Cours 7 – Préparation

1. **Introduction**

* The procedure governing the conduct of an arbitration
  + Temporal scope: commences from the claimant’s initiation of the arbitration and extends up to the closure of the arbitral proceedings
  + International arbitration: freedom of the parties to choose and individually tailor the procedure
* Arbitral procedure may be conducted in flexible, cost-efficient and innovative ways that are attractive to the business community
* Flexibility as the most widely recognized advantage of international commercial arbitration
* Study of 2006: ‘active participation of the parties in determining and shaping the procedure inspires confidence in the process’

1. **Party Autonomy**
2. ***The principle***

* A foundation stone on which the entire edifice of international commercial arbi- tration rests is the principle of party autonomy. A major component of this prin- ciple involves the parties’ freedom to choose the procedure to be applied in their arbitration.
* Model Law embodied this principle in Article 19(1), which has since been referred to as ‘the Magna Carta for party autonomy in all modern laws on international commercial arbitration’
  + Further confirmation of the party autonomy principle is found in:
    - **Article V(1)(d) of the New York Convention** and
    - **Article 34(2)(a)(iv) of the Model Law**,
    - which empower a court to refuse enforcement or set aside an award if the party resisting enforcement establishes that ‘the arbitral procedure was not in accordance with the agreement of the parties’.

1. ***Limits to party autonomy***

* Despite its importance, the autonomy of parties to determine the procedure is **not absolute**. In a number of circumstances, their freedom is controlled or limited by law.
* Reason contained in the preparatory work of the Model Law
  + *“. . . To give parties the greatest possible freedom does not mean, however, to leave everything to them by not regulating it in the model law. Apart from the desirability of providing ‘supplementary’ rules . . . what is needed is a positive confirmation or guarantee of their freedom. Thus, the model law should provide a ‘constitutional framework’ which would recognize the parties’ free will and the validity and effect of their agreements based thereon.*
  + *. . . Yet . . . it is not suggested to accord absolute priority to the parties’ wishes over any provision of the law. Their freedom should be limited by mandatory provisions designed to prevent or to remedy certain major defects in the procedure, any instance of denial of justice or violation of due process. Such restrictions would not be contrary to the interest of the parties, at least not of the weaker and disadvantaged one in a given case. They would also meet the legitimate interest of the State concerned which could hardly be expected to issue the above guarantee without its fundamental ideas of justice being implemented*.”
* The main limits or constraints on party autonomy are

1. *Parties’ failure to agree* 
   * specific default provisions in the chosen set of rules or the *lex arbitri* may be triggered or the arbitral tribunal may be empowered to make the relevant  determination.
2. *Fundamental, mandatory due process principles* (also known as natural-justice principles)
   * principles are essential requirements akin to basic human rights that cannot be overridden by private agreement. An award might be set aside or be unenforceable if tainted by transgressions of such due process requirements.
3. *Other mandatory procedural laws* 
   * If the procedural rules agreed by the parties conflict with any non-derogable provisions of the lex arbitri, then the latter will usually prevail.
   * A noteworthy mandatory law in mainland China is the requirement of institutional arbitration, i.e. parties cannot choose ad hoc arbitration.
4. *Institutional requirements* 
   * may occasionally constrain party autonomy. For example, under some institutional rules parties are not free to exclude the supervision that is part of that institution’s procedure
5. *Third parties* 
   * No matter what the parties to the arbitration agree, their agreement by itself cannot legally bind a third party.
   * however, assistance may be sought from the national courts of a competent jurisdiction to issue an order that legally obliges a third party to act.
6. *Arbitral tribunal discretion*
   * If the arbitral tribunal cannot accept the parties’ agreement on a matter of procedure, it should ordinarily offer its resignation. However, in practice an experienced arbitral tribunal may effectively require the parties to abide by certain procedural rules and decisions despite a reluctance by both parties.
7. *The role of domestic courts*
   * Court decisions concerning a given arbitration are often not fully consistent with what the parties originally agreed in relation to that arbitration.
8. **Rules procedural law and guidelines**
9. ***Arbitration rules***
10. Choice of arbitration rules

