibility of evidence; 2) the purposive approach towards the admissibility of evidence must always be kept in mind; 3) the liberal approach towards the admissibility of evidence must be disregarded; 4) both while amending the admissibility rules and while applying them in arbitral case law the requirements of Art. V(1)(b) and V(2)(b) of the New York Convention must be complied with.

#### 3.2.2.2. Specific Legal Rules Governing the Admissibility of Evidence

The first alternative, which allows avoiding problems associated with arbitrators' broad discretion, is the establishment of specific and clear legal rules governing the admissibility of evidence. Such legal rules, which would give a clear answer as to whether or not a piece of evidence is admissible, could replace the discretionary provisions that have been enshrined in arbitration law sources so far. This amendment would significantly limit the discretion of arbitral tribunals in the context of the admissibility of evidence. To better illustrate such a proposal, the following three paragraphs provide

specific examples of possible changes to the admissibility rules that fall under three categories of the admissibility rules found in international commercial arbitration.

*Firstly*, this thesis provides for possible changes to the admissibility rules designed to improve fact-finding accuracy in arbitration proceedings. For example, in Art. 4(7) of the IBA Rules, we could abandon the discretionary provision "exceptional circumstances" and amend Art. 4(7) in the following way: "If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness."

*Secondly*, this thesis provides for possible changes to the admissibility rules that exclude evidence because of its content. For example, in Art. 9(2)(e) of the IBA Rules, we could waive the discretionary clause "that the Arbitral Tribunal determines to be compelling" and provide: "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection, in whole or in part, for any of the following reasons: grounds of commercial or technical confidentiality." Art. 9(2)(f) of the IBA Rules could be formulated identically: "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document […] for any of the following reasons: grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution)."

*Thirdly*, this thesis provides for possible changes to the admissibility rules that exclude evidence due to infringements of substantive law or procedural law. For instance, in Art. 9(3) of the IBA Rules, we ought to change the discretionary word "may" to "must": "The Arbitral Tribunal must, at the request of a Party or on its own motion, exclude evidence obtained illegally." Art. 9(2) of the IBA Rules should be supplemented with a paragraph establishing a rule on the admissibility of late evidence: "The Arbitral Tribunal must refuse to admit evidence that is submitted too late."

All of these provisions of the IBA Rules may also be formulated in different ways[40]. Nevertheless, the most important aspect is that the legal rule must substantially narrow the discretion of arbitrators in deciding on the admissibility of evidence. For example, if the arbitral tribunal finds that the

[40] For example, Art. 9(2)(e) of the IBA Rules could be changed as follows: "The Arbitral Tribunal must, at the request of a Party or on its own motion, exclude evidence on grounds of commercial or technical confidentiality."

evidence is confidential or was illegally obtained, the arbitrator will have no choice but to exclude the evidence from the case.

The advantage of clearly formulated legal rules is obvious. Unlike discretionary provisions, a clearly and precisely formulated legal rule contributes both to the greater legal certainty and uniformity of the arbitral case law and to more efficient decision-making, as well as helps to avoid subjective decision-making (see on the benefits of legal rules Gumbis, 2018, p. 202–205; Scalia, 1989; Ehrlich, Posner, 1974, p. 264–267; Posner, 1986, p. 513–514). In this respect, the rules on the admissibility of evidence, which leave little room for discretion, would be no exception. The admissibility rules proposed above would provide both arbitrators and the parties themselves a clear idea of the admissible evidence in arbitral proceedings, would allow arbitral tribunals to deal with similar situations similarly, would prevent arbitrators from adopting a personal approach and would allow for a more expeditious and efficient resolution of the question of admissibility of evidence in arbitration proceedings.

Legal scholarship lacks a detailed analysis which would justify the benefits of legal rules in arbitration proceedings. However, the justification can be found in studies related to court proceedings. For example, the study already cited in this thesis came to this conclusion: "these results suggest that clear rules of evidence (such as the blanket prohibition on admissibility of privileged information, absent crime or fraud) have an advantage over standards for admissibility (such as the rule allowing old criminal convictions to be admitted if they are highly relevant). Standards encourage parties to present evidence to the judge in an effort to have it admitted, whereas rules might discourage such activity." (Wistrich *et al*., 2005, p. 1327–1328; see also **part 3.1.4.**).

Nonetheless, it is true that the proposal to create specific legal rules on the admissibility of evidence that significantly restrict the arbitral discretion has some problems. In general, proposals for more regulation and less flexibility in arbitral proceedings are always subject to considerable criticism. The UNCITRAL initiative to draw up guidelines for preliminary hearings in arbitration is a good example. This initiative has been described by P. Fouchard as a serious threat to the very essence of arbitration (Bachand, Gélinas, 2020, p. 381).

On the other hand, such criticism is often unfounded. For example, in legal scholarship, we can find statements that more detailed legal rules in arbitration should be viewed negatively because of the following three reasons: 1) the lawyers involved in the arbitration will have to learn something new; 2) the process of setting aside an arbitral award will become more

complicated; 3) the parties will find it more difficult to agree on which rules should be applied, which, in turn, will lead to a higher time and financial costs for the parties (Park, 2003, p. 296).

These three aspects are not justified since 1) the alleged problem of lawyers having to learn new rules is minimal compared to the legal uncertainty arbitrators or parties face when dealing with the admissibility of evidence (see **part 3.1.1**.). It is sufficient to learn a legal rule that clearly defines what evidence is admissible once, whereas a discretionary provision essentially has to be learned each time the issue of admissibility is confronted anew; 2) it may, in fact, take longer for the parties to agree or disagree on the detailed application of the IBA Rules. Nevertheless, this is also not a major problem, given that if the parties agree to apply the amended IBA Rules, the arbitration process, at least in the context of the admissibility of evidence, will become clearer, avoid subjective decisions and, very importantly, more efficient (see **parts 3.1.1., 3.1.2., 3.1.3., 3.1.4.**); 3) it is also difficult to see how the emergence of legal rules could further complicate the process of setting aside arbitral awards. If the parties agree on the application of specific rules, but the arbitral tribunal disregards those rules and, for example, admits inadmissible evidence when the rule does not allow it, one of the parties could legitimately apply for the annulment of the award on the basis of Art. V(1)(d) of the New York Convention.[41] This is not a complicated or otherwise extraordinary example of the annulment process but rather a frequent and clear example of the process of annulment of arbitral awards.

However, the criticism goes beyond these three aspects. The following are two key counter-arguments which must be discussed in more detail: 1) the fear of formalism in international commercial arbitration; 2) the threat of imposing incorrect and not universally accepted legal rules.

The first counter-argument is the fear of formalism in international commercial arbitration. Criticism of more detailed rules that limit arbitrators' discretion and flexibility of the process often takes the form of a fear of formalism, or what is sometimes called "judicialization" and "Americanisation" (see, *e.g.* Fortier, 1999, p. 402; Marriott, 1996, p. 71). The threat of "judicialization" and "Americanisation" is often described as an "increasing tendency for the arbitration process to adopt or follow the

[41] Art. V(1)(d) of the New York Convention provides: "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: […] the arbitral procedure was not in accordance with the agreement of the parties."

formalism and technicalities of national judicial process – a tendency which is well illustrated, in particular, by the role and methods of American litigators in international arbitrations." (Lalive, 1995, p. 54; see also Helmer, 2003, p. 36). The essence of this counter-argument lies in the position that the introduction of detailed legal rules and the reduction of the flexibility of arbitration proceedings leads to a decrease in a demand for arbitration as an alternative dispute resolution method in the business community (Voser, 2005, p. 117).

The trend towards "judicialization" can certainly be a legitimate threat to the international commercial arbitration process. Nevertheless, at least in the context of the admissibility of evidence, this threat is not justified. The following paragraphs provide three arguments that refute the threat of "judicialization".

*Firstly*, the emergence of legal rules on the admissibility of evidence will not lead to a fundamental change in the flexibility of proceedings. The proposals described in part 3.2.2.2 of this thesis are not intended to eliminate the flexibility of the arbitral process altogether. As detailed above, the right of the parties to choose and agree on the rules governing arbitral procedure, including the admissibility rules, must remain unchanged (see **part 3.2.2.1.**).

Nevertheless, the situation is completely different when it comes not to the parties but to the arbitrators' right to create *ad hoc* rules and to decide on admissibility issues according to their subjective habits. Part 3.1 of this thesis shows in detail why the wide discretion of arbitral tribunals, at least in the context of the admissibility of evidence, should not be considered as "good law" and, hence, should not be tolerated. Accordingly, the legal rules in this respect are not intended to narrow the right of the parties but to address problems associated with the wide discretion of arbitrators.

Moreover, it should not be forgotten that, as noted above, legal certainty is increasingly in demand in the arbitration community, while procedural flexibility is losing its status as the highest value of the arbitration process (see **part 3.1.1.3.**). This should not be surprising. The formulation of clear legal rules avoids lengthy, complex and rather too formal arbitral proceedings. A rule which establishes that illegally obtained evidence is inadmissible brings considerably less formalism or technicality than a discretionary provision that obliges the arbitrator to identify and then assess 5, 10 or more criteria.

Finally, quite often, we also forget the benefits of *ex ante* legal rules in terms of their simplicity and clarity. It is not surprising that, historically, legal systems have not been based on complicated discretionary provisions but on simple and clear legal rules. For example, the French philosopher Montesquieu, in his famous work "The Spirit of the Laws", formulated his

criteria for the development of legal rules and stated that the style of laws should be simple and concise. As an example of such a law, he cited the XII Tables, which was known by the Roman children by heart (Montesquieu, 2004, p. 606). In today's societies, by contrast, the whole legal system tends to be extremely complex and burdensome (see, *e.g.* Epstein, 1995, p. 92–96). Arbitration proceedings, characterised by admissibility rules that are difficult to understand, are no exception in this respect.

*Secondly*, legal rules allow arbitrators to avoid the influence of national legal systems. The threat of "judicialization" or "Americanisation" could arise if the IBA Rules directly incorporate the admissibility rule laid down in the FRE or in the legal source of another jurisdiction. This thesis does not propose such changes to the IBA Rules. On the contrary, the above detailed examples of possible changes to admissibility rules are not based on specific jurisdiction or legal tradition.

Moreover, as noted above, the discretion itself is one of the reason for the influence of national law in arbitration proceedings (see **part 3.1.3.1**.). In this instance, the antidote of discretion – legal rules would prevent the nationalisation of the arbitral process. As has been aptly noted in legal scholarship, soft law instruments are one way to avoid the influence of different legal traditions in the arbitral process (see, *e.g.* Landolt, 2015, p. 166).

*Thirdly*, in legal scholarship it is quite common to use unusual and hardly imaginable examples to justify the threat of "judicialization". For example, the prohibition of one of the parties from using the WC because of the strictly regulated WC usage rules during arbitral proceedings (Park, 2006, p. 143). Another example is the requirement that an arbitral tribunal's award is lawful only if the award "is delivered in a loud voice by the president of the tribunal standing on his head at the top of the highest mountain in the land." (Hunter, 1988, quoted Fortier, 1999, p. 399–400).

This thesis does not propose an introduction of similar legal rules. The examples provided in legal scholarship are difficult to reconcile with common sense. It is unlikely enough that we will see something similar in the IBA Rules or other sources of arbitration law in the future. Although we can agree with the position that: "Insofar as rules contribute to this [rigid, formal and legalistic international arbitration rules] by complexity and by detailed attempts to cover every procedural eventuality, then they are to be deprecated." (Marriott, 1996, p. 71). This thesis does not propose to regulate every step of arbitral proceedings. Quite the contrary – part 3.2.2.2 is only limited to proposals of specific and clear rules on the admissibility of

evidence, which would avoid and eliminate problems related to the discretion of arbitral tribunals.

The second counter-argument against legal rules in arbitration is the threat of unfair and not universally accepted legal rules. If the proposal discussed in this part of the thesis was to be implemented, there would be a rather high risk of formulating incorrect and not universally accepted rules that are not able to reflect various possible circumstances of the arbitral process. As noted in legal scholarship: "it would be hard to argue that proceedings should be forced into an ill-fitting straight-jacket of rules designed for some other controversy, rather than reflecting the contours of each particular case." (Park, 2006, p. 148).

Indeed, the examples proposed for rules on the admissibility of evidence leave practically no room for the arbitrator to take into account any of the wide range of potentially relevant circumstances in a case. For example, waiving the discretionary provision "exceptional circumstances" in Art. 4(7) of the IBA Rules would mean that arbitrators are not allowed to take into account an exceptional circumstance that might reasonably justify the admission of a witness's written testimony. If Art. 9(3) of the IBA Rules is amended and provides that "The Arbitral Tribunal must, at the request of a Party or on its own motion, exclude evidence obtained illegally", then the arbitral tribunal will not be able to take into account a broad range of potentially relevant circumstances, such as the significance of legal values violated by the illegal conduct, the involvement of the party that submits the illegally obtained evidence, *etc*. These and similar legal rules may lead to a situation where, in many cases, neither the arbitrators nor the parties nor the arbitration community as a whole will be satisfied with the result of the legal rule.

On the other hand, the following paragraphs provide three arguments that refute or at least reduce the threat of unfair admissibility rules in arbitration proceedings.

*Firstly*, we should not forget that law is not one of the hard sciences. The creation of ideal rules may be common in mathematics or physics but not in social relations. In many cases, the simple establishment of a clear legal rule is already of great value. The US Supreme Court Justice L. Brandeis famously argued that "[…] in most matters it is more important that the applicable rule of law be settled than that it be settled right." (Burnet v. Coronado Oil and Gas...). This position was also supported by F. von Hayek, who held that the content of legal rules was less relevant than their establishment and enforcement: "It might even be said that for the rule of law to be effective, it is more important that the rule be applied without exception than specific content of the rule. Often, the content of a rule really matters little, as long as

the rule itself is universally applicable. [...]. What matters is that the rule enables us to correctly predict other people's behaviour, which requires that it be applied in all cases – even if we feel it is unjust in a particular case." (von Hayek, 2002, p. 56).

*Secondly*, while the exclusion of evidence may seem unfair in certain cases, the admissibility rules are far from being uniformly flawed. On the contrary, as detailed above, the purposive approach to the admissibility rules suggests that the application of such rules will safeguard and guarantee fundamental legal values, such as the fairness and/or expediency of proceedings, *etc*. (see **parts 1.1.3.2., 1.2.4.2.**). In other words, the strict application of these rules necessarily implements certain values, even if the result in a particular case is not satisfactory to the arbitrators. For example, even if the arbitrators might wish to allow the admission of very relevant but late-filed evidence, a strict requirement for them to exclude such evidence would *per se* fulfil one of the fundamental objectives of the arbitral procedure, namely the efficiency of proceedings.

*Thirdly*, given the fundamental problems caused by arbitrators wielding too much discretion, we should recognise that a clear and specific rule on the admissibility of evidence, one that is crafted to address these problems, is of great legal value, even if its strict application in some cases could lead to unfavourable results.

However, these three arguments in favour of legal rules are far from solving all the problems related to specific legal rules on the admissibility of evidence. Even if we accept that there is value in the establishment of a legal rule, there is, in any case, the question of the specific content of that rule.

As mentioned, the IBA Rules are based on certain compromises within the arbitration community. These compromises can be extremely difficult to achieve. In this respect, the development of the IBA Rules has been described very aptly by V. V. Veeder: "If amended too little, there will be critics who will moan at the committee's timidity. If amended too much, particularly if the new edition is perceived by users as a new code of civil procedure for international arbitration, it will fail. There must be a middle way, such that the IBA Rules are more "perfectible", an appropriately un-English word comprehensible to all." (Veeder, 2009, p. 333).

It would be difficult to argue that the rules on the admissibility of evidence proposed in this part of this thesis would be unanimously accepted by the international arbitration community. On the contrary, even if one grants that the threat of either "judicialization" or the "wrong legal rule" is not so important, various frustrations regarding the lack of procedural flexibility would remain within the arbitration community. Therefore, to allow for a

broader range of considerations, this thesis goes beyond a single proposal and presents a second alternative set of changes to the *status quo* of admissibility of evidence in international commercial arbitration.

#### 3.2.2.3. Balancing Tests with Specific Balancing Criteria

There is always more than one road to Rome when it comes to amending legislation (Marriott, 1996, p. 69). An alternative way to avoid the problems associated with the wide discretion of arbitrators is to introduce balancing tests with specific balancing criteria.

As detailed above, the admissibility rules in arbitration are formulated as discretionary provisions, which are applied by balancing various criteria (see **part 1.2.4.2.**). One of the main problems with this *status quo* is that neither the arbitration law nor the rules of arbitral procedure nor the IBA Rules nor legal scholarship nor the case law of arbitral tribunals answers the question: what specific criteria should arbitral tribunals balance (see **parts 3.1.1. 3.1.2. 3.1.3.**)? The alternative proposal described in this part advocates that the IBA Rules (or another soft law instrument) should make clear what specific criteria arbitral tribunals should balance. As in part 3.2.2.2, to better illustrate such a proposal, the following paragraphs provide three examples of possible changes to the admissibility rules that fall under three categories of the admissibility rules found in international commercial arbitration.

*Firstly*, this thesis provides for possible changes to the admissibility rules designed to improve fact-finding accuracy in arbitration proceedings. Art. 4(7) of the IBA Rules establishes a balancing test with two specific criteria. When deciding on the admissibility of written testimony, the arbitral tribunal has to balance two considerations: 1) the reasons for the witness's absence; 2) other exceptional circumstances existing in the case. The IBA Rules do not go beyond the phrase "exceptional circumstances" and therefore do not establish a clear-cut balancing criterion in advance. In other words, the wording "exceptional circumstances" contains a variety of possible balancing criteria (see **parts 1.2.3.5.2., 3.1.1.1.**) and should therefore be made more specific. For example, Art. 4(7) of the IBA Rules could be amended as follows: "If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless the Witness Statement is of exceptional relevance to the case."

Furthermore, as mentioned above, an additional problem with Art. 4(7) of the IBA Rules lies in the fact that, even when the two essential conditions for the exclusion of witness testimony are met, the arbitral tribunal is left with the discretion not to exclude the written testimony (see **part 3.1.1.1.**). In order to avoid problems related to discretion, arbitral tribunals ought to apply Art. 4(7) of the IBA Rules as it is written and abandon any discretion to ignore the requirement to exclude evidence once specific criteria of Art. 4(7) are established.

*Secondly*, this thesis provides possible changes to the admissibility rules that exclude evidence because of its content. Art. 9(2)(e) and (f) of the IBA Rules should specify the criteria that must be taken into account by the arbitral tribunal when deciding on the admissibility of confidential or politically sensitive evidence. For example, Art. 9(2)(e) of the IBA Rules could provide the following stipulation: "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence […] grounds of commercial or technical confidentiality. In exercising its discretion to admit such evidence, the Arbitral Tribunal must take into account the sensitivity of the confidential or technical information, its relevance to the case, and the extent to which the disclosure of such information may affect the interests of third parties." Art. 9(2)(f) of the IBA Rules could be worded similarly: "The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence […] grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution). In exercising its discretion to admit such evidence, the Arbitral Tribunal must take into account any existing legal provisions protecting politically or institutionally sensitive information, the content of the information itself, and its relevance to the case."