* The parties may, but are not required to, agree on a set of institutional or ad hoc arbitration rules to apply to their arbitration.
  + If they don’t : none will apply.
  + Alternatively, they may simply formulate their own rules or rely on the procedural law at the seat of arbitration.
* Should the procedural rules chosen by the parties be silent as to any matter:
  + the necessary procedure may be chosen by further agreement between the parties
  + or it may be determined by the arbitral tribunal
  + or the lex arbitri.
* Consistent with the party autonomy principle, parties are free to choose the procedural rules of any arbitral institution
* If an arbitration is ad hoc, the rules typically adopted by the parties are the UNCITRAL Arbitration Rules. However, an arbitration can be entirely ad hoc, with no set of arbitration rules involved.
* The procedural rules chosen never cover all the procedural issues that may arise. Usually, once an arbitral tribunal has been appointed, it will hold a preliminary meeting with the party representatives in which many points of procedure will be finalised.
* It is rare that parties do not indicate (through an express choice or by implicitly incorporating institutional rules) what rules will govern their arbitration.
  + But if they do not agree on any rules => the law of the seat of arbitration will govern the arbitral procedure.

1. Differences between institutional and ad hoc arbitration procedure

* The degree of supervision or administration offered by arbitral institutions varies.
  + While the policy of most arbitral institutions **is to leave the arbitral tribunal as free as possible**,
  + **some are more proactive** in ensuring that the arbitration proceeds smoothly and efficiently and complies with its own rules.
    - The ICC Rules, Article 18 : while being very flexible on procedure generally, require an arbitral tribunal to draw up **‘terms of reference’** that identify the issues to be determined
* It follows that ad hoc arbitrations are generally more flexible in the procedure that they may adopt because they are not constrained by the requirements set by arbitral institutions.
  + But the lack of an arbitral institution may in fact be a drawback because:
    - such institutions perform important administrative functions
    - employ counsel with the relevant legal experience, who are available to advise the arbitral tribunal and parties on day-to-day issues.
    - Also : where a party is recalcitrant or otherwise difficult, the support of a supervisory institution will help to minimise that party’s misconduct.
    - Arbitrators also find comfort with the support of an experienced institution that offers a neutral sounding-board for complicated aspects of arbitration practice

1. Failure to object to non-compliance with procedural rules

* A party that does not object to a failure to comply with an applicable procedural rule may be deemed to have waived its right to object subsequently.
  + waiver and estoppel

1. Applicable version of the rules

* A question as to the applicable version of any arbitration rules can arise when the rules are revised or otherwise amended between the time the arbitration agreement is concluded and the time the arbitration is commenced.
  + **Black and Veatch Singapore Pte Ltd v Jurong Engineering Ltd**
    - would be bound to the most appropriate SIAC Rules available at the time of their submission to arbitration.
      * Consequently, because the arbitration was domestic, it was held that the domestic rules of SIAC were applicable even though they did not exist at the time the arbitration agreement was concluded. This decision is consistent with international practice

1. ***IBA Rules of Evidence***

* The International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (‘IBA Rules of Evidence’).
* These Rules, as indicated in their Preamble, are designed not to supplant but ‘to supplement the legal provisions and the international or ad hoc rules according to which the Parties are conducting their arbitration’.
  + David Rivkin : the Rules ‘reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures’.
* However, they have not been immune to the criticism that they are more oriented towards a common law approach
* Parties agree that the arbitral tribunal may refer to them for guidance without being bound by them
  + A Rules of Evidence could play many roles in an arbitration
    - arbitrators consider themselves to be ‘inspired though not bound’ by the IBA Rules of Evidence while others prefer to adopt them as binding

1. **Core procedural rights and duties**

* State courts exercise supervisory jurisdiction over arbitrations that are seated in that state.
  + A major aim of this supervisory function is to ensure that the fundamental procedural rights of parties are protected.

1. ***Right to present case***

* A fundamental right accorded to all parties to an arbitration is that each party be given a reasonable opportunity to present its case
  + Latin maxim audi alteram partem (hear the other side).
* To enable the presentation of each party’s case:
  + all documents or information supplied to the arbitral tribunal by one party should at the same time be communicated to the other parties
    - The Working Group considered that while this contemporaneous communication generally reflected an important principle,
      * there would be circumstances where it would be inappropriate and have the potential to create procedural inequality.
    - this obligation was a matter of minor controversy during the revision of the UNICTRAL Arbitration Rules.
* The Working Group therefore recommended giving the arbitral tribunal a discretion to vary the rule.
* The issue was further discussed by the Commission with the result that the **2010 UNCITRAL Rules** give the arbitral tribunal discretion only where it is permitted by applicable law.
  + A related requirement is that any expert report or evidentiary document relied on by the arbitral tribunal must be communicated to the parties
  + ‘reasonable’ opportunity to each party to present its case.
    - The term ‘reasonable’ avoids reference to a ‘full’ opportunity to present a party’s case, as is the terminology used in Article 18 of the Model Law.
      * the 2010 UNCITRAL Arbitration Rules now use the word ‘reasonable’
* **Dadras International v Islamic Republic of Iran, (1995)**
  + the Tribunal is unpersuaded that any Party can credibly claim that it has been denied a ‘full opportunity of presenting [its] case’ given the procedural history of these Cases. The key word is **‘opportunity’**: the Tribunal is obliged to provide the framework within which the parties may present their cases, but is by no means obliged to acquiesce in a party’s desire for a particular sequence of proceedings or to permit repetitious proceedings.
* Finally, it should be noted that a party’s right to present its case does not neces- 7.32 sarily include the right to an oral hearing.

1. ***Right to equal treatment***

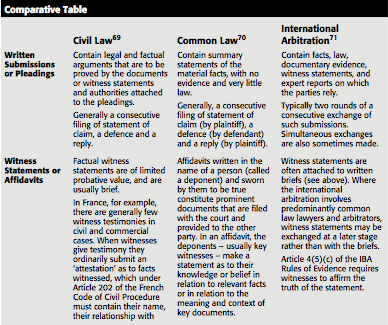
* The rights to present one’s case and to be treated equally overlap significantly.46 7.33 However, it is helpful to keep the two separate as each also possesses distinctive features.
  + The requirement that parties be treated with equality is well established and 7.34 constitutes a cardinal principle of arbitral procedure
  + **Article 15(2) of the ICC Rules**:
    - ‘*the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case’*
  + ‘**fairly and impartially’** rather than **‘equal treatment’** has been said to be that ‘in some cases, treating the parties in precisely the same manner may lead to unfair results’

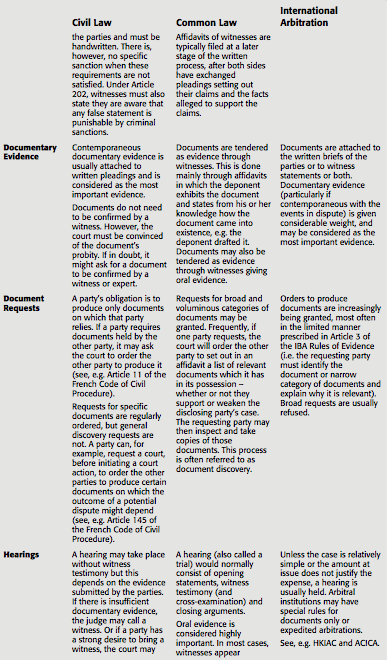
1. ***Arbitrators’ duty to avoid delay and expense***

* Related to arbitral procedure and to some extent procedural rights is an emerging duty on arbitrators to avoid unnecessary costs and delay
  + a fair means for resolving the dispute to which the proceedings relate
* A number of institutional rules impose a time limit within which the arbitral tribunal should render its award
  + **Under the ICC Rules**
    - the failure of the arbitral tribunal to complete the arbitration in a timely manner may lead to a reduction in its fees, which are fixed by the ICC Court,
    - or in an extreme case one or more members of the arbitral tribunal may be replaced
* Growing concern about time and costs in arbitration prompted the ICC Commission on Arbitration to set up a special Task Force in 2004 dedicated to the issue.
  + As a result of its research the **ICC published in 2007** a guide called *Techniques for Controlling Time and Costs in Arbitration*
    - a practical tool designed to stimulate the conscious choice of arbitral procedures with a view to organising an arbitration that is efficient and appropriately tailor-made.
      * It is intended to encourage arbitrators and parties to create a new dynamic