*Thirdly*, this thesis provides possible changes to the admissibility rules that exclude evidence due to infringements of substantive law or procedural. Art. 9(3) of the IBA Rules could be worded as follows: "The Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally. In exercising its discretion to admit such evidence, the Arbitral Tribunal must take into account the gravity of the infringement, the conduct of the Party providing the evidence and the relevance of the evidence." Art. 9(2) of the IBA Rules could be supplemented with a paragraph establishing a rule on the admissibility of late evidence: "The Arbitral Tribunal may refuse to admit evidence that should have been submitted earlier. In exercising its discretion to admit such evidence, the Arbitral Tribunal must take into account the length and reasons for the delay, whether the admission of late evidence

would substantially disrupt the arbitral proceedings as a whole, and the relevance of the evidence."

The proposed admissibility rules, which establish balancing tests with clear criteria, can be formulated in various ways, whether in terms of changing specific wording or introducing different balancing criteria. Nevertheless, on the whole, this proposal can reduce the problems associated with an over-wide discretion on the part of arbitrators and offset some of the criticisms levelled against the establishment of specific legal rules in the arbitration law sources (see **part 3.2.2.2.**). Three more specific arguments in support of this alternative are presented in the following paragraphs.

*Firstly*, a balancing test with clear balancing criteria helps to overcome the problems associated with the wide discretion of arbitrators. Although not nearly as effective as specific legal rules, a balancing test provides a measure of legal certainty for both the arbitrators and parties involved. Providing sufficient information regarding what is expected, by whom, and at what time is often sufficient to achieve legal clarity, and this includes not necessarily a formal application of the rules but one that takes into account the various circumstances of the case (Pitkowitz, 2017, p. 132). In this proposal, the clarity is provided by the *ex ante* established balancing criteria, which outline in advance what the parties should look for when trying to argue in favour of or against the admissibility of evidence and which give a sense of how the arbitral tribunals should apply each particular rule.

In contrast to the *status quo*, *ex ante* criteria would also allow for a more uniform approach among arbitrators as to which criteria should or should not be assessed. Moreover, by specifying these criteria, the rules would leave no room for the influence of other criteria that are not set out in the source of arbitration law but that might be subjectively attractive to individual arbitrators. All of these benefits, *i.e.* legal certainty, uniformity of practice, and a more objective approach to the admissibility of evidence, would inevitably also contribute to a more efficient resolution of any issues that come up with regard to the admissibility of evidence.

*Secondly*, a balancing test with clear balancing criteria preserves the flexibility of the arbitration process. Changes to the IBA Rules or other soft law instruments need to be neither too bold nor too radical. They should instead be practical and careful, so as to avoid a situation where the rules come to be applied in an overly mechanical fashion (Veeder, 2009, p. 333; Pitkowitz, 2017, p. 132). In this respect, the balancing test is a safer and more practical modification. *Ex ante* criteria prevent the arbitration process from turning into, in the words of B. Cardozo, an "unknown and unknowable" process (Cardozo, 1924 quoted Holtzmann, 1994, p. 4), but they also, in

contrast to legal rules, help to maintain flexibility in the process by allowing arbitrators to take into account specific circumstances of each case.

Admittedly, one potential risk is the establishment of incorrect balancing criteria. What specific criteria should be established for a specific admissibility rule is a topic for future research. In the context of this thesis, it is only necessary to mention that specific criteria should be neither too abstract nor too vague nor too difficult to interpret on its own or to compare with other criteria. The introduction of balancing criteria such as "fairness", "justice", "exceptional circumstances", *etc*., would create an image of the arbitral process as being governed by the rule of men rather than the rule of law (see **part 3.1.3.1.**). While overly abstract balancing criteria ought to be avoided due to the risk of discretion-related problems, as in the case of legal rules, it is nevertheless more important that specific criteria for a balancing test are set at all than that they are set correctly (see **part 3.2.2.3.**). In any case, problems arising from discretion should not be tolerated simply because the arbitration community cannot agree on the criteria for specific admissibility rules.

*Thirdly*, the balancing test is not limited to a single national legal system. On the contrary, balancing tests are a common approach for deciding the admissibility of evidence in international practice. It is widely recognised that the international arbitration process must retain its international character, reflect various legal traditions, and avoid being overly influenced by the legal system of either the US or any other single nation (see, *e.g*. Helmer, 2003, p. 66; Blessing, 1999, p. 153). These goals are most easily achieved through balancing tests.

Balancing tests are established in various international legal sources that aim to harmonise the admissibility of evidence. A good example of this is the previously mentioned Rule 90 of the ELI/UNIDROIT Rules, which establishes the three-criteria balancing test for determining the admissibility of illegally obtained evidence: "90.2. Exceptionally, the court may admit illegally obtained evidence if it is the only way to establish the facts. In exercising its discretion to admit such evidence the court must take into account the behaviour of the other party or of non-parties and the gravity of the infringement."

A balancing test with specific balancing criteria can also be found in the same IBA Rules. It has already been mentioned that the assessment of the *ex ante* criteria is enshrined in Art. 4(7) of the IBA Rules. Art. 9(4) of the IBA Rules also contains an exhaustive list of criteria that may be taken into account by an arbitral tribunal when deciding on the admissibility of legal impediments or privileges. As mentioned above, Art. 9(4) is intended to

provide some guidance to arbitrators on the issue of legal impediments or privileges (see **part 1.2.3.1.**).

The above-cited international legal sources demonstrate that balancing tests are one of the more common legal instruments designed to harmonise questions of admissibility of evidence and that they reflect the current best practice in both arbitration and judicial proceedings. Thus, the introduction of balancing tests would serve as a kind of international consensus and would make it difficult to argue either that the IBA Rules are based on one or another national legal tradition, or that the arbitration process itself is becoming increasingly similar to court proceedings in general. This would help to avoid unfounded accusations of "judicialisation" or "Americanisation" of international commercial arbitration.

Therefore, the establishment of balancing tests with clear *ex ante* balancing criteria represents one of two alternative paths for changing the *status quo* of admissibility of evidence. The advantage of such balancing tests is threefold: 1) balancing tests reduce the risk of over-wide discretion on the part of arbitrators; 2) balancing tests maintain a greater amount of flexibility in the arbitral process; 3) balancing tests help to avoid injecting too much influence from one or more national legal systems into international commercial arbitration.

### 3.2.3. Proposals to Change the *Status Quo* of Admissibility of Evidence in International Commercial Arbitration: Concluding Remarks

As detailed in parts 1, 2 and 3.1 of this thesis, the importance of the purposive approach, critical assessment of the liberal approach and the problems of arbitrators' broad discretion require to change the *status quo* of admissibility of evidence in international commercial arbitration. Part 3.2 made and justified proposals for how this *status quo* could be changed, *i.e.* it first identified the object of the change and then proposed potential ways of changing it.

As detailed in part 3.2.1 of this thesis, the main object of a change in the *status quo* should not be the Model Law or the rules of arbitral procedure but rather a soft law instrument, preferably the IBA Rules. The latter conclusion is supported by six arguments: 1) the parties must remain the primary masters of the arbitration process; 2) the main arbitration institutions and organisations tend not to overregulate the procedural rules that are applicable to arbitration proceedings; 3) the IBA Rules are the source of arbitration law that establishes, in principle, the most detailed rules of evidence in international

arbitration; 4) the IBA Rules have an unprecedented influence on the arbitration process; 5) appropriate amendments would help to further increase the success of the IBA Rules; 6) the admissibility rules in the IBA Rules have not been substantially amended since 1999.

As detailed in part 3.2.2.1 of this thesis, if at a future date, a decision is made to change the *status quo* of admissibility of evidence, the following fundamental aspects must be taken into account: 1) with the exception of a rule on the admissibility of late evidence, the IBA Rules should not be supplemented by new admissibility rules; 2) the purposive approach towards the admissibility of evidence must always be taken into account when amending the admissibility rules; 3) the liberal approach towards the admissibility of evidence must be abandoned; and 4) specific requirements of Art. V(1)(b) and V(2)(b) of the New York Convention must be taken into consideration.

As detailed in parts 3.2.2.2 and 3.2.2.3 of this thesis, the *status quo* of admissibility of evidence could be amended in the future in one of two ways: either by introducing specific rules on the admissibility of evidence which clearly define what evidence is inadmissible in arbitration proceedings, or by introducing balancing tests which are characterised by an exhaustive, *ex ante* established list of balancing criteria. While both alternatives could reasonably be considered in the future, part 3.2.2.3 of this thesis explains that balancing tests with clear and predetermined balancing criteria could be the preferred option in the arbitration community. As mentioned, the creation of balancing tests helps to overcome the problems inherent in arbitrators' discretion, preserves the flexibility of the arbitration process, and prevents the undue influence from national legal systems.

We have to admit, however, that despite all of the arguments provided in this thesis, it is very likely that we would still hear critics who would take the position that arbitrators should have the right to decide on the admissibility of the evidence in a free, non-binding manner and on the basis of their own experience and beliefs. Most likely, these critics would argue that formal rules on the admissibility of evidence or formally defined balancing tests deny the fundamental value of the arbitration process – the broad discretion of arbitrators to make the best decision in a flexible manner while taking into account all the relevant circumstances of a case. These critics, should they arise in the future, need only to be reminded that the same "sinister" formalism is part of the principle of the rule of law. As Justice Scalia of the US Supreme Court aptly points out: "The answer to that is, of course it's formalistic! The rule of law is about form. […]. A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbor with a video camera

has filmed the crime; and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct fulldress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism. It is what makes a government a government of laws and not of men." (Scalia, 1997, p. 25).

# CONCLUSIONS

1. The admissibility of evidence in international commercial arbitration is illustrated by two approaches towards the admissibility of evidence. These approaches not only answer the question: "What rules on the admissibility of evidence exist in international commercial arbitration?" but also "What is the purpose of these rules?":
   1.1. The conceptual approach reflects the rules on the admissibility of evidence as set out in the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules, the Rules of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration Rules and the IBA Rules on the Taking of Evidence in International Arbitration. This approach allows us to distinguish three categories of admissibility rules: 1) admissibility rules designed to improve fact-finding accuracy, *i.e.* rules whose main objective is linked to the accuracy of fact-finding in international commercial arbitration proceedings; 2) admissibility rules that exclude evidence because of its content, *i.e.* rules that exclude evidence on the grounds related to the specific content of that evidence; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law, *i.e.* on the grounds that it has been obtained, submitted, presented or evaluated in a manner that is contrary to procedural law or substantive law;
   1.2. The purposive approach sheds a light on specific purposes served by the rules on the admissibility of evidence established in the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules, the Rules of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration Rules and the IBA Rules on the Taking of Evidence in International Arbitration. The admissibility rules are based on the premise that arbitrators, unfortunately, but like any other human being, sometimes make various mistakes during decision-making. Thus, the admissibility rules act as a procedural instrument that helps 1) to improve fact-finding accuracy in proceedings; 2) to ensure fair proceedings; 3) to ensure the legitimacy of the arbitral tribunal and its decision; 4) to ensure expedient and efficient proceedings; 5) to ensure the

protection of other legal values, such as a person's ability to freely consult with a lawyer or medical doctor, *etc*.

The formulation of admissibility rules as discretionary provisions in arbitration law sources makes the realisation of these fundamental objectives dependent on the broad discretion of arbitrators rather than on *ex ante* rules of admissibility. This *status quo* presupposes that the arbitrators are aware of, understand, and can independently resolve various issues related to the admissibility of evidence. In other words, in international commercial arbitration, arbitrators are guided by the "I'll know it when I see it" approach rather than the "I see it because I know it in advance" approach.

2. The broad discretion of arbitral tribunals is exercised in accordance with the widely accepted liberal approach. However, the analysis of the reasons behind the liberal approach has shown that this approach is not justified. The reasons supposedly justifying the liberal approach can be divided into two important procedural circumstances, which ultimately support rejecting the liberal approach towards the admissibility of evidence:

   2.1. Circumstances that favour the application of rules on the admissibility of evidence in international commercial arbitration: 1) the arbitral process does not focus on the determination of objective but rather on legal, otherwise called formal, truth; 2) arbitrators are not required to reach the standard of reasonable doubt or the standard of absolute or reasonable certainty, but the relatively lower standard of preponderance of evidence or sometimes referred as the standard of balance of probabilities; 3) the interpretation and application of Art. V(1)(b) of the New York Convention by national courts suggests that the exclusion of evidence by the arbitrators does not lead to the annulment of arbitral awards; 4) the lack of an appeal is not a distinctive feature of the arbitral process, since in various national jurisdictions fact-finding process takes place only once, *i.e.* usually in the court of first instance; 5) a wide range of options are available to the parties and the arbitral tribunals at the evidence production stage;

   2.2. Circumstances that encourage arbitral tribunals to apply the admissibility rules: 1) the negative impact that the free evaluation of evidence can have on the arbitral process, either through the disregard of values external to the establishment of truth during the arbitral process or through the risk of cognitive errors on the part of arbitrators; 2) the threat of annulment of an award based

on Art. V(2)(b) of the New York Convention in cases where arbitral tribunals do not apply the admissibility rules that exclude evidence either because of its content or due to infringements of substantive law or procedural law; 3) the decline in the demand for arbitration as an alternative dispute resolution mechanism due to uncertainty with regard to whether and how the rules on the admissibility of evidence will be applied; 4) the inability of arbitrators to distance themselves from the information contained in inadmissible evidence, which encourages a greater focus on the rules on the admissibility of evidence in arbitration; 5) a wide range of options are available to the parties and the arbitral tribunals at the evidence production stage.

3. A critical examination of the liberal approach leads to the conclusion that arbitrators' discretion to decide on the admissibility of evidence is currently not properly exercised. This necessitates re-evaluating one of the key aspects of the *status quo* of admissibility of evidence in international commercial arbitration, *i.e.* the broad discretion of arbitrators. As the analysis presented in this thesis shows, the following four shortcomings characterise the broad discretion of arbitrators, in the context of the admissibility of evidence:
   - 3.1. It does not ensure one of the widely accepted values in the arbitration community – legal certainty, *i.e.* neither the parties nor the arbitrators can predict what evidence is to be considered admissible in international commercial arbitration;
   - 3.2. It does not ensure a uniform case law among arbitral tribunals, both concerning the different and contradictory approaches towards the influence of national law on the admissibility of evidence and concerning the application of various rules of admissibility of evidence in arbitral proceedings;
   - 3.3. It leads to subjective decision-making, which results both in the arbitration process being a process which is governed by the rule of men rather than the rule of law and in the undue influence of national law on the arbitral process;
   - 3.4. It does not effectively prevent the submission of inadmissible evidence in an arbitration case and imposes significant time and financial costs on both parties and arbitrators while they sort out the relevant admissibility issues.

   The existence of these four problems of discretion reveals that the *status quo* of admissibility of evidence in international commercial arbitration is incompatible with the eight criteria of "good law" identified by the

legal theorist L. L. Fuller. The *status quo* of admissibility of evidence is not: 1) sufficiently general; 2) publicly promulgated, 3) prospective (*i.e.* applicable only to future behaviour, not past); 4) clear; 5) free of contradictions, 6) relatively constant; 7) possible to obey; and 8) administered in a way that does not wildly diverge from their obvious or apparent meaning.

4. A critical analysis of the *status quo* of admissibility of evidence allows us to demonstrate the need for changes to the *status quo* and, therefore, to formulate specific guidelines for those changes. The main object of these future changes should not be the UNCITRAL Model Law on International Commercial Arbitration or the rules of arbitration procedure but rather a soft law instrument, ideally the IBA Rules on the Taking of Evidence in International Arbitration. The following general aspects must be taken into account when formulating these future changes: 1) with one exception, *i.e.* a rule on the admissibility of late evidence, the IBA Rules on the Taking of Evidence in International Arbitration should not be supplemented by new rules on the admissibility of evidence; 2) the purposive approach to the admissibility of evidence must always be borne in mind; 3) the liberal approach to the admissibility of evidence must be abandoned; and 4) the requirements of Art. V(1)(b) and V(2)(b) of the New York Convention, as identified by this thesis, must be taken into account. In line with these requirements, two alternative routes can be taken to amend the problems of the status quo of the admissibility of evidence:
    4.1. The establishment of specific legal rules governing the admissibility of evidence, allowing both the parties and the arbitrators to have a clear understanding of whether the evidence submitted in a case should be admissible;
    4.2. The introduction of balancing tests with an exhaustive and *ex ante* established list of balancing criteria, which allows both the parties and the arbitrators to know in advance which specific criteria are to be assessed when deciding on the admissibility of evidence.

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## III. Court practice

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# SUMMARY

## 1. THE IDENTIFICATION OF THE SCIENTIFIC PROBLEM

This thesis follows the position of ancient philosopher Aristotle: "A 'thesis' is a supposition of some eminent philosopher that conflicts with the general opinion [...].". The admissibility of evidence in international commercial arbitration can be characterised by three general opinions, which are explained in the following paragraphs.

*Firstly*, the admissibility of evidence plays a minor role in international commercial arbitration proceedings. The admissibility of evidence in international commercial arbitration is touched upon in almost every treatise on international commercial arbitration. However, there is a lack of both a conceptual analysis, which would allow the identification of admissibility rules that are applicable in international commercial arbitration and a purposive analysis, which would allow the identification and exploration of the primary underlying purposes behind admissibility rules. Accordingly, this rather declarative approach towards the admissibility of evidence has prevented a clear understanding of both specific rules on the admissibility of evidence set out in the sources of international commercial arbitration and the importance of these rules in arbitration proceedings.

*Secondly*, arbitral tribunals tend to take a liberal approach towards the application of the admissibility rules. In other words, arbitrators admit almost any evidence submitted by the parties. The generally accepted approach towards the admissibility of evidence is so entrenched that it has virtually never been challenged. To date, legal scholarship has yet to assess in detail the reasons for this view and the validity of the view itself. In other words, legal scholarship does not provide a detailed analysis that would reveal whether the liberal approach is, in fact, a valid approach in international commercial arbitration.

*Thirdly*, in the absence of an agreement to the contrary by the parties, the admissibility of evidence is left to the broad discretion of arbitral tribunals. The broad discretion of arbitrators in the context of the admissibility of evidence reflects the prevailing opinion that evidentiary issues should be left to the arbitrators' discretion rather than to detailed *ex ante* established rules of evidence. The broad discretion of arbitrators ensures one of the most important values of international commercial arbitration, *i.e.* the flexibility of the process, which is fulfilled by giving arbitrators a broad mandate to adapt the arbitral process to the procedural situation or the expectations of the parties. However, to date, we cannot find a detailed analysis that would help answer

the question – is arbitrators' discretion the most appropriate tool to deal with the admissibility of evidence in international commercial arbitration? Moreover, is procedural flexibility, which is associated with the broad discretion, really an absolute value, and can we justify this value in terms of other procedural values, such as a lack of legal certainty?

These three generally held opinions, *i.e.* the lack of focus on the admissibility of evidence, the liberal approach towards the application of the admissibility rules and the broad discretion of arbitrators, can be seen as the *status quo* of admissibility of evidence in international commercial arbitration. The main scientific problem addressed in the dissertation concerns the validity of this *status quo* in international commercial arbitration, *i.e.* the dissertation aims, by various methods, firstly, to provide an explanation of the existing *status quo* of admissibility of evidence and, secondly, to provide a critical assessment of it.