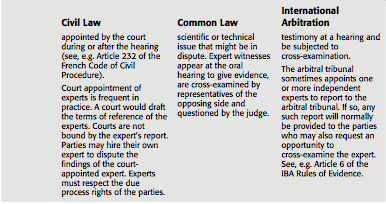
1. **Balancing common law and civil law procedure**

* International commercial arbitration frequently involves two or more parties based in jurisdictions whose legal traditions are different.
  + balance between these traditions in terms of procedure is one of international arbitration’s key advantages.
* A traditional characterization of these two legal systems is that:
  + the common law is said to be adversarial (i.e. the judge largely leaves the presentation of the case to the parties),
  + whereas civil law procedure is described as inquisitorial (i.e. the judge tends to play a more active role in ascertaining the truth and is less dependent on the arguments put forward by the parties).
* This difference between various Asia-Pacific legal systems is sometimes overlooked by practitioners trained solely in common law jurisdictions.
* Then arbitrators from both the civil law and the common law sit together,
  + **cross-cultural influences may lead to the adoption of the better aspects from each tradition and the avoidance of weaker aspects**.









1. **Arbitral proceedings**
2. ***Overview of typical procedural steps***

Again, at the risk of oversimplification, the following list sets out in sequential order many of the most typical procedural steps from the commencement to the closure of an international arbitration:

1. notice of arbitration;
2. response to the notice of arbitration;
3. appointment of arbitrators;
4. preliminary meeting between the arbitral tribunal and the parties at which procedural timetables and documents such as terms of reference might be prepared (this meeting may be in person, by telephone, video-link, or dispensed with altogether);
5. exchange of written submissions (witness statements may instead be attached to pre-hearing briefs);
6. disclosure of documentary evidence (requests to produce);
7. oral hearing (with witnesses of fact and expert witnesses);
8. post-hearing submissions;
9. deliberations of the arbitrators;
10. issuance of the award; and
11. setting aside or enforcement of the award in domestic courts.

* As a consequence of the flexible character of arbitral procedure and party autonomy,
  + these steps may not feature in an arbitration and other steps not mentioned may also be adopted.
  + it should be borne in mind that the arbitration procedure may sometimes be split into different phases.

1. ***Initiating the arbitration***

* The notice of arbitration (or request for arbitration) initiates the arbitration process.
  + It typically includes:
    - details of the parties,
    - the arbitration clause or agreement invoked,
    - the nature of the claim and remedy sought,
    - and proposals for the appointment of arbitrators.
* Institutional arbitration rules often require that the respondent submit an answer (or response) to the notice or request,
  + a brief document responding to the notice of arbitration.
  + Later provisions of those rules may require parties to file more detailed written submissions, such as a statement of claim (or case) or a statement of defence.

1. ***Representation***

* Arbitration rules and laws generally do not require that a person representing a party in an arbitration be a lawyer.
* In practice, however, lawyers virtually always represent the parties in large international commercial arbitrations.
  + The position of the Chinese Ministry of Justice : restrictive.
    - It has been observed that on its face this appears to permit ‘*foreign law firms to practice arbitration in China; however, since Chinese law is applied or otherwise implicated in almost every arbitration case in China, the prohibition on providing advice or commenting on relevant China law issues constitutes a restriction*’
* Institutional rules and domestic laws may also need to empower arbitral tribunals to refuse a party’s chosen representative in appropriate cases

1. ***Preliminary meeting***

* Once an arbitral tribunal has been appointed, the arbitrators may confer by teleconference or email and discuss issues relating to the organization and conduct of the proceedings.
* Thereafter, the arbitral tribunal might hold a preliminary meeting with the parties.
  + At this preliminary meeting the arbitral tribunal, in consultation with the parties, will decide a number of procedural issues

1. ***Terms of reference***

* The ICC is well known for requiring ‘terms of reference’ to be drawn up by the arbitral tribunal as soon as it receives the arbitration file from the ICC Secretariat.
  + **Article 18(1) of the ICC Rules** requires that those terms include a summary of the parties’ claims and the particulars of the applicable procedural rules.
    - They may also include a list of issues to be determined. The terms of reference must be signed by the arbitral tribunal as well as the parties.
* In some instances, where an original arbitration agreement is defective, the terms of reference – because they are signed by the parties – may be considered as a substitute arbitration agreement

1. ***Witten submissions***

* Like virtually all aspects of arbitration procedure, the type, number and sequence of written submissions is flexible and varies greatly.
  + It is common for the exchange of written submissions to take place consecutively rather than simultaneously
  + After a statement of claim is served or submitted, the respondent is required to serve or submit a statement of defence, to which would ordinarily be attached supportive documentary evidence and witness statements.
* Although in practice it is relatively rare for arbitral proceedings to be based solely on documents, this may result in very fast and economical arbitrations
* Documentary evidence is often attached to pre-hearing written submissions.
  + in rare cases, a party might wish to withhold a document for a later stage of the proceedings.
    - This might be part of a strategy used to withhold the document until the cross-examination of a witness.
      * Caution should be applied in adopting such a technique because

(1) that document may be required to be disclosed in a document production request (2) it is highly probable that the other party will object to the document’s later inclusion on the grounds that

(i) it has been submitted out of time;

(ii) it is unfair to surprise the opposing party with such a document; and/or

(iii) extra time is needed to respond to it, with the costs of any adjournment

to be paid by the late-submitting party.

* As regards the filing or service of the written submissions, deadlines are usually set by the arbitral tribunal in consultation with the parties.
  + In the absence of agreement by the parties and subject to the arbitral tribunal’s (or arbitral institution’s) discretion, some institutional rules fix time periods for submission.
* Post-hearing written submissions are common in larger cases.
  + parties : permitted to comment on the evidence that was given during the hearing or they may be permitted to summarize in one final document all factual and legal arguments presented during the proceedings.

1. ***Amendment of claims***

* Many institutional rules and laws in the region provide for the amendment of the claim or defence.
  + The ICC Rules are different in this respect.
    - silent as to ‘amendments’ to claims but prohibit the introduction of ‘new claims’ falling outside the scope of the terms of reference without the arbitral tribunal’s permission. No definition of a ‘new claim’ is provided.
      * A mere amendment to, say, the quantum of the claim, or refining the language of a claim will not normally be considered as a new claim.
* if a new claim is not admitted, that does not amount to rejection of the claim. A claim not admitted, subject to jurisdictional requirements, may be reintroduced in a later proceeding.

1. ***On-site inspections***

* Colloquially, an on-site inspection may be referred to as a ‘see, touch and smell’ exercise.
  + It gives the arbitral tribunal an important impression of a place or object that is relevant to the arbitration and may provide the arbitrators with a deeper understanding of the factual issues in dispute.
    - The power to conduct on-site inspections is given to most courts and arbitral tribunals
* However:
  + **Article 24(2) of the Model Law** provides that for any meeting of the arbitral tribunal at which inspection of property is to take place, the parties should be given sufficient advance notice. Again, this is simply an application of due process principles.

1. ***Bifurcation and trifurcation***

* A procedural device that may increase efficiency in arbitration involves splitting the procedure into several phases.
  + Bifurcation and trifurcation, respectively, divide the proceedings into two or three phases,
    - for example,
      * one dealing with jurisdictional issues,
      * one dealing with liability
      * and a final one with quantum or costs.
  + Partial arbitral awards may be issued for each phase before the following one begins.
  + This division can save costs and time.