## 2. THE OBJECT OF THE DISSERTATION RESEARCH

The dissertation focuses on the admissibility of evidence in international commercial arbitration. As already mentioned, the admissibility of evidence in international commercial arbitration is essentially characterised by three aspects, which are analysed in this thesis: 1) the lack of conceptual and purposive analysis of the admissibility of evidence in international commercial arbitration; 2) the liberal approach towards the application of the admissibility rules; and 3) the arbitrators' broad discretion to decide how the rules of admissibility of evidence should be applied.

The focus of this thesis is exclusively related to the admissibility of evidence in international commercial arbitration. Nevertheless, this thesis additionally focuses on three aspects which do not extend the scope of the object of this thesis itself but are unavoidable in order to achieve the aim and objectives of this thesis. These three aspects are briefly explained in the following paragraphs.

*Firstly*, this thesis focuses on and pays more attention to specific admissibility rules. As it is elaborated on and substantiated in this thesis, the analysis of the admissibility of evidence allows us to distinguish three categories of admissibility rules in international commercial arbitration: 1) admissibility rules designed to improve fact-finding accuracy; 2) admissibility rules that exclude evidence because of its content; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law. Accordingly, this thesis does not focus on all possible admissibility rules but

rather on a few rules that fall into one of these three categories. From the first category – this thesis focuses on the admissibility of the written testimony of a witness who is not examined in the arbitration hearing. From the second category – this thesis focuses on the admissibility of confidential evidence and the admissibility of politically or institutionally sensitive evidence. From the third category – this thesis focuses on the admissibility of illegally obtained evidence and the admissibility of evidence submitted too late. The choice has been made to focus on these particular admissibility rules because of the relatively frequent application of these rules in arbitral case law.

*Secondly*, the concept and purpose of the admissibility of evidence in international commercial arbitration are analysed by exploring general features of the admissibility of evidence in civil procedure law in both the civil law tradition and the common law tradition. However, this thesis uses civil procedure law only as a general starting point to understand the admissibility of evidence in international commercial arbitration.

*Thirdly*, this thesis is not limited to the case law of international commercial arbitration tribunals but, in some cases, due to the confidential nature of international commercial arbitration, analyses the case law of investment arbitration tribunals as well as that of other international tribunals, namely the case law of the International Court of Justice and the Iran-United States Claims Tribunal.

## 3. THE MAIN AIM OF THIS THESIS

The main aim of this thesis is to reveal, analyse and critically evaluate the *status quo* of admissibility of evidence in international commercial arbitration. The dissertation uses legal methods to investigate and challenge three widely accepted opinions on the admissibility of evidence in the international arbitration community.

The aim of this dissertation is not to analyse in detail a specific rule of admissibility of evidence in international commercial arbitration. A scholarly work devoted to a specific admissibility rule, such as, for example, the admissibility of illegally obtained evidence, while undoubtedly useful, is not capable of drawing general conclusions about the fundamental aspects linking all the admissibility rules in international commercial arbitration. Hence, this thesis does not set out to analyse individual admissibility rules in detail but to uncover, review, evaluate and, if necessary, change the entire *status quo* of admissibility of evidence in international commercial arbitration.

## 4. DISSERTATION OBJECTIVES AND LEGAL METHODOLOGY OF THEIR IMPLEMENTATION

Because of the main aim of this thesis, the thesis fulfils four objectives. The objectives of the dissertation are achieved by using a specific legal methodology explained in detail in the following paragraphs.

*Firstly*, to uncover and analyse both the conceptual and purposive approaches towards the admissibility of evidence in international commercial arbitration.

This thesis aims to identify and analyse the conceptual approach towards the admissibility of evidence in international commercial arbitration, *i.e.* to identify specific rules of admissibility of evidence that are embodied in the legal sources of international commercial arbitration. However, the analysis does not end there. This thesis also seeks to reveal the purposive approach towards the admissibility of evidence in international commercial arbitration, *i.e*. to show the specific purposes of the admissibility rules and how the application of these rules achieves them.

The conceptual and purposive approaches towards the admissibility of evidence are analysed and revealed in part 1 of this thesis by exploring three groups of arbitration law sources: 1) *lex arbitri*, *i.e.* the UNCITRAL Model Law on International Commercial Arbitration; 2) three rules of arbitration procedure, *i.e*. the UNCITRAL Arbitration Rules, the Rules of Arbitration of the International Chamber of Commerce and the London Court of International Arbitration Rules; and 3) soft law instrument, *i.e*. the IBA Rules on the Taking of Evidence in International Arbitration.

*Secondly*, to uncover, analyse and critically assess the prevailing liberal approach in the international arbitration community towards the application of the rules of admissibility of evidence in international commercial arbitration proceedings. As already mentioned, arbitral tribunals tend to adopt the liberal approach towards the application of the rules on the admissibility of evidence. The liberal approach and the validity of its reasons are analysed and examined in part 2 of this thesis while using comparative, systematic, linguistic and teleological methods.

Part 2 of this thesis analyses the following sources of law – the UNCITRAL Model Law on International Commercial Arbitration, three rules of arbitration procedure, the IBA Rules on the Taking of Evidence in International Arbitration, legal scholarship, the case law of arbitration courts and national courts. These sources of law are used to identify and explain the

liberal approach, the reasons for its emergence and its implications for the admissibility of evidence in international commercial arbitration.

*Thirdly*, to identify, analyse and critically assess the shortcomings of the arbitral tribunals' discretion to apply the admissibility rules in international commercial arbitration.

The conceptual and purposive approaches towards the admissibility of evidence and the criticism of the liberal approach lead to the need to change the *status quo* of admissibility of evidence, which inevitably entails changes to the broad discretion of arbitrators to decide on the application of admissibility rules. Thus, by using linguistic, systematic and teleological methods and analysing various arbitration law sources, part 3.1 of this thesis reveals, explains, and critically assesses the broad discretion of the arbitral tribunals in the context of admissibility of evidence. Arbitrators' discretion is assessed in accordance with a specific methodology. The analysis attempts to answer the question of whether the broad discretion and, accordingly, the whole *status quo* of admissibility of evidence is in line with the fundamental requirements of the inner morality of law as set out by the famous legal scholar L. L. Fuller in his work "The Morality of Law".

*Fourthly*, to identify and justify more appropriate, effective and non-discretionary legal tools to address the admissibility of evidence in international commercial arbitration.

This thesis goes beyond a critique of the *status quo* of admissibility of evidence. After exposing fundamental problems with the liberal approach and the discretion of arbitral tribunals, part 3.2 of this thesis presents possible alternatives for changing the *status quo*. Using linguistic, systematic, teleological and comparative methods, part 3.2 of this thesis explores two essential aspects. The first aspect focuses on the object of the amendment of the *status quo*, *i.e.*, what should be amended or, in other words, which source of arbitration law should be changed. The second aspect analyses an equally important question: how should this object be changed? This thesis proposes and evaluates two alternative ways of improving the existing framework of admissibility of evidence in international commercial arbitration.

This thesis does not set out to provide detailed changes to each specific admissibility rule found in international commercial arbitration. As mentioned, this thesis does not focus on analysing the application of specific admissibility rules in international commercial arbitration. On the contrary, this thesis seeks to provide an overview and a critical assessment of the general framework of the admissibility of evidence in international commercial arbitration. Hence, the last part of this thesis only proposes a framework that would allow for future changes to the arbitration law sources.

In other words, the analysis provides both general criteria that must be taken into account by entities when changing the sources of arbitration law in the future and possible ways of changing the general framework of the *status quo* of admissibility of evidence.

## 5. SCIENTIFIC NOVELTY AND SIGNIFICANCE OF THIS THESIS

Not only are the issues analysed in this thesis relevant, but the results are significant and novel. The following three aspects confirm the scientific novelty of this thesis.

*Firstly*, the dissertation reveals the conceptual and purposive approaches towards the admissibility of evidence in international commercial arbitration. Unfortunately, until this thesis, legal scholarship did not provide a detailed analysis of the concept or purposes of admissibility of evidence in international commercial arbitration.

*Secondly*, this thesis critically assesses the liberal approach towards the admissibility of evidence that has to date, dominated the international commercial arbitration process. The criticism of specific rationales behind the liberal approach can be found in legal scholarship. However, until this thesis, legal scholarship did not provide a comprehensive analysis of the liberal approach towards the admissibility of evidence in international commercial arbitration.

As detailed in this thesis, the liberal approach, which is often referred to as an established practice, is not only unjustified, but on the contrary, the reasons behind the liberal approach create favourable conditions for the application of admissibility rules, and in some instances, even encourage arbitral tribunals to apply these rules. The abandonment of the liberal approach, which, according to this thesis, would be fully justified, would lead to significant changes in international commercial arbitration proceedings.

*Thirdly*, the significance and novelty of this thesis are also manifested in the fact that the research reveals fundamental shortcomings of the arbitrators' discretion in the context of the admissibility of evidence. As it is shown in this thesis, arbitrators' discretion is characterised by four flaws: the lack of legal certainty, the contradiction in the arbitral case law, subjective decision-making, and inefficiency. These shortcomings suggest that discretion should not be a preferred method of dealing with the admissibility of evidence in arbitral proceedings. Moreover, the significance and novelty of this thesis are manifested in the fact that this thesis also makes general observations and

suggestions as to how the *status quo* of admissibility of evidence in international commercial arbitration could be changed.

# 6. SUMMARY OF THE RESULTS OF THIS THESIS

## 6.1. Summary of the Results of Part 1 "The Conceptual and Purposive Approaches towards the Admissibility of Evidence in International Commercial Arbitration"

The analysis in part 1 of this thesis identifies the two main approaches towards the admissibility of evidence in international commercial arbitration. *i.e.* the conceptual approach and the purposive approach. These approaches not only reveal specific admissibility rules, but also reveal the underlying purposes behind these rules.

*Firstly*, the conceptual approach towards the admissibility of evidence identifies three categories of the admissibility rules that include admissibility rules established in the sources of arbitration law analysed in this thesis:

| **The Categories of the Rules of Admissibility of Evidence** | **The Admissibility Rules as Set Out in the Arbitration Law Sources** |
|---|---|
| Admissibility rules designed to improve fact-finding accuracy | Art. 20(5) of the London Court of International Arbitration Rules<br><br>Art. 4(7) 5(5), 6(2) and 9(2)(g) of the IBA Rules on the Taking of Evidence in International Arbitration |
| Admissibility rules that exclude evidence because of its content | Art. 9(2)(b), (e), (f) and (g) of the IBA Rules on the Taking of Evidence in International Arbitration |
| Admissibility rules that exclude evidence due to infringements of substantive law or procedural law | Art. 23(2) of the UNCITRAL Model Law on International Commercial Arbitration<br><br>Art. 22 and 27(3) of the UNCITRAL Arbitration Rules |

| | |
|---|---|
| | Art. 25(1) and 27 of the Rules of Arbitration of the International Chamber of Commerce<br><br>Art. 22(1)(i) of the London Court of International Arbitration Rules<br><br>Art. 4(6), (7), 5(3), (5), 6(2), 9(2)(g) and 9(3) of the IBA Rules on the Taking of Evidence in International Arbitration |

*Secondly*, the purposive approach towards the admissibility of evidence identifies the primary purposes behind these admissibility rules. The admissibility rules are based on the premise that judges and arbitrators, unfortunately, but like any other human being, sometimes make various mistakes during decision-making. Thus, the admissibility rules act as a procedural instrument that helps 1) to improve fact-finding accuracy in proceedings; 2) to ensure fair proceedings; 3) to ensure the legitimacy of the arbitral tribunal and its decision; 4) to ensure expedient and efficient proceedings; 5) to ensure the protection of other legal values.

However, part 1 revealed that admissibility rules in international commercial arbitration are not formulated as *ex ante* legal rules but as discretion-conferring provisions applied by balancing various criteria. The discretion-conferring formulation of the admissibility rules is central to the purposive approach towards the admissibility of evidence. The establishment of the *ex post* rather than *ex ante* admissibility rules allows the arbitral tribunal to apply the admissibility rules in a variety of ways, *i.e.* either to apply them by balancing one set of criteria or a different set of criteria or, in some instances, do not apply them at all. This conditional application of the admissibility rules only achieves its purposes to a limited extent. In international commercial arbitration, the admissibility rules do not function as a set of pre-determined rules that help the arbitral tribunal avoid misleading evidence or to ensure efficient proceedings. On the contrary, it is up to the arbitrators to decide whether they should exclude the misleading information from proceedings, whether the proceedings based on illegally obtained evidence will undermine the principle of fairness or the legitimacy of arbitral awards, *etc*. Accordingly, in this respect, it is essential to assess how arbitrators exercise this discretion, *i.e.* to assess the general liberal approach towards the admissibility of evidence.

## 6.2. Summary of the Results of Part 2 "The Exercise of Discretion in Deciding on the Admissibility of Evidence in International Commercial Arbitration"

Part 2 of the dissertation assesses in detail six most common reasons for the liberal approach highlighted in legal scholarship: 1) the principle of free evaluation of evidence; 2) the purpose of establishing the truth; 3) the standard of proof; 4) the party's right to present its case; 5) institutional aspects of the arbitration process; 6) disadvantages of the evidence production stage. A detailed analysis of these reasons reveals that the liberal approach has no clear and valid justification in arbitration proceedings. The liberal approach can be refuted by two procedural circumstances which best illustrate the criticism of the liberal approach provided in this thesis.

*Firstly*, some of the reasons, which supposedly support the liberal approach, do not, in fact, support but undermine the validity of the liberal approach. A detailed analysis of these reasons suggests that some of these reasons create favourable procedural conditions for applying admissibility rules.

*Secondly*, another and even more important aspect which can be identified from the analysis presented in this thesis is that some reasons not only create favourable procedural conditions for the application of admissibility rules but also encourage the arbitral tribunals to apply these rules.

Therefore, the reasons that supposedly support the liberal approach, in fact, justify both favourable conditions for the application of admissibility rules and, in a sense, encourages arbitrators to apply these rules:

| **Circumstances that favour the application of admissibility rules in international commercial arbitration** | **Circumstances that encourage arbitral tribunals to apply admissibility rules in international commercial arbitration** |
|---|---|
| 1. Arbitration proceedings do not focus on the objective truth but on legal, or sometimes referred to as formal, truth | 1. The negative impact of the principle of free evaluation of evidence on arbitrators |

| | |
|---|---|
| 2. Arbitrators must achieve the balance of probabilities standard | 2. The threat of annulment of an arbitral award based on Art. V(2)(b) of the New York Convention |
| 3. The unfounded threat of annulment of arbitral awards based on Art. V(1)(b) of the New York Convention | 3. The refusal to apply the admissibility rules could undermine the popularity of arbitration in the business community |
| 4. The lack of appeal in arbitration proceedings | 4. Arbitrators' inability to distance themselves from inadmissible information |
| 5. Broad opportunities for the parties and arbitral tribunals at the evidence production stage | 5. Broad opportunities for the parties and arbitral tribunals at the evidence production stage |

In light of the analysis in part 2 of this thesis, we can conclude that the criticism of the liberal approach reveals that the liberal approach itself is flawed and that various legal circumstances imply a duty to increase the importance of admissibility rules in arbitral proceedings considerably. This conclusion indicates that arbitrators' discretion in deciding on the admissibility of evidence is, in principle, not properly exercised. This is not to argue that arbitrators err in all cases while they exercise their broad discretion to apply the admissibility rules. The analysis in part 2 only assesses the prevailing attitude of arbitral tribunals towards the admissibility of evidence. Nevertheless, a critical analysis of the prevailing liberal approach provides a general and, as it turned out, fundamentally flawed view towards the admissibility rules.

### 6.3. Summary of the Results of Part 3 "Changes to the *Status Quo* of Admissibility of Evidence in International Commercial Arbitration"

The research of various sources of arbitration law has led to the identification of four problems caused by the discretion of arbitral tribunals in the context of admissibility of evidence: 1) the discretion of arbitral tribunals does not ensure legal certainty; 2) the discretion of arbitral tribunals leads to contradictory arbitral case law; 3) the discretion of arbitral tribunals leads to subjective decision-making; 4) the discretion of arbitral tribunals is an

ineffective mean of dealing with issues related to the admissibility of evidence.

These problems should be taken seriously. While there are many criticisms of various aspects of the arbitration procedure in legal scholarship, the abovementioned criticisms of arbitrators' discretion should be a cause for concern. It is true that just because one or another aspect of procedural law has serious problems does not mean that it should be changed. Nevertheless, the problems of discretion do not end there. As it is explained in part 3.1 of this thesis, the abovementioned discretion problems, *i.e.* the legal uncertainty, the inconsistency of arbitral practice, the subjectivity and the ineffectiveness, justify that the discretion of arbitral tribunals and eventually the whole *status quo* of admissibility of evidence are contrary to all eight requirements of "good law" as set out by L. L. Fuller.

As detailed in parts 1, 2 and 3.1 of this thesis, the importance of the purposive approach, critical assessment of the liberal approach and the problems of arbitrators' broad discretion require to change the *status quo* of admissibility of evidence in international commercial arbitration. Part 3.2 of this thesis makes and justifies the following three proposals for how this *status quo* could be changed.

*Firstly*, the main object of a change in the *status quo* should not be the UNCITRAL Model Law on International Commercial Arbitration or the rules of arbitral procedure but rather a soft law instrument, preferably the IBA Rules on the Taking of Evidence in International Arbitration.

*Secondly*, the following fundamental aspects must be taken into account when changing the *status quo* of admissibility of evidence: 1) except for a rule on the admissibility of late evidence, the IBA Rules on the Taking of Evidence in International Arbitration should not be supplemented by new rules on the admissibility of evidence; 2) the purposive approach towards the admissibility of evidence must always be taken into account when amending the admissibility rules; 3) the liberal approach towards the admissibility of evidence must be abandoned; and 4) specific requirements of Art. V(1)(b) and V(2)(b) of the New York Convention must be taken into consideration.

*Thirdly*, the *status quo* of admissibility of evidence could be amended in the future in one of two ways: either by introducing *ex ante* legal rules on the admissibility of evidence, which clearly defines what evidence is inadmissible in arbitration proceedings, or by introducing balancing tests which are characterised by an exhaustive, *ex ante* established list of balancing criteria. While both alternatives could be considered in the future, part 3.2.2.3 of this thesis explains that balancing tests with clear and pre-determined balancing criteria are the preferred option in the arbitration community.