1. ***Party default and non-participating parties***

* Some international arbitrations involve a respondent that decides not to participate in the arbitration.
  + Less often, a claimant may file a notice of arbitration but thereafter it may fail to submit a statement of claim. The arbitration’s procedural laws and rules usually stipulate the consequences in these situations of party default.
    - In the context of ICC arbitration, in 2009 there was at least one non- participating party in 6.4% of ICC arbitration cases.
* Non-participation raises the question whether the arbitration should proceed **ex parte (i.e. without the respondent’s participation)**
  + In arbitration, however, refusal by the respondent to participate does not override the arbitral tribunal’s duty to examine and question the claimant’s position.
  + the claimant is still required to prove its case : according to **Article 25(b) of the Model Law**, if:
    - *the respondent fails to communicate his statement of defence . . . the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant’s allegations.*
* AT must issue an award that is accompanied by reasons for its decisions and detailing the circumstances of the respondent’s failure to participate.
  + **Hainan Machinery Import & Export Corporation v Donald & McArthy Pte Ltd**
    - Hainan initiated CIETAC arbitration proceedings but some of the documents it relied on were in Chinese.
      * *Although informed of the hearing Donald did not attend. After the hearing, Donald was informed that it had taken place and was given an opportunity to submit materials. Donald simply replied stating that it did not agree to the arbitration. An award was rendered in favour of Hainan. Enforcement of the award was sought and granted in Singapore. The decision of the Singapore High Court in granting enforcement noted that there were no errors of procedure made in the arbitration*
* Not all laws or rules address a claimant’s failure to submit a statement of claim after it has made a request for arbitration.
  + The procedural laws or the arbitral rules that deal with such a circumstance generally require termination of the arbitral proceedings

1. ***Expedited arbitration procedures***

* In certain circumstances, the parties to arbitration may desire a swift resolution of their dispute.
  + The principle of party autonomy allows them to agree on **an expedited or fast-track procedure.**
    - Parties may prefer faster dispute resolution at the possible sacrifice of a better quality decision.
  + A more cost effective process is an important feature of expedited arbitration, particularly where the amount in dispute is relatively small.
  + The rapid determination of legal rights has also been considered positive in the sense that it reduces prolonged uncertainty.

1. ***Arb-Med***

* As its name suggests, arb-med is a fusion of arbitration and mediation.
* Under this process, arbitrating parties agree that their arbitrator may act as a mediator in the same dispute at some point during the arbitral proceedings.
  + The essential difference between arbitration and mediation is that the latter is facilitative.
  + It involves an impartial third party mediator who assists the parties to arrive at a settlement.
    - Unlike an arbitrator, a mediator lacks the power to impose a decision on the parties.
* In relation to China in particular,
  + Michael Moser that *‘[o]ne of the unique characteristics of arbitration in China is that proceedings before the international arbitration bodies frequently involve conciliation’*.
* It has been observed that ‘[m]any cases show that the party’s frank confidential chats with the arbitrator acting as a mediator [do] not make resumption of the arbitrator’s work as an adjudicator difficult’.
  + However, this may not always reflect the reality of the situation.
* Some of the attractive features of arb-med are reported to be that

(1) it provides a ‘gentler solution’ to arbitration,

(2) it facilitates a continuation of commercial relations, and

(3) arbitrators have the power to make binding decisions if the mediation attempted during the arbitration fails.

* + As regards the latter feature, it is considered that the decision-making power of arbitrators tends to increase the chances that the parties resolve their differences in the mediation because a failure to settle will result in a binding arbitral award that may not be satisfactory to one or even all of them
* Enforcement of an award may be jeopardised or the award may be set aside if such requirements are not present.
  + Given the potential risks, caution should be exercised before utilising arb-med procedures if the arbitrator may be expected to resume his or her arbitral role failing successful mediation.

1. ***Termination of the proceedings***

* Under **Article 32(1) of the Model Law** a final award terminates the arbitral proceedings. Other circumstances in which proceedings may be terminated include:

1. the claimant’s withdrawal or discontinuance of a claim, which is not objected to by the respondent;
2. an agreement by the parties to terminate or discontinue the proceedings;
3. a finding by the arbitral tribunal that continuation of the proceedings has  become unnecessary or impossible; or
4. the failure of the parties to act.