# 7. CONCLUSIONS

1. The admissibility of evidence in international commercial arbitration is illustrated by two approaches towards the admissibility of evidence. These approaches not only answer the question: "What rules on the admissibility of evidence exist in international commercial arbitration?" but also "What is the purpose of these rules?":
   1.1. The conceptual approach reflects the rules on the admissibility of evidence as set out in the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules, the Rules of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration Rules and the IBA Rules on the Taking of Evidence in International Arbitration. This approach allows us to distinguish three categories of admissibility rules: 1) admissibility rules designed to improve fact-finding accuracy, *i.e.* rules whose main objective is linked to the accuracy of fact-finding in international commercial arbitration proceedings; 2) admissibility rules that exclude evidence because of its content, *i.e.* rules that exclude evidence on the grounds related to the specific content of that evidence; 3) admissibility rules that exclude evidence due to infringements of substantive law or procedural law, *i.e.* on the grounds that it has been obtained, submitted, presented or evaluated in a manner that is contrary to procedural law or substantive law.
   1.2. The purposive approach sheds a light on specific purposes served by the rules on the admissibility of evidence established in the UNCITRAL Model Law on International Commercial Arbitration, the UNCITRAL Arbitration Rules, the Rules of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration Rules and the IBA Rules on the Taking of Evidence in International Arbitration. The admissibility rules are based on the premise that arbitrators, unfortunately, but like any other human being, sometimes make various mistakes during decision-making. Thus, the admissibility rules act as a procedural instrument that helps 1) to improve fact-finding accuracy in proceedings; 2) to ensure fair proceedings; 3) to ensure the legitimacy of the arbitral tribunal and its decision;

4) to ensure expedient and efficient proceedings; 5) to ensure the protection of other legal values, such as a person's ability to freely consult with a lawyer or medical doctor, *etc*.

The formulation of admissibility rules as discretionary provisions in arbitration law sources makes the realisation of these fundamental objectives dependent on the broad discretion of arbitrators rather than on *ex ante* rules of admissibility. This *status quo* presupposes that the arbitrators are aware of, understand, and can independently resolve various issues related to the admissibility of evidence. In other words, in international commercial arbitration, arbitrators are guided by the "I'll know it when I see it" approach rather than the "I see it because I know it in advance" approach.

2. The broad discretion of arbitral tribunals is exercised in accordance with the widely accepted liberal approach. However, the analysis of the reasons behind the liberal approach has shown that this approach is not justified. The reasons supposedly justifying the liberal approach can be divided into two important procedural circumstances, which ultimately support rejecting the liberal approach towards the admissibility of evidence:

   2.1. Circumstances that favour the application of rules on the admissibility of evidence in international commercial arbitration: 1) the arbitral process does not focus on the determination of objective but rather on legal, otherwise called formal, truth; 2) arbitrators are not required to reach the standard of reasonable doubt or the standard of absolute or reasonable certainty, but the relatively lower standard of preponderance of evidence or sometimes referred as the standard of balance of probabilities; 3) the interpretation and application of Art. V(1)(b) of the New York Convention by national courts suggests that the exclusion of evidence by the arbitrators does not lead to the annulment of arbitral awards; 4) the lack of an appeal is not a distinctive feature of the arbitral process, since in various national jurisdictions fact-finding process takes place only once, *i.e.* usually in the court of first instance; 5) a wide range of options are available to the parties and the arbitral tribunals at the evidence production stage.

   2.2. Circumstances that encourage arbitral tribunals to apply the admissibility rules: 1) the negative impact that the free evaluation of evidence can have on the arbitral process, either through the disregard of values external to the establishment of truth during the arbitral process or through the risk of cognitive errors on the

part of arbitrators; 2) the threat of annulment of an award based on Art. V(2)(b) of the New York Convention in cases where arbitral tribunals do not apply the admissibility rules that exclude evidence either because of its content or due to infringements of substantive law or procedural law; 3) the decline in the demand for arbitration as an alternative dispute resolution mechanism due to uncertainty with regard to whether and how the rules on the admissibility of evidence will be applied; 4) the inability of arbitrators to distance themselves from the information contained in inadmissible evidence, which encourages a greater focus on the rules on the admissibility of evidence in arbitration; 5) a wide range of options are available to the parties and the arbitral tribunals at the evidence production stage.

3. A critical examination of the liberal approach leads to the conclusion that arbitrators' discretion to decide on the admissibility of evidence is currently not properly exercised. This necessitates re-evaluating one of the key aspects of the *status quo* of admissibility of evidence in international commercial arbitration, *i.e.* the broad discretion of arbitrators. As the analysis presented in this thesis shows, the following four shortcomings characterise the broad discretion of arbitrators, in the context of the admissibility of evidence:
   - 3.1. It does not ensure one of the widely accepted values in the arbitration community – legal certainty, *i.e.* neither the parties nor the arbitrators can predict what evidence is to be considered admissible in international commercial arbitration;
   - 3.2. It does not ensure a uniform case law among arbitral tribunals, both concerning the different and contradictory approaches towards the influence of national law on the admissibility of evidence and concerning the application of various rules of admissibility of evidence in arbitral proceedings;
   - 3.3. It leads to subjective decision-making, which results both in the arbitration process being a process which is governed by the rule of men rather than the rule of law and in the undue influence of national law on the arbitral process;
   - 3.4. It does not effectively prevent the submission of inadmissible evidence in an arbitration case and imposes significant time and financial costs on both parties and arbitrators while they sort out the relevant admissibility issues.

   The existence of these four problems of discretion reveals that the *status quo* of admissibility of evidence in international commercial arbitration

is incompatible with the eight criteria of "good law" identified by the legal theorist L. L. Fuller. The *status quo* of admissibility of evidence is not: 1) sufficiently general; 2) publicly promulgated, 3) prospective (*i.e.* applicable only to future behaviour, not past); 4) clear; 5) free of contradictions, 6) relatively constant; 7) possible to obey; and 8) administered in a way that does not wildly diverge from their obvious or apparent meaning.

4. A critical analysis of the *status quo* of admissibility of evidence allows us to demonstrate the need for changes to the *status quo* and, therefore, to formulate specific guidelines for those changes. The main object of these future changes should not be the UNCITRAL Model Law on International Commercial Arbitration or the rules of arbitration procedure but rather a soft law instrument, ideally the IBA Rules on the Taking of Evidence in International Arbitration. The following general aspects must be taken into account when formulating these future changes: 1) with one exception, *i.e.* a rule on the admissibility of late evidence, the IBA Rules on the Taking of Evidence in International Arbitration should not be supplemented by new rules on the admissibility of evidence; 2) the purposive approach to the admissibility of evidence must always be borne in mind; 3) the liberal approach to the admissibility of evidence must be abandoned; and 4) the requirements of Art. V(1)(b) and V(2)(b) of the New York Convention, as identified by this thesis, must be taken into account. In line with these requirements, two alternative routes can be taken to amend the problems of the status quo of the admissibility of evidence:
   4.1. The establishment of specific legal rules governing the admissibility of evidence, allowing both the parties and the arbitrators to have a clear understanding of whether the evidence submitted in a case should be admissible;
   4.2. The introduction of balancing tests with an exhaustive and *ex ante* established list of balancing criteria, which allows both the parties and the arbitrators to know in advance which specific criteria are to be assessed when deciding on the admissibility of evidence.

# SANTRAUKA

## 1. MOKSLINĖS PROBLEMOS IDENTIFIKAVIMAS

Šioje disertacijoje vadovaujamasi Antikos laikų filosofo Aristotelio pozicija: „Disertacija – tai kokio nors žymaus filosofo prielaida, prieštaraujanti visuotinei nuomonei. <...>.“ Įrodymų leistinumą tarptautiniame komerciniame arbitraže galime apibūdinti trimis visuotinai pripažįstamomis nuomonėmis, kurios yra detaliau atskleidžiamos toliau.

*Pirma*, įrodymų leistinumas tarptautinio komercinio arbitražo procese neužima svarbios vietos. Nors įrodymų leistinumo tema paliečiama daugiau ar mažiau kiekvienoje tarptautinio komercinio arbitražo knygoje, tačiau trūksta tiek konceptualesnės analizės, kuri leistų identifikuoti tarptautiniame komerciniame arbitraže taikomas įrodymų leistinumo taisykles, tiek funkcinės šių taisyklių analizės, kuri leistų nustatyti ir ištirti ne tik pačias įrodymų leistinumo taisykles, bet ir pagrindinius šių taisyklių tikslus. Šis gana deklaratyvus požiūris į įrodymų leistinumą iki šiol neleido aiškiai suprasti tiek konkrečių įrodymų leistinumo taisyklių, įtvirtintų tarptautinio komercinio arbitražo šaltiniuose, tiek šių taisyklių svarbos arbitražo procese.

*Antra*, arbitražo teismai yra linkę vadovautis liberaliu požiūriu į įrodymų leistinumą. Kitaip tariant, arbitrai pripažįsta leistinais beveik visus šalių pateiktus įrodymus. Šis arbitražo bendruomenėje visuotinai pripažįstamas požiūris yra toks įsišaknijęs, kad praktiškai niekada nebuvo kvestionuojamas. Iki šiol teisės doktrina nėra detaliai įvertinusi šio požiūrio priežasčių ir paties požiūrio pagrįstumo. Be to, teisės doktrinoje taip pat nerasime ir detalios mokslinės analizės, kuri leistų atskleisti, ar liberalus požiūris iš tikrųjų yra pagrįstas požiūris tarptautinio komercinio arbitražo procese.

*Trečia*, nesant šalių priešingo susitarimo, įrodymų leistinumo klausimas yra paliekamas plačiai arbitražo teismų diskrecijai. Ši plati arbitrų diskrecija įrodymų leistinumo kontekste atspindi dominuojantį požiūrį, kad įrodinėjimo klausimai turi būti palikti ne detalioms įrodinėjimo taisyklėms, bet plačiai arbitrų diskrecijai. Plati arbitrų diskrecija užtikrina vieną iš svarbiausių tarptautinio komercinio arbitražo vertybių – proceso lankstumą, kuris realizuojamas suteikus arbitrams plačius įgaliojimus pritaikyti arbitražo procesą ir jo eigą prie šalių lūkesčių ar susiklosčiusios procesinės situacijos. Nepaisant to, iki šiol teisės doktrinoje nerasime detalios analizės, kuri leistų atsakyti į klausimą – ar arbitrų diskreciją yra tinkamiausia priemonė spręsti įrodymų leistinumo klausimus tarptautiniame komerciniame arbitraže? Be to, ar su plačia diskrecija susijęs proceso lankstumas iš tikrųjų yra absoliuti

vertybė ir ar šią vertybę galime pateisinti kitų procesinių vertybių, pavyzdžiui, teisinio aiškumo, stokos atžvilgiu?

Taigi, šias tris visuotinai pripažįstamas nuomones, t. y. mažą dėmesį įrodymų leistinumui, liberalų požiūrį į įrodymų leistinumo taisyklių taikymą ir plačią arbitrų diskreciją, galime laikyti šiuo metu egzistuojančiu įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže. Disertacijoje keliama pagrindinė mokslinė problema ir yra susijusi su šio *status quo* pagrįstumu tarptautiniame komerciniame arbitraže, t. y. disertacijoje mokslinių metodų pagalba siekiama, visų pirma, tiek atskleisti egzistuojantį įrodymų leistinumo *status quo*, tiek, antra, jį kritiškai įvertinti.

## 2. DISERTACIJOS TYRIMO OBJEKTAS

Disertacijos objektas – įrodymų leistinumas tarptautiniame komerciniame arbitraže. Kaip jau minėta, įrodymų leistinumą tarptautiniame komerciniame arbitraže iš esmės apibūdina trys disertacijoje analizuojami aspektai: 1) mažas dėmesys konceptualiam ir funkciniam požiūriui į įrodymų leistinumą tarptautiniame komerciniame arbitraže; 2) liberalus požiūris į įrodymų leistinumo taisyklių taikymą; 3) nesant šalių priešingo susitarimo, plati arbitrų diskrecija nuspręsti, kaip turėtų būti taikomos įrodymų leistinumo taisyklės.

Šio tyrimo objektas koncentruojasi išimtinai tik į įrodymų leistinumą tarptautiniame komerciniame arbitraže. Nepaisant to, toliau apžvelgiami keli aspektai, kurie nepraplečia paties darbo objekto, bet yra neišvengiami, siekiant pasiekti disertacijoje išsikeltą tikslą.

*Pirma*, disertacijoje didžiausias dėmesys yra skiriamas konkrečioms įrodymų leistinumo taisyklėmis. Kaip yra detalizuojama ir pagrindžiama disertacijoje, įrodymų leistinumo analizė leidžia išskirti tris įrodymų leistinumo taisyklių kategorijas tarptautiniame komerciniame arbitraže: 1) įrodymų leistinumo taisyklės, kuriomis siekiama pagerinti faktų nustatymo tikslumą; 2) įrodymų leistinumo taisyklės, pagal kurias įrodymai gali būti pripažįstami neleistinais dėl įrodymų turinio; 3) įrodymų leistinumo taisyklės, pagal kurias įrodymai gali būti pripažįstami neleistinais dėl proceso teisės arba materialinės teisės pažeidimų. Atsižvelgiant į tai, buvo nuspręsta disertacijoje didesnį dėmesį skirti ne visoms įrodymų leistinumo taisyklėmis, patenkančioms į šias kategorijas, bet konkrečioms įrodymų leistinumo taisyklėms, patenkančioms į kiekvieną iš šių kategorijų. Iš pirmosios kategorijos – šioje disertacijoje daugiausia dėmesio skiriama liudytojo, kuris nebuvo apklaustas arbitražo posėdyje, rašytinių parodymų leistinumui. Iš antrosios kategorijos – šioje disertacijoje daugiausia dėmesio skiriama konfidencialių įrodymų ir politiškai ar instituciškai jautrių įrodymų

leistinumui. Iš trečiosios kategorijos – šiame darbe daugiausia dėmesio skiriama neteisėtai gautų įrodymų leistinumui ir per vėlai pateiktų įrodymų leistinumui. Disertacijoje buvo nuspręsta didesnį dėmesį skirti būtent šioms taisyklėmis dėl pakankamai dažno šių taisyklių taikymo arbitražo teismų praktikoje.

*Antra*, konceptualus ir funkcinis požiūris į įrodymų leistinumą tarptautiniame komerciniame arbitraže yra analizuojama pasitelkiant bendro pobūdžio civilinio proceso teisės bruožus, būdingus tiek civilinės teisės tradicijoje, tiek bendrosios teisės tradicijoje. Tiesa, ši analize neišplečia disertacijos objekto, nes disertacijoje civilinio proceso teisė yra naudojama tik kaip tam tikras atskaitos taškas, leidžiantis geriau atskleisti konceptualų ir funkcinį požiūrius į įrodymų leistinumą tarptautiniame komerciniame arbitraže.

*Trečia*, dėl konfidencialaus tarptautinio komercinio arbitražo pobūdžio disertacija neapsiriboja komercinio arbitražo teismų praktika, bet kai kuriais atvejais pasitelkia tiek investicinio arbitražo teismų, tiek kitų tarptautinių teismų, t. y. Tarptautinio Teisingumo Teismo ir Irano – JAV ieškinių tribunolo, praktiką.

## 3. DISERTACIJOS TIKSLAS

Šios disertacijos tikslas – atskleisti, išanalizuoti ir kritiškai įvertinti įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže. Disertacija teisinių metodų pagalba tiria ir kvestionuoja tarptautinio arbitražo bendruomenėje plačiai pripažįstamas tris nuomones apie įrodymų leistinumą.

Disertacijos tikslas nėra detaliai išanalizuoti vieną ar kitą įrodymų leistinumo taisyklę tarptautiniame komerciniame arbitraže. Konkrečiai leistinumo taisyklei, pavyzdžiui, neteisėtai surinktų įrodymų leistinumui, skirtas mokslinis darbas, nors būtų neabejotinai naudingas, yra nepajėgus daryti bendrų išvadų apie fundamentalius aspektus, siejančius visas įrodymų leistinumo taisykles tarptautiniame komerciniame arbitraže. Todėl disertacijoje nuspręsta analizuoti ne pavienes įrodymų leistinumo taisykles, bet atskleisti, apžvelgti, įvertinti ir, esant poreikiui, pakeisti visą įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže.

## 4. DISERTACIJOS UŽDAVINIAI IR JŲ ĮGYVENDINIMO METODOLOGIJA

Atsižvelgiant į disertacijos tikslą, yra būtina įvykdyti keturis uždavinius. Disertacijos uždaviniai yra įvykdomi pasitelkiant konkrečią, toliau detaliai paaiškinamą teisinę metodologiją.

*Pirma*, atskleisti ir išanalizuoti konceptualų ir funkcinį požiūrius į įrodymų leistinumą tarptautiniame komerciniame arbitraže.

Disertacijoje siekiama identifikuoti ir išanalizuoti konceptualų požiūrį į įrodymų leistinumą, kuris leistų atkleisti įrodymų leistinumo sampratą, t. y. kokios konkrečios įrodymų leistinumo taisyklės yra įtvirtintos tarptautinio komercinio arbitražo teisės šaltiniuose. Nepaisant to, tyrimas ties tuo nesibaigia. Disertacijoje taip pat siekiama atskleisti funkcinį požiūrį į įrodymų leistinumą tarptautiniame komerciniame arbitraže, kuris leistų paaiškinti šių taisyklių esmę, t. y. atskleistų kokius konkrečius tikslus ir kaip juos įgyvendina šių taisyklių taikymas tarptautinio komercinio arbitražo procese.

Įrodymų leistinumas tarptautiniame komerciniame arbitraže yra analizuojama disertacijos 1 dalyje pasitelkiant tris arbitražo teisės šaltinių grupes: 1) *lex arbitri*, t. y. UNCITRAL Tarptautinio komercinio arbitražo pavyzdinis įstatymas; 2) trys arbitražo proceso taisyklės, t. y. UNCITRAL arbitražo taisyklės, Tarptautinių prekybos rūmų arbitražo taisyklės, Londono tarptautinio arbitražo teismo taisyklės; 3) *soft law* šaltinis, t. y. IBA Taisyklės dėl Įrodymų Rinkimo Tarptautiniame Arbitraže.

*Antra*, atskleisti, išanalizuoti ir kritiškai įvertinti tarptautinio arbitražo bendruomenėje dominuojantį liberalųjį požiūrį į įrodymų leistinumo taisyklių taikymą tarptautinio komercinio arbitražo procese. Kaip jau minėta, arbitražo teismai yra linkę laikytis liberalaus požiūrio į įrodymų leistinumo taisyklių taikymą. Liberalus požiūris ir jo priežasčių pagrįstumas analizuojamas ir nagrinėjamas šios disertacijos 2 dalyje, pasitelkiant lyginamąjį, sisteminį, lingvistinį ir teleologinį metodus.

Disertacijos 2 dalyje analizuojami šie teisės šaltiniai: UNCITRAL Tarptautinio komercinio arbitražo pavyzdinis įstatymas, trys arbitražo proceso taisyklės, IBA Taisyklės dėl Įrodymų Rinkimo Tarptautiniame Arbitraže, teisės doktrina, arbitražo teismų ir nacionalinių teismų praktika. Šie teisės šaltiniai naudojami siekiant nustatyti ir paaiškinti liberalųjį požiūrį, jo atsiradimo priežastis ir reikšmę įrodymų leistinumui tarptautiniame komerciniame arbitraže.

*Trečia,* atskleisti, išanalizuoti ir kritiškai įvertinti arbitražo teismų diskrecijos spręsti dėl įrodymų leistinumo taisyklių taikymo trūkumus ir pagrįstumą tarptautinio komercinio arbitražo procese.

Tiek konceptualus ir funkcinis požiūriai į įrodymų leistinumą, tiek liberalaus požiūrio kritika nulemia poreikį koreguoti įrodymų leistinumo *status quo*, kuris neišvengiamai yra susijęs su plačia arbitrų diskrecija nuspręsti dėl įrodymų leistinumo taisyklių taikymo. Todėl, pasitelkiant lingvistinį, sisteminį, teleologinį metodus ir įvairius arbitražo teisės šaltinius, disertacijos 3.1 dalyje yra atskleidžiama, paaiškinama ir kritiškai įvertinama plati arbitražo teismų diskrecija įrodymų leistinumo kontekste. Arbitrų diskrecija yra įvertinama vadovaujantis konkrečia metodologija. Disertacijos 3.1 dalyje pateikiamoje mokslinėje analizėje yra bandoma atsakyti į klausimą, ar arbitrų plati diskrecija ir atitinkamai pats įrodymų leistinumo *status quo* atitinka garsiojo teisės teoretiko L. L. Fuller darbe „The Morality of Law“ išskiriamus pamatinius teisės reikalavimus, sudarančius pamatinį teisės moralinį turinį.

*Ketvirta*, identifikuoti ir pagrįsti tinkamesnes, efektyvesnes ir arbitrų diskrecijos problemomis nepasižyminčias teisines priemones, padedančias išspręsti įrodymų leistinumo klausimus tarptautiniame komerciniame arbitraže.

Disertacija neapsiriboja tik įrodymų leistinumo *status quo* kritika. Atskleidus fundamentalias liberalaus požiūrio ir arbitražo teismų diskrecijos problemas, disertacijos 3.2 dalyje yra pateikiami galimi *status quo* pokyčiai. Pasitelkiant lingvistinį, sisteminį, teleologinį, lyginamąjį metodus, disertacijos 3.2 dalyje yra moksliškai tiriami du aspektai. Pirmas aspektas susikoncentruoja į pakeitimo objektą, t. y. į klausimą – kas turėtų būti keičiama? Antras aspektas analizuoja ne ką mažiau svarbų klausimą – kaip turėtų būti keičiamas šis objektas? Disertacija pateikia ir įvertina du alternatyvius būdus, kurie leistų pagerinti egzistuojančią įrodymų leistinumo sistemą tarptautiniame komerciniame arbitraže.

Disertacijoje nėra keliamas tikslas pateikti detalius konkrečių įrodymų leistinumo taisyklių pakeitimus. Kaip jau minėta, ši disertacija nėra orientuota į vienos ar kelių konkrečių įrodymų leistinumo taisyklių taikymo analizę. Priešingai – disertacijoje siekiama apžvelgti ir kritiškai įvertinti bendrą įrodymų leistinumo sistema tarptautiniame komerciniame arbitraže. Atitinkamai, paskutinės disertacijos užduoties įvykdymas yra siejamas su tam tikros sistemos pasiūlymu, kuris leistų ateityje tinkamai pakeisti arbitražo teisės šaltinius, reglamentuojančius įrodymų leistinumą. Kitaip tariant, analizė ne tik pateikia pasiūlymus, kaip konkrečiai galėtų būti keičiamas įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže, bet pateikia ir tam tikrus bendrus kriterijus, į kuriuos privalo atsižvelgti subjektai, ateityje keičiantys arbitražo teisės šaltinius.

## 5. DISERTACIJOS NAUJUMAS IR REIKŠMĖ

Disertacijos problematika yra ne tik aktuali, bet ir pačios disertacijos rezultatai yra reikšmingi ir nauji. Tai patvirtinta trys toliau nurodomi aspektai.

*Pirma*, disertacijoje detaliai atskleidžiami konceptualus ir funkcinis požiūriai į įrodymų leistinumą tarptautiniame komerciniame arbitraže. Deja, bet kaip minėta, teisės doktrina iki šiol vis dar nebuvo pateikusi detalios įrodymų leistinumo sampratos ar įrodymų leistinumo taisyklių tikslų analizės tarptautiniame komerciniame arbitraže.

*Antra*, disertacijoje kritiškai įvertinamas iki šiol tarptautiniame komerciniame arbitraže dominuojantis liberalus požiūris į įrodymų leistinumą. Kai kurių liberalaus požiūrio priežasčių kritiką galime aptikti teisės doktrinoje. Nepaisant to, iki šiol teisės doktrinoje nerasime išsamios liberalaus požiūrio ir jo priežasčių pagrįstumo analizės tarptautiniame komerciniame arbitraže.

Kaip yra detaliai atskleista šioje disertacijoje, liberalus požiūris, kuris dažnai įvardinamas kaip nusistovėjusi praktika, yra ne tik nepagrįstas, bet netgi priešingai – liberalųjį požiūrį nulemiančios priežastys sukuria palankias sąlygas įrodymų leistinumo taisyklių taikymui, o, tam tikrais atvejais, netgi skatina arbitražo teismus taikyti šias taisykles. Liberalaus požiūrio atsisakymas, kuris, vadovaujantis disertacijos išvadomis, būtų visiškai pagrįstas, turėtų reikšmingų pakeitimų tarptautinio komercinio arbitražo procese.

*Trečia*, disertacijos reikšmingumas ir naujumas pasireiškia ir tuo, kad atliktame moksliniame tyrime yra atskleidžiami arbitrų diskrecijos trūkumai įrodymų leistinumo kontekste. Kaip yra atskleidžiama šioje disertacijoje, diskrecija įrodymų leistinumo kontekste pasižymi keturiais trūkumais, t. y. teisinio tikrumo stoka, nevienoda arbitražo teismų praktika, subjektyviu sprendimų priėmimu ir neefektyvumu. Šie trūkumai leidžia teigti, kad diskrecija visgi neturėtų būti priimtiniausias būdas spręsti įrodymų leistinumo klausimus arbitražo procese. Autoriaus žiniomis, diskrecija ir jos trūkumai iki šiol nebuvo vertinami konkrečiame, t. y. įrodymų leistinumo, kontekste. Be to, disertacijos reikšmė ir naujumas pasireiškia ir tuo, kad disertacijoje pateikiami ir bendri pastebėjimai, ir pasiūlymai, kaip galėtų būti keičiamas įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže.

# 6. SVARBIAUSIŲ DISERTACIJOS REZULTATŲ SANTRAUKA

## 6.1. Disertacijos 1 dalies „Konceptualus ir funkcinis požiūriai į įrodymų leistinumą tarptautiniame komerciniame arbitraže“ rezultatų santrauka

Šios disertacijos 1 dalyje pateiktoje analizėje nustatyti du pagrindiniai požiūriai į įrodymų leistinumą tarptautiniame komerciniame arbitraže, t. y. konceptualus požiūris ir funkcinis požiūris. Šie požiūriai ne tik atskleidžia konkrečias įrodymų leistinumo taisykles, bet ir pagrindinius šių taisyklių tikslus.

*Pirma*, remiantis konceptualiu požiūriu į įrodymų leistinumą, išskiriamos trys įrodymų leistinumo taisyklių kategorijos, apimančios šioje disertacijoje analizuojamuose arbitražo teisės šaltiniuose įtvirtintas įrodymų leistinumo taisykles:

| **Įrodymų leistinumo taisyklių kategorijos** | **Įrodymų leistinumo taisyklės, įtvirtintos arbitražo teisės šaltiniuose** |
|---|---|
| Įrodymų leistinumo taisyklės, kuriomis siekiama pagerinti faktų nustatymo tikslumą | Londono tarptautinio arbitražo teismo taisyklių 20 straipsnio 5 dalis<br><br>IBA Taisyklių dėl Įrodymų Rinkimo Tarptautiniame Arbitraže 4 straipsnio 7 dalis, 5 straipsnio 5 dalis, 6 straipsnio 2 dalis ir 9 straipsnio 2 dalies g punktas |
| Įrodymų leistinumo taisyklės, pagal kurias įrodymai gali būti pripažįstami neleistinais dėl įrodymų turinio | IBA Taisyklių dėl Įrodymų Rinkimo Tarptautiniame Arbitraže 9 straipsnio 2 dalies b, e, f ir g punktai |
| Įrodymų leistinumo taisyklės, pagal kurias įrodymai gali būti pripažįstami neleistinais dėl proceso teisės arba materialinės teisės pažeidimų | UNCITRAL Tarptautinio komercinio arbitražo pavyzdinio įstatymo 23 straipsnio 2 dalis<br><br>UNCITRAL arbitražo taisyklių 22 straipsnis ir 27 straipsnio 3 dalis |

| | |
|---|---|
| | Tarptautinių prekybos rūmų arbitražo taisyklių 25 straipsnio 1 dalis ir 27 straipsnis<br><br>Londono tarptautinio arbitražo teismo taisyklių 22 straipsnio 1 dalies i punktas<br><br>IBA Taisyklių dėl Įrodymų Rinkimo Tarptautiniame Arbitraže 4 straipsnio 6 ir 7 dalys, 5 straipsnio 3 ir 5 dalys, 6 straipsnio 2 dalis, 9 straipsnio 2 dalies g punktas ir 9 straipsnio 3 dalis |

*Antra*, pasitelkiant funkcinį požiūrį į įrodymų leistinumą, galime nustatyti pagrindinius šių įrodymų leistinumo taisyklių tikslus. Įrodymų leistinumo taisyklės grindžiamos prielaida, kad teisėjai ir arbitrai, deja, kaip ir bet kuris kitas žmogus, priimdami sprendimus neišvengia įvairių klaidų. Taigi, įrodymų leistinumo taisyklės veikia kaip procesinė priemonė, padedanti: 1) pagerinti faktų nustatymo tikslumą procese; 2) užtikrinti sąžiningą procesą; 3) užtikrinti arbitražo teismo ir jo sprendimo legitimumą; 4) užtikrinti operatyvų ir efektyvų procesą; 5) užtikrinti kitų teisinių vertybių apsaugą.

Nepaisant to, disertacijos 1 dalis atskleidė, kad įrodymų leistinumo taisyklės tarptautiniame komerciniame arbitraže suformuluotos ne kaip *ex ante* teisės taisyklės, o kaip diskrecijos teisę suteikiančios nuostatos, taikomos balansuojant įvairius kriterijus. Toks įrodymų leistinumo taisyklių formulavimas yra kertinis funkciniam požiūriui į įrodymų leistinumą. *Ex post*, o *ne ex ante* įrodymų leistinumo taisyklių formulavimas leidžia arbitražo teismui įvairiais būdais taikyti įrodymų leistinumo taisykles, t. y. taikyti jas balansuojant vienus ar kitus kriterijų, arba tam tikrais atvejais iš viso jų netaikyti. Toks sąlyginis įrodymų leistinumo taisyklių taikymas funkcinius tikslus pasiekia tik sąlyginai. Įrodymų leistinumo taisyklės nebeveikia kaip iš anksto nustatytų taisyklių rinkinys, padedantis sprendimų priėmėjui išvengti klaidinančių įrodymų arba padedantis užtikrinti efektyvų, sąžiningą procesą. Priešingai – patys arbitrai turi nuspręsti, kada ir kaip jie turėtų pašalinti klaidinančią informaciją iš proceso, ar neteisėtai gautais įrodymais grindžiamas procesas nepakenks sąžiningumo principui arba arbitražo sprendimo legitimumui ir pan. Atitinkamai, šiuo atžvilgiu labai svarbu

įvertinti, kaip arbitrai naudojasi šia diskrecija, t. y. įvertinti liberalų požiūrį į įrodymų leistinumą.

### 6.2. Disertacijos 2 dalies „Diskrecijos įgyvendinimas sprendžiant dėl įrodymų leistinumo tarptautiniame komerciniame arbitraže“ rezultatų santrauka

Disertacijos 2 dalyje išsamiai įvertinamos šešios dažniausiai teisės moksle nurodomos liberalaus požiūrio priežastys: 1) laisvo įrodymų vertinimo principas; 2) tiesos nustatymo tikslas; 3) įrodinėjimo standartas; 4) šalies teisė būti išklausytai arbitražo byloje; 5) arbitražo proceso instituciniai aspektai; 6) įrodymų išreikalavimo stadijos trūkumai. Išsami šių priežasčių analizė atskleidžia, kad liberalus požiūris neturi aiškaus ir pagrįsto pagrindimo arbitražo procese. Liberalųjį požiūrį galima paneigti dvejomis procesinėmis aplinkybėmis, kurios geriausiai iliustruoja šioje disertacijoje pateiktą liberalaus požiūrio kritiką.

*Pirma*, kai kurios priežastys, tariamai pagrindžiančios liberalųjį požiūrį, iš tiesų ne patvirtina, o paneigia liberalaus požiūrio pagrįstumą. Išsami šių priežasčių analizė rodo, kad kai kurios iš šių priežasčių sukuria palankias procesines įrodymų leistinumo taisyklių taikymo sąlygas.

*Antra*, kitas ir dar svarbesnis aspektas, kurį leidžia identifikuoti 2 dalyje atskleista analizė, yra tai, kad kai kurios priežastys ne tik sudaro palankias procesines sąlygas įrodymų leistinumo taisyklių taikymui, bet, tam tikra prasme, net ir įpareigoja arbitražo teismus taikyti įrodymų leistinumo taisykles.

Taigi, priežastys, neva nulėmusios liberalų požiūrį, iš tikrųjų pagrindžia arba palankias procesines sąlygas įrodymų leistinumo taisyklių taikymui, arba arbitrus skatina taikyti įrodymų leistinumo taisykles:

| **Aplinkybės, sudarančios palankias sąlygas įrodymų leistinumo taisyklių taikymui tarptautinio komercinio arbitražo procese** | **Aplinkybės, skatinančios arbitražo teismą taikyti įrodymų leistinumo taisykles** |
|---|---|
| 1. Arbitražo procesas koncentruojasi ne į objektyvios, bet į teisinės, arba kitaip – formalios, tiesos nustatymą | 1. Laisvo įrodymų vertinimo principo neigiama įtaka arbitražo procesui |

| | | | |
|---|---|---|---|
| 2. | Arbitrai privalo pasiekti didesnės tikimybės įsitikinimo laipsnį | 2. | Grėsmė dėl arbitražo teismo sprendimo panaikinimo Niujorko konvencijos V straipsnio 2 dalies b punkto pagrindu |
| 3. | Nepagrįsta grėsmė dėl arbitražo teismo sprendimo panaikinimo Niujorko konvencijos V straipsnio 1 dalies b pagrindu | 3. | Atsisakymas taikyti įrodymų leistinumo taisykles gali pakenkti arbitražo proceso populiarumui verslo bendruomenėje |
| 4. | Apeliacijos nebuvimas arbitražo procese | 4. | Arbitrų negalėjimas atsiriboti nuo neleistinos informacijos |
| 5. | Plačios šalių ir arbitražo teismų galimybės įrodymų išreikalavimo stadijoje | 5. | Plačios šalių ir arbitrų galimybės įrodymų išreikalavimo stadijoje |

Atitinkami, atsižvelgiant į aukščiau atliktą analizę, galime daryti išvadą, kad dominuojantis liberalus požiūris į įrodymų leistinumą yra nepagrįstas. Liberalaus požiūrio kritika atskleidžia ne tik tai, kad pats požiūris yra ydingas, bet ir tai, kad įvairios teisinės aplinkybės suponuoja pareigą ženkliai rimčiau vertinti įrodymų leistinumo taisyklių svarbą arbitražo procese. Ši išvada taip pat reiškia, kad arbitrų diskrecija, sprendžiant dėl įrodymų leistinumo, iš esmės yra įgyvendinama netinkamai. Šiuo atveju neteigiama, kad arbitražo teismai visais atvejais klysta įgyvendindami savo diskreciją sprendžiant dėl įrodymų leistinumo. Disertacijos 2 dalyje pateiktoje analizėje, dėl jau nurodytų priežasčių, buvo vertinamas tik dominuojantis arbitražo teismų požiūris į įrodymų leistinumą. Nepaisant to, dominuojančio liberalaus požiūrio kritika leidžia susidaryti bendrą ir, kaip paaiškėjo, iš esmės ydingą požiūrį į įrodymų leistinumo taisykles. Visa tai neišvengiamai sukelia pagrįstas abejones dėl įrodymų leistinumo *status quo* tarptautinio komercinio arbitražo procese.

### 6.3. Disertacijos 3 dalies „Įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže pokyčiai“ rezultatų santrauka

Disertacijos 3.1 dalyje pateiktas įvairių arbitražo teisės šaltinių tyrimas leido identifikuoti keturias arbitražo teismų diskrecijos sukeliamas problemas: 1) arbitražo teismų diskrecija neužtikrina teisinio aiškumo; 2) arbitražo teismų

diskrecija nulemia nevienodą arbitražo teismų praktiką; 3) arbitražo teismų diskrecija nulemia subjektyviais įsitikinimais paremtų sprendimų priėmimą; 4) arbitražo teismų diskrecija yra neefektyvi priemonė spręsti su įrodymų leistinumu susijusias problemas.

Šios problemos turėtų būti priimamos rimtai. Nors teisės moksle galime aptikti nemažai kritikos įvairiems arbitražo proceso aspektams, disertacijoje pateikta arbitrų diskrecijos kritika turėtų kelti nerimą. Tiesa, vien tai kad vienas ar kitas proceso teisės aspektas turi rimtų problemų, tai dar, toli gražu, nereiškia, kad turėtume jį koreguoti. Nepaisant to, ties čia diskrecijos problemos nesibaigia. Kaip yra apibendrinama disertacijos 3 dalyje, atskleistos ir pagrįstos diskrecijos problemos leidžia teigti, kad įrodymų leistinumo *status quo* neatitinka visų aštuonių L. L. Fuller išskirtų „geros teisės“ kriterijų.

Kaip išsamiai išdėstyta šios disertacijos 1, 2 ir 3.1 dalyse, dėl funkcinio požiūrio svarbos, kritinio liberalaus požiūrio įvertinimo ir problemų, susijusių su plačia arbitrų diskrecija, reikia keisti įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže. 3.2 dalyje yra pateikti ir pagrįsti pasiūlymai, kaip šį *status quo* būtų galima pakeisti.

*Pirma*, pagrindinis *status quo* pokyčių objektas turėtų būti ne UNCITRAL Tarptautinio komercinio arbitražo pavyzdinis įstatymas ar arbitražo proceso taisyklės, o *soft law* instrumentas, geriausiu atveju – IBA Taisyklės dėl Įrodymų Rinkimo Tarptautiniame Arbitraže.

*Antra*, tuo atveju, jeigu ateityje bus nuspręsta keisti įrodymų leistinumo *status quo*, būtina atsižvelgti į šiuos bendro pobūdžio reikalavimus: 1) išskyrus taisyklę dėl pavėluotai pateiktų įrodymų leistinumo, IBA Taisyklės dėl Įrodymų Rinkimo Tarptautiniame Arbitraže neturėtų būti papildomos naujomis įrodymų leistinumo taisyklėmis; 2) keičiant įrodymų leistinumo taisykles visada turi būti atsižvelgiama į funkcinį požiūrį į įrodymų leistinumą; 3) turi būti atsisakyta liberalaus požiūrio į įrodymų leistinumą; 4) turi būti laikomasi konkrečių reikalavimų, kylančių iš Niujorko konvencijos V straipsnio 1 dalies b punkto ir V straipsnio 2 dalies b punkto.