* Once the arbitral tribunal issues an award that leaves no more disputed issues between the parties to be determined, the arbitral proceedings are brought to a close and the arbitral tribunal becomes **functus officio**, i.e. it has discharged its duty.
  + However, this may not terminate the matter between the parties because they may be entitled to challenge the award before domestic courts.
    - the mandate of the arbitral tribunal may revive if there is a request by a party (or decision by the arbitral tribunal on its own initiative) to correct or interpret the award
    - or if a court hearing a setting aside application determines that the arbitral tribunal shall ‘resume the arbitral proceedings or
    - to take such other action as in the arbitral tribunal’s opinion will eliminate the grounds for setting aside’

1. **Evidence**

* More than half a century ago, Bin Cheng observed that the ‘conviction of the Tribunal as to the truth of the assertions of the parties is secured by means of evidence’
* Evidence is largely unregulated in international arbitration. Party autonomy dictates matters of evidence. Failing an agreement between the parties, the arbitral tribunal is usually empowered to decide on the admissibility, relevance, materiality and weight of evidence
  + **Municipal Corporation of Delhi v Jagan Nath Ashok Kumar**
    - *Appraisement of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers. The arbitrator in our opinion is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge of the evidence before the arbitrator.*

1. ***Burden and standard of proof***

* Concerning the burden of proof in international commercial arbitration, each party must prove the facts on which it relies.However, the standard or degree of proof required is a matter for the arbitral tribunal to determine.
  + Redfern and Hunter: while acknowledging that the standard of proof in international arbitration is not precise, appear to distil generally from arbitral practice a ‘**balance of probability’** standard
  + Lew, Mistelis and Kro ̈ll observe that the standard of proof may be a matter of substantive law and may depend on the subjective views of the arbitrators in each case.
* exceptional cases:
  + ex: when a claimant produces prima facie evidence in a situation where proof of a fact is extremely difficult and there is an absence of rebuttal by the respondent.
    - In such cases, the arbitral tribunal might shift the burden of proof on relatively little evidence or it may not insist on very rigorous standards of proof.
* Proof would not usually be required in the event the fact or proposition is uncontroversial, common knowledge or obvious.

1. ***Documentary evidence***

* A particular feature of international arbitration that distinguishes it from proceedings in common law courts is its emphasis **on evidence in the form of contemporaneous documents created around the time the transaction or the events giving rise to the dispute took place**
* Bin Cheng
  + *‘Testimonial evidence’, it has been said, ‘due to the frailty of human contingencies is most liable to arouse distrust.’ On the other hand, documentary evidence stating, recording, or sometimes even incorporating the facts at issue, written or executed either contemporaneously or shortly after the events in question by persons having direct knowledge thereof, and for purposes other than the presentation of a claim or the support of a contention in a suit, is ordinarily free from this distrust and considered of higher probative value*.
* The consequence is that in international arbitration, documents are readily admitted without arguments as to whether they are admissible
  1. Document production – Domestic court practice
* At one end of the spectrum must be placed the US document discovery procedure, which is broad and extensive.
  + Next in line are the more temperate discovery procedures of English courts and former British colonies, which view discovery as integral but require or order document disclosure on a less extensive scale than in the US.
* And on the other end of the spectrum, one finds many civil law jurisdictions.
  + At this end of the spectrum, one may also find some Asia-Pacific countries with civil law systems
* Giorgio Bernini
  + “*the taking of evidence in international arbitrations is likely to present itself as the occasion in which the different approaches characterising the contribution of civil and common law attorneys and arbitrators may give rise to a serious cultural clash. Discovery, in particular, is bound to remain a very controversial issue in arbitration. Nonetheless, the actual practice of arbitration shows signs of adjustment, and, despite theoretical differences, a workable modus vivendi has emerged in the reality of arbitration practice at [the] international level*.”
  1. Document production – Arbitral practice
* Arbitration rules sometimes contain specific provisions that empower arbitral tribunals to order document production.
* Although it is impossible to generalise about the type of document discovery usually permitted by international commercial arbitral tribunals,
  + one thing is clear: extensive US style court discovery is rarely, if ever, practised.
* It is also clear that there is great variation in the extent of discovery or document production that is permitted in international arbitration.
  + It depends on the procedure agreed by the parties, the circumstances surrounding the request and on the preferences of the arbitrator(s), which might in turn depend on their legal background and experience.
    - Lawyers trained in common law systems should not assume that the practice of obtaining evidence through discovery that may be familiar to them will be appropriate or acceptable in an international commercial arbitration.
    - On the other hand, lawyers trained in civil law systems should be ready to accept at least some form of document production.
  1. Court assistance in document production
  2. The IBA Rules of evidence and document production