*Trečia*, įrodymų leistinumo *status quo* ateityje galėtų būti pakeistas vienu iš dviejų būdų: arba nustatant konkrečias įrodymų leistinumo taisykles, kuriose būtų aiškiai apibrėžta, kokie įrodymai arbitražo procese yra neleistini, arba nustatant balansavimo testus, kuriems būdingas išsamus, iš anksto nustatytas balansavimo kriterijų sąrašas. Nors abi alternatyvos galėtų būti pagrįstai svarstomos ateityje, šios disertacijos 3.2.2.3 dalyje paaiškinama, kad arbitražo bendruomenė pirmenybę galėtų teikti balansavimo testams su aiškiais ir iš anksto nustatytais balansavimo kriterijais.

# 7. IŠVADOS

Šioje disertacijoje atlikta analizė leidžia daryti šias išvadas:

1. Įrodymų leistinumą tarptautiniame komerciniame arbitraže atskleidžia du požiūriai. Šie požiūriai ne tik leidžia atsakyti į klausimą: „kokios įrodymų leistinumo taisyklės egzistuoja tarptautiniame komerciniame arbitraže?“, bet ir „koks yra šių taisyklių tikslas?“:
    1.1. Konceptualus požiūris atskleidžia UNCITRAL Tarptautinio komercinio arbitražo pavyzdiniame įstatyme, UNCITRAL arbitražo taisyklėse, Tarptautinių prekybos rūmų arbitražo taisyklėse, Londono tarptautinio arbitražo teismo taisyklėse ir IBA Taisyklėse dėl Įrodymų Rinkimo Tarptautiniame Arbitraže įtvirtintas įrodymų leistinumo taisykles. Šis požiūris leidžia išskirti tris įrodymų leistinumo taisyklių kategorijas: 1) įrodymų leistinumo taisyklės, kuriomis siekiama pagerinti faktų nustatymo tikslumą, t. y. taisyklės, kurių pagrindinis tikslas yra susietas su tiesos nustatymu komercinio arbitražo procese; 2) įrodymų leistinumo taisyklės, kurios įrodymus pripažįsta neleistinais dėl įrodymų turinio, t. y. taisyklės, kurios įrodymus pašalina dėl konkretaus įrodymų turinio; 3) įrodymų leistinumo taisyklės, kurios įrodymus pripažįsta neleistinais dėl proceso teisės arba materialinės teisės pažeidimų – šiuo atveju įrodymai yra pašalinami iš bylos dėl to, kad įrodymai buvo surinkti, gauti, pateikti, ištirti, įvertinti arba proceso teisei, arba materialinei teisei prieštaraujančiu būdu.
    1.2. Funkcinis požiūris atskleidžia kokius konkrečius tikslus atlieka UNCITRAL Tarptautinio komercinio arbitražo pavyzdiniame įstatyme, UNCITRAL arbitražo taisyklėse, Tarptautinių prekybos rūmų arbitražo taisyklėse, Londono tarptautinio arbitražo teismo taisyklėse ir IBA Taisyklėse dėl Įrodymų Rinkimo Tarptautiniame Arbitraže įtvirtintos įrodymų leistinumo taisyklės. Įrodymų leistinumo taisyklės yra grindžiamos prielaida, kad arbitrai, deja, kaip ir bet kuris kitas žmogus, priimdami sprendimus kartais daro įvairių klaidų. Atitinkamai, įrodymų leistinumo taisyklės veikia kaip procesinis instrumentas, padedantis užtikrinti: 1) faktų nustatymo tikslumą; 2) sąžiningą procesą; 3) sprendimo legitimumą; 4) proceso operatyvumą ir efektyvumą; 5) kitas teisines vertybes, pavyzdžiui, asmens galimybę laisvai konsultuotis su advokatu, mediku ir kt.

Dėl įrodymų leistinumo taisyklių suformulavimo, kaip diskrecijos teisę suteikiančių nuostatų, arbitražo teisės šaltiniuose, šių fundamentalių tikslų įgyvendinimas priklauso ne nuo *ex ante* nustatytų įrodymų leistinumo taisyklių, o nuo plačios arbitrų diskrecijos. Šis *status quo* suponuoja, kad arbitrai yra suprantantys, suvokiantys ir gebantys patys išspręsti įrodymų leistinumo klausimus. Kitaip tariant, tarptautiniame komerciniame arbitraže arbitrai vadovaujasi požiūriu – „žinosiu, kai pamatysiu“, o ne „matau, nes iš anksto žinau“.

2. Plati arbitražo teismų diskrecija yra įgyvendinama laikantis plačiai arbitraže pripažįstamo liberalaus požiūrio, kuris nulemia deklaratyvų požiūrį į įrodymų leistinumą. Liberalų požiūrį nulemiančių priežasčių analizė atskleidė, kad šis požiūris nėra pagrįstas. Liberalų požiūrį neva pagrindžiančios priežastys gali būti skirstomos į dvi svarbias procesines aplinkybes, kurios iš tiesų galiausiai patvirtina poreikį atmesti liberalų požiūrį į įrodymų leistinumą:

   2.1. Procesinės aplinkybės, sudarančios palankias sąlygas įrodymų leistinumo taisyklių taikymui tarptautiniame komerciniame arbitraže: 1) arbitražo procesas koncentruojasi ne į objektyvios, bet į teisinės, arba kitaip – formalios, tiesos nustatymą; 2) arbitrai privalo pasiekti ne pagrįstų abejonių ar visiško įsitikinimo, bet didesnės tikimybės įsitikinimo laipsnį; 3) Niujorko konvencijos V straipsnio 1 dalies b pagrindo aiškinimas ir taikymas nacionalinių teismų praktikoje leidžia teigti, kad arbitrų, kurie pašalino įrodymus, baimė dėl arbitražo teismo sprendimo panaikinimo yra nepagrįsta; 4) apeliacijos trūkumas nėra išskirtinis arbitražo proceso, kuriame faktinių aplinkybių nustatymo procesas, kaip ir įvairiose nacionalinėse jurisdikcijose, vyksta vienintelį kartą, bruožas; 5) plačios šalių ir arbitražo teismų galimybės įrodymų išreikalavimo stadijoje;

   2.2. Procesinės aplinkybės, skatinančios arbitražo teismus taikyti įrodymų leistinumo taisykles: 1) laisvo įrodymų vertinimo neigiama įtaka arbitražo procesui, kuri pasireiškia tiek su tiesos nustatymu nesusijusių arbitražo proceso vertybių ignoravimu, tiek arbitrų kognityvinių klaidų rizika; 2) grėsmė dėl arbitražo teismo sprendimo panaikinimo Niujorko konvencijos V straipsnio 2 dalies b punkto pagrindu tais atvejais, kai arbitražo teismai netaiko įrodymų leistinumo taisyklių, kurios įrodymus pripažįsta neleistinais dėl įrodymų turinio arba dėl proceso teisės arba materialinės teisės pažeidimų; 3) arbitražo, kaip alternatyvaus ginčų sprendimo mechanizmo, paklausos

mažėjimas dėl egzistuojančio teisinio netikrumo arbitražo procese; 4) arbitrai nesugeba atsiriboti nuo neleistinos informacijos, o tai skatina didesnį dėmesį įrodymų leistinumo taisyklėms arbitražo procese; 5) plačios šalių ir arbitrų galimybės įrodymų išreikalavimo stadijoje.

3. Liberalaus požiūrio kritika nulemia tai, kad šiuo metu arbitrų diskrecija spręsti dėl įrodymų leistinumo yra įgyvendinama netinkamai. Dėl to būtina iš naujo įvertinti vieną iš pagrindinių įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže aspektų, t. y. plačią arbitrų diskreciją. Įrodymų leistinumo kontekste ši diskrecija pasižymi šiais trūkumais:
   3.1. Neužtikrina arbitražo bendruomenėje plačiai pripažįstamos vertybės – teisinio aiškumo, t. y. nei šalys, nei arbitrai negali numatyti, kokie įrodymai yra laikomi leistinais tarptautinio komercinio arbitražo byloje;
   3.2. Neužtikrina vienodos arbitražo teismų praktikos tiek dėl nacionalinės teisės įtakos sprendžiant dėl įrodymų leistinumo, tiek dėl įvairių įrodymų leistinumo taisyklių taikymo arbitražo procese;
   3.3. Nulemia subjektyvų sprendimų priėmimą, kurio pasekmės yra tiek arbitražo procesas, kaip žmonių, o ne teisės viršenybės procesas, tiek nepagrįsta nacionalinės teisės įtaka arbitražo procesui;
   3.4. Neužtikrina efektyvios prevencijos prieš neleistinų įrodymų pateikimą į bylą ir sukelia didelius laiko ir finansinius kaštus tiek šalims, tiek arbitrams sprendžiant įrodymų leistinumo klausimus.

   Šių keturių diskrecijos problemų egzistavimas leidžia atskleisti įrodymų leistinumo *status quo* tarptautiniame komerciniame arbitraže nesuderinamumą su teisės teoretiko L. L. Fuller išskirtais 8 „geros teisės“ kriterijais. Įrodymo leistinumo *status quo* tarptautiniame komerciniame arbitraže: 1) nėra bendro pobūdžio visiems; 2) nėra viešai paskelbta; 3) nėra nukreipta į ateitį; 4) nėra aiški; 5) nėra tarpusavyje suderinta; 6) formuluoja sunkiai įgyvendinamus ar neįmanomus reikalavimus proceso šalims; 7) yra per dažnai keičiama; 8) sukelia oficialių veiksmų, t. y. įrodymų leistinumo taisyklių taikymo, ir pačios teisės, t. y. įrodymų leistinumo taisyklių, nesuderinamumą.

4. Įrodymų leistinumo *status quo* kritinis įvertinimas leidžia pagrįsti poreikį pakeisti galiojantį *status quo* ir pateikti tam tikras galimų pokyčių gaires. Ateities pakeitimo objektas turėtų būti ne UNCITRAL Tarptautinio komercinio arbitražo pavyzdinis įstatymas ar arbitražo

proceso taisyklės, bet *soft law* instrumentas, idealiausiu atveju – IBA Taisyklės dėl Įrodymų Rinkimo Tarptautiniame Arbitraže. Keičiant šį objektą ateityje privaloma atsižvelgti ir turėti omenyje šiuos bendro pobūdžio reikalavimus: 1) išskyrus vieną išimtį, t. y. per vėlai pateiktų įrodymų leistinumo taisyklę, IBA Taisyklės dėl Įrodymų Rinkimo Tarptautiniame Arbitraže neturėtų būti pildomos naujomis įrodymų leistinumo taisyklėmis; 2) visada būtina turėti omenyje funkcinį požiūrį į įrodymų leistinumą; 3) atsisakyti liberalaus požiūrio į įrodymų leistinumą; 4) atsižvelgti į disertacijoje išskirtus Niujorko konvencijos V straipsnio 1 dalies b punkto ir V straipsnio 2 dalies b punkto keliamus reikalavimus. Laikantis šių reikalavimų, egzistuoja du alternatyvūs pakeitimo būdai, išsprendžiantys įrodymų leistinumo *status quo* problemas:

4.1. Konkrečių teisės taisyklių, reglamentuojančių įrodymų leistinumą, įtvirtinimas, leidžiantis tiek šalims, tiek arbitrams aiškiai suprasti, ar byloje pateiktas įrodymas turėtų būti leistinas;

4.2. Balansavimo testų, pasižyminčių konkrečiais kriterijais, įtvirtinimas, leidžiantis tiek šalims, tiek arbitrams iš anksto žinoti, kokie konkretūs kriterijai turi būti vertinami sprendžiant dėl pateikto įrodymų leistinumo.

# SAMENVATTING

## 1. DE PROBLEEMSTELLING

Deze dissertatie volgt het standpunt van de oude filosoof Aristoteles: “Een ‘thesis is een opvatting van een of andere eminente filosoof die in strijd is met de algemene opinie [...]”. De toelaatbaarheid van bewijs in internationale handelsarbitrage kan worden gekenmerkt door drie algemene opinies, die in de volgende paragrafen worden toegelicht.

*Ten eerste*, de toelaatbaarheid van bewijs speelt een ondergeschikte rol in internationale arbitrageprocedures in handelszaken. De toelaatbaarheid van bewijs in internationale handelsarbitrage komt in bijna elke verhandeling over internationale handelsarbitrage aan bod. Er is echter een gebrek aan zowel een conceptuele analyse, aan de hand waarvan kan worden vastgesteld welke ontvankelijkheidsregels van toepassing zijn in internationale handelsarbitrage, als een doelgerichte analyse, aan de hand waarvan de belangrijkste onderliggende doelstellingen van de ontvankelijkheidsregels kunnen worden vastgesteld en onderzocht. Deze eerder oppervlakkige benadering van de toelaatbaarheid van bewijs in de bestaande rechtsliteratuur heeft derhalve een weldoordacht begrip verhinderd van zowel de specifieke regels inzake de toelaatbaarheid van bewijs zoals vervat in de formele rechtsbronnen over internationale handelsarbitrage als van het belang van deze regels in arbitrageprocedures.

*Ten tweede*, arbitragetribunalen neigen tot een liberale benadering van de toepassing van de ontvankelijkheidsregels. Met andere woorden, arbiters laten vrijwel alle door de partijen overgelegde bewijzen toe. De algemeen aanvaarde benadering van de toelaatbaarheid van bewijs is zo verankerd dat zij vrijwel nooit ter discussie is gesteld. Tot op heden heeft de rechtswetenschap de redenen voor dit standpunt en de wenselijkheid van het standpunt zelf nog niet in detail onderzocht. Met andere woorden, de rechtswetenschap biedt geen gedetailleerde analyse waaruit zou blijken of de liberale benadering inderdaad een aangewezen of, synoniem, gerechtvaardigde benadering is in internationale handelsarbitrage.

*Ten derde*, indien de partijen niet anders zijn overeengekomen, wordt de toelaatbaarheid van bewijsmateriaal overgelaten aan de ruime discretionaire bevoegdheid van de scheidsgerechten. De ruime discretionaire bevoegdheid van arbiters met betrekking tot de toelaatbaarheid van bewijs weerspiegelt de heersende opvatting dat bewijskwesties moeten worden overgelaten aan het oordeel van arbiters in plaats van aan gedetailleerde vooraf vastgestelde bewijsregels. De ruime discretionaire bevoegdheid van arbiters waarborgt een

van de belangrijkste waarden van internationale handelsarbitrage, namelijk de flexibiliteit van het proces, die wordt beschermd door aan arbiters een ruim mandaat te geven om het arbitrageproces aan te passen aan de procedurele situatie of de verwachtingen van de partijen. Tot op heden kunnen wij echter geen gedetailleerde analyse vinden die kan helpen bij het beantwoorden van de vraag of de discretionaire bevoegdheid van arbiters het meest geschikte instrument is om de toelaatbaarheid van bewijs in internationale handelsarbitrage te regelen? Bovendien, is de procedurele flexibiliteit, die gepaard gaat met de ruime discretionaire bevoegdheid, werkelijk een absolute waarde, en kunnen we de mate aan procedurele flexibiliteit voldoende rechtvaardigen in het licht van andere procedurele waarden die ervoor worden opgeofferd, zoals de verminderde bescherming van rechtszekerheid?

Deze drie algemene opvattingen, namelijk het gebrek aan aandacht voor de toelaatbaarheid van bewijs, de liberale benadering van de toepassing van de ontvankelijkheidsregels en de ruime discretionaire bevoegdheid van arbiters, maken het *status quo* op van de regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage. De probleemstelling waarvan dit onderzoek vertrekt, is de wenselijkheid van dit *status quo* in internationale handelsarbitrage: het proefschrift beoogt door middel van verschillende methoden, ten eerste, een overzicht te geven van het bestaande *status quo* van de regels inzake de toelaatbaarheid van bewijs en, ten tweede, deze regels kritisch te evalueren.

## 2. HET ONDERZOEKSVOORWERP

Het proefschrift richt zich op de toelaatbaarheid van bewijs in internationale handelsarbitrage. Zoals reeds vermeld, wordt de toelaatbaarheid van bewijs in internationale handelsarbitrage hoofdzakelijk gekenmerkt door drie aspecten, die in dit proefschrift worden geanalyseerd: 1) het ontbreken van een conceptuele en doelgerichte analyse van de regels over toelaatbaarheid van bewijs in internationale handelsarbitrage; 2) de liberale toepassing van die regels; en 3) de ruime discretionaire bevoegdheid van arbiters om te beslissen hoe de regels inzake toelaatbaarheid van bewijs moeten worden toegepast.

De focus van dit proefschrift ligt uitsluitend op de toelaatbaarheid van bewijs in internationale handelsarbitrage. Niettemin richt dit proefschrift zich aanvullend op drie aspecten die het onderzoeksvoorwerp van dit proefschrift zelf niet uitbreiden, maar onvermijdelijk zijn om de onderzoeksdoelstelling te behalen en de onderzoeksstappen te kunnen uitvoeren . Deze drie aspecten worden in de volgende paragrafen kort toegelicht.

*Ten eerste*, gaat deze dissertatie in op specifieke ontvankelijkheidsregels. Zoals is gebleken en werd onderbouwd in dit onderzoek, is het mogelijk om drie categorieën van toelaatbaarheidsregels te onderscheiden binnen de regels over internationale handelsarbitrage: 1) ontvankelijkheidsregels die bedoeld zijn om de nauwkeurigheid van de waarheidsvinding te verbeteren; 2) ontvankelijkheidsregels die bewijs uitsluiten op basis van de inhoud ervan; en 3) ontvankelijkheidsregels die bewijs uitsluiten op basis van inbreuken op het materiële recht of het procesrecht. Dit onderzoek focust niet op alle regels die binnen deze driedeling vallen en maakt een nadere selectie. Die selectie is als volgt: de toelaatbaarheid van de schriftelijke getuigenverklaring van een getuige die niet wordt gehoord tijdens de arbitragezitting (eerste categorie); de toelaatbaarheid van vertrouwelijk bewijs en van politiek of institutioneel gevoelig bewijs (tweede categorie); en de toelaatbaarheid van onrechtmatig verkregen bewijs en de toelaatbaarheid van te laat ingediend bewijs (derde categorie). De keuze voor deze specifieke toelaatbaarheidsregels is ingegeven vanwege de relatief frequente toepassing van deze regels in de arbitrale uitspraken.

*Ten tweede*, het concept en het doel van de toelaatbaarheid van bewijs in internationale handelsarbitrage worden geanalyseerd door de algemene kenmerken van de toelaatbaarheid van bewijs in het burgerlijk procesrecht in zowel civielrechtelijke als *Common Law*-rechtsstelsels te onderzoeken. In dit proefschrift dient de vergelijking met het burgerlijk procesrecht slechts als vertrekpunt om de regels over de toelaatbaarheid van bewijs in internationale handelsarbitrage te begrijpen.

*Ten derde*, is dit proefschrift niet beperkt tot de rechtspraak van internationale handelsarbitragetribunalen. Vanwege het vertrouwelijke karakter van sommige internationale handelsarbitrages werd in sommige delen van het onderzoek ook rechtspraak betrokken van instellingen voor internationale investeringsarbitrage en andere internationale tribunalen, zoals het *International Court of Justice* en het *Iran-United States Claims Tribunal*.

## 3. ONDERZOEKSDOELSTELLING

Het hoofddoel van dit proefschrift is het onthullen, analyseren en kritisch evalueren van het *status quo* aan regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage. Het proefschrift gebruikt juridische methoden om drie algemeen aanvaarde opvattingen over de toelaatbaarheid van bewijs in de internationale arbitragegemeenschap te onderzoeken en ter discussie te stellen.

Dit proefschrift heeft niet tot doel een specifieke regel van toelaatbaarheid van bewijs in internationale handelsarbitrage in detail te analyseren. Een wetenschappelijk werk gewijd aan een specifieke ontvankelijkheidsregel, zoals bijvoorbeeld de toelaatbaarheid van onrechtmatig verkregen bewijs, is weliswaar ongetwijfeld nuttig, maar kan niet leiden tot inzichten over de fundamentele aspecten die alle ontvankelijkheidsregels in internationale handelsarbitrage delen. Het is dus niet de bedoeling van dit proefschrift om afzonderlijke ontvankelijkheidsregels in detail te analyseren, maar om het gehele *status quo* aan regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage bloot te leggen, te herzien, te evalueren en zo nodig te wijzigen.

## 4. ONDERZOEKSSTAPPEN EN BIJHORENDE ONDERZOEKSMETHODEN

Om de onderzoeksdoelstelling te behalen, werden vier onderzoeksstappen gezet. Elk van die vier stappen gaat gepaard met een specifieke methode. Die onderzoeksstappen en methodes worden hieronder nader toegelicht.

*Ten eerste*, de conceptuele en de doelgerichte benadering van de toelaatbaarheid van bewijs in internationale handelsarbitrage blootleggen en analyseren.

Dit proefschrift beoogt de conceptuele benadering van de toelaatbaarheid van bewijs in internationale handelsarbitrage te identificeren en te analyseren, door de specifieke regels voor de toelaatbaarheid van bewijs te identificeren die zijn opgenomen in diverse formele rechtsbronnen over internationale handelsarbitrage. Daar houdt het onderzoek echter niet op. Dit proefschrift hanteert ook een doelgerichte benadering en wil aan de hand daarvan de doelstellingen blootleggen die achter de geïdentificeerde regels schuilgaan en aantonen hoe de toepassing van die regels leidt tot het bereiken van die doelstellingen.

De conceptuele en doelgerichte benadering van de toelaatbaarheid van bewijs in internationale handelsarbitrage wordt in deel 1 van dit proefschrift geanalyseerd en onthuld door drie groepen arbitrage-instrumenten te onderzoeken: 1) de *lex arbitri*: de *UNCITRAL Model Law on International Commercial Arbitration*; 2) drie sets aan procedureregels voor arbitrage:de *UNCITRAL Arbitration Rules*, de *Rules of Arbitration of the International Chamber of Commerce* en de *London Court of International Arbitration Rules*; en 3) *soft law*: de *IBA Rules on the Taking of Evidence in International Arbitration.*

*Ten tweede*, het blootleggen, analyseren en kritisch beoordelen van de in de internationale arbitragegemeenschap heersende liberale benadering van de toepassing van de regels inzake de toelaatbaarheid van bewijs in internationale arbitrageprocedures in handelszaken.

Zoals reeds gezegd, neigen arbitrale tribunalen ertoe de liberale benadering te volgen ten aanzien van de toepassing van de regels inzake de toelaatbaarheid van bewijs. De liberale benadering en de gerechtvaardigdheid van de redenen daarvoor worden in deel 2 van dit proefschrift geanalyseerd en onderzocht met behulp van vergelijkende, systematische, taalkundige en teleologische methoden.

In deel 2 van dit proefschrift worden de volgende rechtsbronnen geanalyseerd: de UNCITRAL *Model Law on International Commercial Arbitration*, de drie bovenvermelde sets aan procedureregels, de *IBA Rules on the Taking of Evidence in International Arbitration*, doctrine en rechtspraak van arbitragehoven en nationale rechtbanken. Deze rechtsbronnen worden gebruikt om de liberale benadering, de redenen voor het ontstaan ervan en de gevolgen ervan voor de toelaatbaarheid van bewijs in internationale handelsarbitrage te identificeren en toe te lichten.

*Ten derde*, het identificeren, analyseren en kritisch beoordelen van de tekortkomingen bij de discretionaire toepassing van de ontvankelijkheidsregels in internationale handelsarbitrage door arbitragetribunalen.

De conceptuele en doelgerichte benadering van de regels inzake de toelaatbaarheid van bewijs en de kritiek op de liberale benadering leiden tot de noodzaak om het *status quo* aan regels inzake de toelaatbaarheid van bewijs te wijzigen, hetgeen onvermijdelijk veranderingen met zich meebrengt in de discretionaire bevoegdheid van arbiters bij de toepassing van ontvankelijkheidsregels. Door gebruik te maken van taalkundige, systematische en teleologische methoden en door verschillende bronnen van arbitragewetgeving te analyseren, wordt in deel 3.1 van dit proefschrift de ruime discretionaire bevoegdheid van arbiters in het kader van de toelaatbaarheid van bewijs blootgelegd, toegelicht en kritisch beoordeeld. De beoordelingsvrijheid van arbiters wordt beoordeeld volgens een specifieke methodologie. De analyse tracht de vraag te beantwoorden of de ruime beoordelingsvrijheid en daarmee het gehele *status quo* aan regels inzake de toelaatbaarheid van bewijs in overeenstemming is met de fundamentele vereisten van de *Inner Morality of Law* zoals uiteengezet door de beroemde rechtsgeleerde L. L. Fuller in zijn werk “The Morality of Law”.

*Ten vierde*, het identificeren en onderbouwen van geschiktere, effectievere en niet-discretionaire rechtsinstrumenten om de toelaatbaarheid van bewijs in internationale handelsarbitrage te reguleren.

Dit proefschrift doet meer dan kritiek geven op het *status quo* aan regels inzake de toelaatbaarheid van bewijs. Nadat fundamentele problemen met de liberale benadering en met de discretionaire beoordelingsbevoegdheid van arbitragetribunalen zijn blootgelegd, geeft deel 3.2 van dit proefschrift enkele mogelijkheden weer om het *status quo* aan regels inzake de toelaatbaarheid van bewijs te veranderen. Met behulp van taalkundige, systematische, teleologische methoden en rechtsvergelijking onderzoekt deel 3.2 van dit proefschrift twee essentiële aspecten. Het eerste aspect betreft het voorwerp van de wijziging van het *status quo*, d.w.z. wat moet worden gewijzigd of, met andere woorden, welke bron van het arbitragerecht moet worden gewijzigd. Het tweede aspect analyseert een even belangrijke vraag: op welke manier kan dit object worden gewijzigd? Deze dissertatie stelt twee alternatieve manieren voor om het bestaande rechtskader over de toelaatbaarheid van bewijs in internationale handelsarbitrage te verbeteren, en evalueert deze.

Het is niet de bedoeling van deze scriptie om voor elke specifieke ontvankelijkheidsregel die in internationale handelsarbitrage voorkomt, gedetailleerde wijzigingen voor te stellen. Zoals gezegd, worden in deze scriptie geen specifieke ontvankelijkheidsregels in internationale handelsarbitrage geanalyseerd. Integendeel, dit proefschrift tracht een overzicht en een kritische beoordeling te geven van het algemene rechtskader over de toelaatbaarheid van bewijs in internationale handelsarbitrage. In het laatste deel van dit proefschrift wordt dus alleen een kader voorgesteld dat toekomstige wijzigingen van de bronnen van het arbitragerecht mogelijk maakt. Met andere woorden, de analyse biedt zowel algemene criteria waarmee entiteiten rekening moeten houden wanneer zij in de toekomst de bronnen van het arbitragerecht wijzigen, als mogelijke manieren om het algemene kader van het *status quo* van de toelaatbaarheid van bewijs te wijzigen.

## 5. WETENSCHAPPELIJKE VERNIEUWING EN RELEVANTIE

De in dit proefschrift geanalyseerde problemen zijn niet alleen relevant, maar de onderzoeksresultaten zijn ook significant en vernieuwend. De wetenschappelijke vernieuwing van deze thesis uit zich op drie manieren.

*Ten eerste*, het proefschrift onthult de conceptuele en doelgerichte benaderingen van regels inzake de toelaatbaarheid van bewijs in internationale

handelsarbitrage. Die inzichten ontbraken tot op heden in de rechtsliteratuur en worden door dit onderzoek aangeleverd.

*Ten tweede*, deze dissertatie bevat een kritische beoordeling van de liberale benadering van de toelaatbaarheid van bewijs die tot op heden de internationale commerciële arbitrage domineert. Kritiek op diverse rechtvaardigingen van die liberale benadering is reeds te vinden in de bestaande rechtswetenschap. Tot deze dissertatie bood de rechtswetenschap echter geen alomvattende analyse van de liberale benadering van de toelaatbaarheid van bewijs in internationale handelsarbitrage.

Zoals in dit proefschrift wordt uiteengezet, is de liberale benadering, die vaak wordt aangeduid als een gevestigde praktijk, niet alleen ongerechtvaardigd, maar leiden de ideeën die schuilgaan achter de liberale benadering tot een klimaat waarin de ontvankelijkheidsregels snel kunnen worden toegepast en moedigen zij in sommige gevallen arbitragetribunalen zelfs aan deze regels toe te passen. De afschaffing van de liberale benadering, die volgens deze scriptie volledig gerechtvaardigd zou zijn, zou leiden tot belangrijke veranderingen in internationale arbitrageprocedures in handelszaken.

*Ten derde*, de relevantie en de vernieuwing van dit proefschrift blijkt ook uit het feit dat het onderzoek fundamentele tekortkomingen aan het licht brengt in de beoordelingsvrijheid van arbiters in het kader van de toelaatbaarheid van bewijs. Zoals uit dit proefschrift blijkt, wordt de discretionaire bevoegdheid van arbiters gekenmerkt door vier gebreken: het gebrek aan rechtszekerheid, de tegenstrijdigheid in de arbitrale jurisprudentie, subjectieve besluitvorming en inefficiëntie. Deze tekortkomingen suggereren dat een discretionaire beoordeling niet de voorkeur verdient als methode voor de behandeling van de toelaatbaarheid van bewijs in arbitrageprocedures. Het belang en de nieuwheid van dit proefschrift blijken bovendien uit het feit dat in dit proefschrift ook algemene inzichten worden aangeboden en suggesties worden gegeven over de wijze waarop het *status quo* aan regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage zou kunnen worden gewijzigd.

# 6. SAMENVATTING VAN DE ONDERZOEKSRESULTATEN

## 6.1. Samenvatting van de onderzoeksresultaten van deel 1 "Conceptuele en doelgerichte benadering van de toelaatbaarheid van bewijs in internationale handelsarbitrage"

De analyse in deel 1 van dit proefschrift identificeert de twee belangrijkste benaderingen van de toelaatbaarheid van bewijs in internationale handelsarbitrage, namelijk de conceptuele benadering en de doelgerichte benadering. Deze benaderingen brengen niet alleen een specifieke classificatie van ontvankelijkheidsregels aan het licht, maar ook de achterliggende doelstellingen van deze regels.

*Ten eerste*, werden aan de hand van een conceptuele benadering van de toelaatbaarheid van bewijs drie categorieën van de ontvankelijkheidsregels geïdentificeerd waarin de ontvankelijkheidsregels die zijn vastgesteld in de bronnen van het arbitragerecht die in dit proefschrift zijn geanalyseerd, ondergebracht kunnen worden:

| **De categorieën van de regels inzake de toelaatbaarheid van bewijs** | **Ermee corresponderende ontvankelijkheidsregels uit de onderzochte rechtsbronnen** |
|---|---|
| Ontvankelijkheidsregels ter verbetering van de waarheidsvinding | Art. 20(5) uit de *London Court of International Arbitration Rules*<br><br>Art. 4(7) 5(5), 6(2) en 9(2)(g) uit de *IBA Rules on the Taking of Evidence in International Arbitration* |
| Ontvankelijkheidsregels die bewijsmateriaal uitsluiten vanwege de inhoud ervan | Art. 9(2)(b), (e), (f) en (g) uit de *IBA Rules on the Taking of Evidence in International Arbitration* |
| Ontvankelijkheidsregels die bewijs uitsluiten wegens strijdig met het materiële recht of het procesrecht | Art. 23(2) uit de UNCITRAL *Model Law on International Commercial Arbitration*<br><br>Arts. 22 en 27(3) uit de *UNCITRAL Arbitration Rules* |

| | |
|---|---|
| | Arts. 25(1) en 27 uit de *Rules of Arbitration of the International Chamber of Commerce*<br><br>Art. 22(1)(i) uit de *London Court of International Arbitration Rules*<br><br>Arts. 4(6), (7), 5(3), (5), 6(2), 9(2)(g) en 9(3) uit de *IBA Rules on the Taking of Evidence in International Arbitration* |

*Ten tweede*, werden aan de hand van een doelgerichte benadering van de regels inzake de toelaatbaarheid van bewijs de primaire doelstellingen achter deze toelaatbaarheidsregels geïdentificeerd. De ontvankelijkheidsregels zijn gebaseerd op de vooronderstelling dat rechters en arbiters net als ieder ander mens, verschillende soorten fouten kunnen maken tijdens hun besluitvorming. De ontvankelijkheidsregels fungeren als een procedureel instrument dat helpt om 1) de nauwkeurigheid van de waarheidsvinding in de procedure te verbeteren; 2) het recht op een eerlijk proces te waarborgen; 3) de legitimiteit van het scheidsgerecht en zijn beslissing te waarborgen; 4) een snelle en efficiënte procedure te waarborgen; 5) de bescherming van andere juridische waarden te waarborgen.

Uit deel 1 is echter gebleken dat de ontvankelijkheidsregels in internationale handelsarbitrage niet worden geformuleerd als *ex ante*-rechtsregels, maar als discretionaire bepalingen die worden toegepast door verschillende criteria tegen elkaar af te wegen. De discretionaire formulering van de ontvankelijkheidsregels staat centraal in de doelgerichte benadering van de toelaatbaarheid van bewijsmateriaal. De *ex post*-vaststelling van de ontvankelijkheidsregels in plaats van *ex ante* stelt het scheidsgerecht in staat de ontvankelijkheidsregels op verschillende manieren toe te passen door een aantal vrij te kiezen criteria tegen elkaar af te wegen of door die regels in sommige gevallen helemaal niet toe te passen.

De discretionaire aard van de ontvankelijkheidsregels leidt ertoe dat de, bovenvermelde, achterliggende doelstellingen van die regels slechts in beperkte mate bereikt kunnen worden. In internationale handelsarbitrage fungeren de ontvankelijkheidsregels niet als een reeks vooraf vastgestelde

regels die het scheidsgerecht helpen misleidend bewijs te voorkomen of een efficiënte procedure te waarborgen. Integendeel, het is aan de arbiters om te beslissen of zij de misleidende informatie van de procedure moeten uitsluiten, of, anders gezegd, te beoordelen in welke mate het recht op een eerlijk proces en de legitimiteit van de eruit voortkomende arbitrale uitspraak door de aanwezigheid van onrechtmatig verkregen bewijs te ernstig in het gedrang komt. In dit verband is het derhalve van essentieel belang om na te gaan en te evalueren hoe arbiters deze discretionaire bevoegdheid uitoefenen, d.w.z. een analyse en evaluatie van de algemene liberale benadering van de toelaatbaarheid van bewijsmateriaal.

## 6.2. Samenvatting van de resultaten van deel 2 “De uitoefening van discretionaire beoordelingsbevoegdheid bij beslissingen over de toelaatbaarheid van bewijs in internationale handelsarbitrage”

In het tweede deel van dit proefschrift worden de zes meest voorkomende rechtvaardigingen voor de liberale benadering die in de onderzochte rechtsliteratuur terug te vinden zijn , in detail beoordeeld: 1) het beginsel van vrije bewijswaardering; 2) het doel van waarheidsvinding; 3) de bewijsstandaard; 4) het recht van een partij om bewijs aan te dragen en gehoord te worden; 5) institutionele aspecten van het arbitrageproces; 6) nadelen verbonden aan de huidige invulling van de bewijsvoeringsfase. Uit een gedetailleerde analyse van deze redenen blijkt dat geen eenduidige en overtuigende rechtvaardiging bestaat voor de liberale benadering in arbitrageprocedures. De liberale benadering kan worden weerlegd door te wijzen op twee procedurele omstandigheden die toelaten om de kritiek op de liberale benadering die in dit proefschrift aan bod komt, te illustreren.

*Ten eerste*, ondermijnen sommige van de redenen voor de liberale benadering die benadering in plaats van ze werkelijk te rechtvaardigen. Uit een gedetailleerde analyse van deze redenen blijkt namelijk dat sommige ervan gunstige procedurele omstandigheden scheppen voor de toepassing van de ontvankelijkheidsregels.

*Ten tweede*, scheppen sommige redenen niet alleen gunstige procedurele omstandigheden voor de toepassing van de ontvankelijkheidsregels, maar moedigen die redenen scheidsgerechten bovendien ook aan om die regels toe te passen.

De redenen die zogezegd de liberale aanpak ondersteunen, werken dus in feite de creatie van gunstige voorwaarden voor de toepassing van de ontvankelijkheidsregels in de hand en moedigen arbiters op een zekere manier aan om deze regels toe te passen:

| Omstandigheden die de toepassing van de ontvankelijkheidsregels in internationale handelsarbitrage in de hand werken | | Omstandigheden die scheidsgerechten ertoe aanzetten ontvankelijkheidsregels toe te passen in internationale handelsarbitrage | |
|---|---|---|---|
| 6. | De arbitrageprocedure is niet gericht op de objectieve waarheid maar op de juridische, of soms formele, waarheid. | 6. | De negatieve gevolgen van het beginsel van vrije bewijswaardering voor arbiters |
| 7. | Arbiters moeten de waarschijnlijkheidsnorm halen | 7. | De dreiging van vernietiging van een arbitraal vonnis op grond van art. V(2)(b) van de *New York Convention* |
| 8. | De ongegronde dreiging van nietigverklaring van arbitrale vonnissen op basis van art. V(1)(b) van de *New York Convention* | 8. | De weigering om de ontvankelijkheidsregels toe te passen, zou de populariteit van arbitrage in het bedrijfsleven kunnen ondermijnen |
| 9. | De afwezigheid van een mogelijkheid tot hoger beroep na arbitrageprocedures | 9. | Het onvermogen van arbiters om afstand te nemen van ontoelaatbare informatie |
| 10. | Ruime mogelijkheden voor de partijen en de scheidsgerechten in de fase van de bewijsvoering | 10. | Ruime mogelijkheden voor de partijen en de scheidsgerechten in de fase van de bewijsvoering |

Uit de analyse die in het tweede deel van dit proefschrift werd uitgevoerd, volgt dat de liberale benadering om verschillende redenen geen navolging behoort te genieten en dat, bijgevolg, het belang van de ontvankelijkheidsregels in arbitrageprocedures aanzienlijk vergroot behoort te worden. Deze conclusie wijst erop dat de beoordelingsvrijheid van arbiters bij beslissingen over de toelaatbaarheid van bewijs, in beginsel, niet naar behoren wordt uitgeoefend. Dit wil niet zeggen dat arbiters in hun bestaande praktijk buiten de m.i. aangewezen marge treden wanneer zij hun discretionaire bevoegdheid om ontvankelijkheidsregels aanwenden. De

analyse in deel 2 beoordeelt alleen de heersende houding van arbitrale tribunalen ten aanzien van de toelaatbaarheid van bewijs zoals die volgt uit hun arbitrale uitspraken en de bestaande rechtsliteratuur. Niettemin toont de kritische analyse van de heersende liberale benadering een algemene en, zoals is gebleken, fundamenteel onjuiste kijk op de ontvankelijkheidsregels aan.

## 6.3. Samenvatting van de resultaten van deel 3 "Wijzigingen aan het *status quo* aan regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage"

Onderzoek van verschillende bronnen over arbitragerecht heeft 4 problemen in kaart gebracht die worden veroorzaakt door de discretionaire bevoegdheid van arbitragetribunalen in het kader van de toelaatbaarheid van bewijs: 1) de discretionaire bevoegdheid van arbitragetribunalen waarborgt geen rechtszekerheid; 2) de discretionaire bevoegdheid van arbitragetribunalen leidt tot tegenstrijdige arbitrale rechtspraak; 3) de discretionaire bevoegdheid van arbitragetribunalen leidt tot subjectieve besluitvorming; en 4) de discretionaire bevoegdheid van arbitragetribunalen is een ondoeltreffend middel om de toelaatbaarheid van bewijs te beoordelen.

Deze problemen moeten serieus worden genomen. Hoewel er in de rechtswetenschap reeds veel kritiek op verschillende aspecten van de arbitrageprocedure te vinden is, zou de bovengenoemde kritiek op de beoordelingsvrijheid van arbiters een reden tot bezorgdheid moeten zijn. Het is waar dat het feit dat een of ander aspect van het procesrecht ernstige problemen oplevert, niet noodzakelijk betekent dat het moet worden veranderd. Toch houden de problemen met de discretionaire bevoegdheid daar niet op. Zoals uiteengezet in deel 3.1 van dit proefschrift, rechtvaardigen de bovengenoemde discretionaire problemen, te weten de rechtsonzekerheid, de inconsistentie van de arbitragepraktijk, de subjectiviteit en de ineffectiviteit, dat de discretionaire bevoegdheid van arbiters en uiteindelijk het gehele *status quo* aan regels inzake de toelaatbaarheid van bewijsmateriaal in strijd zijn met alle acht vereisten van "goed recht" zoals uiteengezet door L. L. Fuller.

Zoals uiteengezet in de delen 1, 2 en 3.1 van deze scriptie, tonen de doelgerichte benadering, de kritische beoordeling van de liberale benadering en de problemen van de ruime discretionaire bevoegdheid van arbiters aan dat het *status quo* aan regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage gewijzigd moet worden. Deel 3.2 van dit proefschrift omschrijft en rechtvaardigt de volgende drie voorstellen voor de wijze waarop dit *status quo* kan worden veranderd.

*Ten eerste*, het rechtsinstrument dat gewijzigd zou moeten worden, is niet zozeer de *UNCITRAL Model Law on International Commercial Arbitration* of het arbitrageprocesrecht, maar eerder een *soft law*-instrument, bij voorkeur de *IBA Rules on the Taking of Evidence in International Arbitration*.

*Ten tweede*, moet met de volgende fundamentele aspecten rekening worden gehouden wanneer het *status quo* aan regels inzake de toelaatbaarheid van bewijsmateriaal zou worden gewijzigd: 1) naast een regel over de toelaatbaarheid van laattijdig bewijs, mogen de *IBA Rules on the Taking of Evidence in International Arbitration* niet worden aangevuld met andere, nieuwe regels over de toelaatbaarheid van bewijs; 2) bij de wijziging van de ontvankelijkheidsregels moet altijd rekening worden gehouden met de doelgerichte benadering van de toelaatbaarheid van bewijs; 3) de liberale benadering van de toelaatbaarheid van bewijs moet worden verlaten; en 4) moet met de specifieke vereisten van art. V(1)(b), en art. V(2)(b) van de *New York Convention* rekening worden gehouden.

*Ten derde*, het *status quo* aan regels inzake de toelaatbaarheid van bewijsmateriaal zou in de toekomst op een van de volgende twee manieren kunnen worden gewijzigd: ofwel door de invoering van *ex ante*-rechtsregels inzake de toelaatbaarheid van bewijs, waarin duidelijk wordt bepaald welk bewijs in arbitrageprocedures niet toelaatbaar is, ofwel door de invoering van een exhaustieve lijst aan criteria die in een gegeven arbitrageprocedure tegenover elkaar moeten worden afgewogen. Hoewel beide alternatieven in de toekomst kunnen worden overwogen, wordt in deel 3.2.2.3 van dit proefschrift aangetoond dat afwegingstoetsen met duidelijke en vooraf vastgestelde afwegingscriteria de voorkeur genieten in de arbitragegemeenschap.

## 7. CONCLUSIES

De conclusies van het uitgevoerde onderzoek luiden als volgt:

1. De regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage worden geïllustreerd aan de hand van twee benaderingen van de toelaatbaarheid van bewijs. Deze benaderingen geven niet alleen een antwoord op de vraag: “Welke regels inzake de toelaatbaarheid van bewijs bestaan er in internationale handelsarbitrage?”, maar ook op de vraag :“Wat is het doel van deze regels?”:
    1.1. De conceptuele benadering geeft de regels inzake de toelaatbaarheid van bewijs weer zoals die zijn neergelegd in de *UNCITRAL Model Law on International Commercial*

*Arbitration, UNCITRAL Arbitration Rules,* de *Rules of Arbitration of the International Chamber of Commerce,* de *London Court of International Arbitration Rules* en de *IBA Rules on the Taking of Evidence in International Arbitration.* In het licht van deze benadering worden drie categorieën ontvankelijkheidsregels van elkaar onderscheiden: 1) ontvankelijkheidsregels die bedoeld zijn om de nauwkeurigheid van de waarheidsvinding te verbeteren, d.w.z. regels waarvan het hoofddoel verband houdt met de nauwkeurigheid van de feitelijke vaststelling in internationale arbitrageprocedures in handelszaken; 2) ontvankelijkheidsregels die bewijs uitsluiten vanwege de inhoud ervan, d.w.z. regels die bewijs uitsluiten op gronden die verband houden met de specifieke inhoud van dat bewijs; 3) ontvankelijkheidsregels die bewijs uitsluiten vanwege schendingen van het materiële- of procesrecht, d.w.z. op grond dat het bewijs is verkregen, ingediend, voorgesteld of beoordeeld op een wijze die in strijd is met het procesrecht of het materieel recht;

1.2. De doelgerichte benadering werpt een licht op de specifieke doeleinden die worden nagestreefd door de regels inzake de toelaatbaarheid van bewijs die zijn opgenomen in de *UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL Arbitration Rules,* de *Rules of Arbitration of the International Chamber of Commerce,* de *London Court of International Arbitration Rules* en de *IBA Rules on the Taking of Evidence in International Arbitration*. De ontvankelijkheidsregels zijn gebaseerd op het idee dat arbiters helaas, maar net als ieder ander mens, verschillende fouten zouden kunnen maken tijdens hun besluitvorming. De ontvankelijkheidsregels fungeren als een procedureel instrument dat helpt om 1) de nauwkeurigheid van de waarheidsvinding tijdens de procedure te verbeteren; 2) een behoorlijke rechtsgang te waarborgen; 3) de legitimiteit van zowel het scheidsgerecht als zijn beslissing te waarborgen; 4) een snelle en efficiënte procedure te waarborgen; 5) de bescherming van andere juridische waarden te waarborgen, zoals de mogelijkheid van een persoon om vrijelijk een advocaat of arts te raadplegen.

De formulering van ontvankelijkheidsregels als discretionaire bepalingen in de bronnen van het arbitragerecht maakt de verwezenlijking van deze fundamentele doelstellingen afhankelijk van

de ruime discretionaire bevoegdheid van arbiters en niet van *ex ante*-ontvankelijkheidsregels. Dat *status quo* veronderstelt dat arbiters de verschillende probleemsituaties in verband met de toelaatbaarheid van bewijs kennen, begrijpen en zelfstandig kunnen oplossen. Met andere woorden, in internationale handelsarbitrage worden arbiters geleid door de "*I'll know it when I see it*"-benadering in plaats van de "*I see it because I know it in advance*"-benadering.

2. De ruime discretionaire bevoegdheid van de scheidsgerechten wordt uitgeoefend overeenkomstig de algemeen aanvaarde liberale benadering. Uit de analyse van verschillende rechtvaardigingen die voor de liberale benadering worden gegeven, is echter gebleken dat deze benadering niet aangewezen is. De redenen die de liberale benadering zouden rechtvaardigen, kunnen worden bekritiseerd door te verwijzen naar twee procedurele omstandigheden, die uiteindelijk de verwerping van de liberale benadering van de toelaatbaarheid van bewijsmateriaal ondersteunen:
    2.1. Omstandigheden die de toepassing van regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage in de hand werken: 1) het arbitrageproces is niet gericht op de vaststelling van de objectieve, maar veeleer op de juridische, ook wel formele, waarheid; 2) arbiters zijn niet verplicht de norm van redelijke twijfel of de norm van absolute of redelijke zekerheid te bereiken, maar zwakkere norm van overwicht van bewijs (*preponderance of evidence*) die soms ook wordt aangeduid als 'de norm van de waarschijnlijkheidsafweging'; 3) de uitlegging en toepassing van art. V(1)(b) van de *New York Convention* door nationale rechters suggereert dat de uitsluiting van bewijs door de arbiters niet leidt tot de nietigverklaring van arbitrale vonnissen; 4) het ontbreken van hoger beroep is geen onderscheidend kenmerk van de arbitrageprocedure, aangezien in verschillende nationale jurisdicties het feitenonderzoek slechts eenmaal plaatsvindt, namelijk gewoonlijk in de rechtbank van eerste aanleg; 5) de partijen en de scheidsrechterlijke instanties beschikken over een breed scala aan mogelijkheden in de fase van de bewijsvoering;
    2.2. Omstandigheden die arbitragetribunalen ertoe aanzetten om de ontvankelijkheidsregels toe te passen: 1) het negatieve effect dat de vrije beoordeling van bewijsmateriaal kan hebben op het arbitrageproces, hetzij door de veronachtzaming van andere waarden dan de waarheidsvinding tijdens het arbitrageproces,

hetzij door het risico van cognitieve fouten bij arbiters; 2) de dreigende nietigverklaring van een vonnis op basis van het art. V(2)(b) van de *New York Convention* in gevallen waarin arbiters de ontvankelijkheidsregels die bewijsmateriaal uitsluiten, hetzij vanwege de inhoud ervan, hetzij vanwege inbreuken op het materiële recht of het procesrecht, niet toepassen; 3) een daling in de populariteit van arbitrage als alternatief geschillenbeslechtingsmechanisme, als gevolg van de onzekerheid over de vraag of en hoe de regels inzake de toelaatbaarheid van bewijs zullen worden toegepast; 4) het onvermogen van arbiters om zich te distantiëren van de informatie vervat in ontoelaatbaar bevonden bewijsmateriaal, is een reden om de aandacht van arbiters meer te laten vestigen op de regels inzake de toelaatbaarheid van bewijs in arbitrageprocedures; 5) de partijen en de scheidsgerechten beschikken over een breed scala aan mogelijkheden in de fase van de bewijsvoering.

3. Een kritisch onderzoek van de liberale benadering leidt tot de conclusie dat de discretionaire bevoegdheid van arbiters om de toelaatbaarheid van bewijsmateriaal te beoordelen, momenteel niet naar behoren wordt uitgeoefend. Dit noopt tot een revaluatie van een van de belangrijkste aspecten van het *status quo* aan regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage, namelijk de ruime discretionaire bevoegdheid van arbiters. Uit het gevoerde onderzoek blijkt dat de ruime discretionaire bevoegdheid van arbiters bij de beoordeling van de toelaatbaarheid van bewijsmateriaal behept is met de volgende vier tekortkomingen:
   3.1. Een van de algemeen aanvaarde waarden in de arbitragegemeenschap – rechtszekerheid – wordt niet gewaarborgd: noch de partijen noch de arbiters kunnen voorspellen welk bewijsmateriaal in internationale handelsarbitrage toelaatbaar zal worden geacht;
   3.2. De liberale benadering zorgt niet voor een uniforme rechtspraak tussen de scheidsgerechten, zowel wat betreft de verschillende en tegenstrijdige benaderingen van de invloed van het nationale recht op de toelaatbaarheid van bewijs als wat betreft de toepassing van verschillende regels inzake de toelaatbaarheid van bewijs in arbitrageprocedures;
   3.3. De liberale benadering leidt tot subjectieve besluitvorming, hetgeen er zowel toe leidt dat de arbitrageprocedure wordt

beheerst door *the rule of men rather than the rule of law*, als dat het nationale recht een ongewenste invloed heeft op de arbitrageprocedure;

3.4. De liberale benadering voorkomt niet dat ontoelaatbaar bewijs wordt aangedragen in een arbitragezaak en brengt voor zowel de partijen als de arbiters aanzienlijke investering van tijd en financiële middelen mee doordat zij de relevante ontvankelijkheidsvraagstukken moeten regelen.

Het bestaan van deze vier beoordelingsproblemen toont aan dat het *status quo* aan regels inzake de toelaatbaarheid van bewijs in internationale handelsarbitrage onverenigbaar is met de acht criteria van "goed recht" die de rechtstheoreticus L. L. Fuller heeft voorgesteld. Dat *status quo* is niet: 1) voldoende algemeen; 2) publiekelijk bekendgemaakt; 3) prospectief (d.w.z. alleen van toepassing op toekomstig gedrag, niet op gedragingen in het verleden); 4) duidelijk; 5) vrij van tegenstrijdigheden; 6) betrekkelijk constant; 7) toepasbaar; en 8) toegepast op een wijze die niet grondig afwijkt van de gebruikelijk betekenis van de gebruikte terminologie.

4. Een kritische analyse van het *status quo* aan regels inzake de toelaatbaarheid van bewijs stelt ons in staat aan te tonen dat het *status quo* moet worden gewijzigd en helpt om specifieke richtsnoeren voor die wijzigingen te formuleren. Het aan te passen instrument is niet de *UNCITRAL Model Law on International Commercial Arbitration* of het arbitrageprocesrecht, maar wel een *soft law*-instrument, idealiter de *IBA Rules on the Taking of Evidence in International Arbitration*. Bij de formulering van deze toekomstige wijzigingen moet rekening worden gehouden met de volgende algemene aspecten: 1) op één uitzondering na, namelijk een regel over de toelaatbaarheid van laattijdig bewijs, mogen de *IBA Rules on the Taking of Evidence in International Arbitration* niet worden aangevuld met andere nieuwe regels over de toelaatbaarheid van bewijs; 2) de doelgerichte benadering van de toelaatbaarheid van bewijs moet steeds voor ogen worden gehouden; 3) de liberale benadering van de toelaatbaarheid van bewijs moet worden verlaten; en 4) er moet rekening worden gehouden met de vereisten van arts. V(1)(b) en V(2)(b) van de *New York Convention*, zoals die in dit proefschrift zijn ingevuld. In overeenstemming met deze eisen kunnen twee alternatieve routes worden gevolgd om de problemen van het *status quo* aan regels inzake de toelaatbaarheid van bewijs te remediëren:

4.1. De vaststelling van specifieke rechtsregels over de toelaatbaarheid van bewijs, zodat zowel de partijen als de arbiters duidelijk weten of het in een zaak overgelegde bewijsmateriaal toelaatbaar is;

4.2. De invoering van een exhaustieve lijst aan afwegingscriteria, waardoor zowel de partijen als de arbiters vooraf weten welke specifieke criteria moeten worden afgewogen wanneer zij moeten oordelen over de toelaatbaarheid van bewijsmateriaal.

# LIST OF SCIENTIFIC PUBLICATIONS

## Scientific publications on the subject of the dissertation

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# LIST OF SCIENTIFIC EVENTS WHERE THE RESULTS OF THE DISSERTATION WERE PRESENTED

## International scientific events where the results of the dissertation were presented

Report “Rule of Law v. Balancing Test: the Admissibility of Illegally Obtained Evidence in Civil Proceedings” in the 2023 Post-Doctoral Summer School organised by the International Association of Procedural Law on 19–21 June 2023.

Report “The Admissibility of Evidence in International Commercial Arbitration” in the Doctoral Colloquium organised by the International Network for Law and Economics of the University of Lucerne on 9 May 2023.

Report “The Admissibility of Evidence in International Commercial Arbitration” in the Guest Forum organised by Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law on 9 February 2023.

Report “The Truth and Determination of the Truth in Lithuanian Civil Proceedings” in the international conference “Current Challenges for the Legal Systems of Lithuania and Ukraine: 2022” organised by Vilnius University Faculty of Law on 10 June 2022.

Report “Digitalisation of International Arbitration: How Can We Save Arbitrators’ Jobs?” in the international conference “Everything You Always Wanted to Know About Law (But Were Afraid to Ask)” organised by the International Network of Doctoral Network of Law on 2–3 of June 2022.

Report “Illegally Obtained E-Evidence in International Arbitration” in the international conference “Transnational Dispute Resolution in an Increasingly Digitalised World” organised by the Center for the Future of Dispute Resolution at Ghent University on 24 March 2022.

**National scientific events where the results of the dissertation were presented**

Report “Admissibility of Evidence in International Commercial Arbitration” in the annual PhD seminar organised by Ghent University Faculty of Law and Criminology on 16 December 2022.

Report “Truth v. Fairness: Illegally Made Audio Recording in Civil Procedure” in the national conference “Private Law Principles in Today’s Legal Reality” organised by Vilnius University Faculty of Law and the Supreme Court of the Republic of Lithuania on 4 February 2022.

Report “The Admissibility of Illegally Obtained Evidence in Civil Procedure and Arbitration” in the annual PhD students conference organised by Vilnius University Faculty of Law on 5 February 2021.

# INFORMATION ABOUT THE AUTHOR

Jurgis Bartkus was born on 25 May 1995 in Vilnius, Lithuania

**Education:**
2019 – 2023 Joint PhD studies at Vilnius University Faculty of Law and Ghent University Faculty of Law and Criminology.

2023 visiting scholar at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural (scholarship 2023).

2022 studies at the Hague Academy of International Law.

2018 studies at the School of European Private Law at Paris-Lodron University Salzburg.

2017 – 2018 Erasmus studies at Ghent University Faculty of Law and Criminology.

2014 – 2019 Master's degree from Vilnius University Faculty of Law.

**Professional experience:**
2023 – present Adviser to the President of the Civil Cases Division of the Supreme Court of Lithuania.

2019 – present Teaching Assistant at Vilnius University Faculty of Law. Subjects: Evidence and Proof in Civil Proceedings, Civil Procedure Law, Global Law and Legal Ethics, International and European Company Law.

2021 – 2023 Associate at law firm Bartkus & Partners COMPANY LAW INITIATIVE.

2021 Associate Expert at the Lithuanian Free Market Institute.

2018 – 2021 Junior Associate and Associate at law firm Ellex Valiunas.

Vilniaus universiteto leidykla
Saulėtekio al. 9, III rūmai, LT-10222 Vilnius
El. p. info@leidykla.vu.lt, www.leidykla.vu.lt
Tiražas 20 egz.