

Dr. Fabian von Schlabrendorff

Partner

Clifford Chance, Frankfurt

ETHICAL STANDARDS FOR ARBITRATORS, HYBRID PROCEEDINGS, RULES OF TRANSNATIONAL LAW: ARE WE MOVING TOWARDS A UNIFORM LAW OF INTERNATIONAL ARBITRATION?

The article examines trends towards uniformity in three important areas of the law of international arbitration: ethical standards for arbitrators, procedures for evidence taking, and application of transnational rules of law. While there is a clear movement towards the harmonisation of legal concepts and standards in all three areas which is the result of changes in international and domestic law, the practice of international arbitral tribunals and the activities of private or intergovernmental “formulating agencies”, a comparison of developments also shows important differences. The degree of convergence which can be achieved depends on the acceptance of privately proposed rules by arbitrators, arbitral institutions and, to a certain degree, also by the courts reviewing the arbitral process. The described developments do not support the idea of the existence of an autonomous body of lex mercatoria, but provide ample evidence of a “transnationalist” attitude of arbitrators, arbitral institutions and formulating agencies, which aims at identifying and applying legal concepts to international commercial transactions which are consistent with their international character.

Key words: *Ethical rules – Hybrid proceedings – Lex mercatoria – New York Convention on the Recognition and Enforcement of Foreign Awards – Transnational rules of law – Uniformity of international arbitration law.*

1. INTRODUCTION

International commercial arbitration relies on manifold sources of law, including international conventions, national laws on arbitration,

rules and practices implemented by arbitral institutions, court decisions, decisions and practice as applied by arbitral tribunals and, last but not necessarily least, agreements between parties to arbitration proceedings. Yet, despite this great variety of public and private law sources, as noted by many observers¹, there seems to be a general trend towards unifying rules and standards applicable within the field of international arbitration. The great variety and flexibility which arbitration offers for solving national and cross-border legal disputes appears to be overshadowed by an increasingly standardised approach to private dispute resolution in the international arena.

This article examines this move towards uniformity with regard to three important areas of international arbitration law: ethical standards of behaviour for arbitrators, hybrid common/civil law proceedings on evidence taking and the reliance on rules of transnational law in arbitral decisions. The purpose of taking a closer look at the developments in these three select areas of international arbitration law is firstly to find out some useful details of the degree of harmonisation which currently exists, as well as about the influences which can explain the generally observed trend towards uniformity. Is there a general trend suggesting that all aspects of international arbitration law will become increasingly standardised, or is it necessary to differentiate between different areas of the law? Secondly, a closer look at developments may also be of some use in trying to find out whether these actually support the idea of an autonomously developing international arbitration law, of a *lex mercatoria* of arbitration.

In view of the broadness of the topics addressed in this article it is not possible to provide an exhaustive analysis. Rather, the study of these topics must necessarily remain a rough sketch of developments in international arbitration law, limited to a description of only its most salient features.

2. A BRIEF OVERVIEW OF THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION

In line with the international growth of business activities from the 1950s to the present day, international commercial arbitration has become a phenomenon of global significance.²

¹ Setting the development of arbitration in the general context: K.-H.Böckstiegel, “The Role of Arbitration within Today’s Challenges to the World Community and to International Law”, *Arbitration International* 22/2006, 165 etc.

² An excellent overview is given by J. Lew, “Achieving the Dream: Autonomous Arbitration”, *Arbitration International* 22/2006, 179 etc.

The first legal basis for international commercial arbitration was provided by the 1958 New York Convention on the Recognition and Enforcement of Foreign Awards, which fundamentally changed the pre-existing regime of the recognition and enforcement of international arbitral awards as it existed in many countries.³ Arbitral awards now have to be recognised and enforced practically globally⁴ if the successful party shows the existence of an arbitration agreement and the ensuing award. National courts are granted the discretion to refuse enforcement only on the limited grounds set out in Art. V of the Convention (non-conformity of the award with the arbitration agreement or its decisions being outside the terms thereof; violation of due process; non-observance of public policy in respect of contents and subject matter of the award).

Equally important for the internationalisation of commercial arbitration have been subsequently the UNCITRAL Arbitration Rules published in 1976 and the UNCITRAL Model Law on International Commercial Arbitration of 1986, revised in 2006⁵. The objectives of the UNCITRAL Model Law can be said to have been twofold: Firstly, it has been a template of domestic law on arbitration which reflects widely accepted principles of international arbitration, allowing countries without such legislation, or those wishing to modernise their legislation, to easily formulate and adopt domestic legislation on international (and national) arbitration. Secondly, it has ensured that new legislation on arbitration adopted by individual countries followed the principles of the Model Law, thereby achieving a harmonisation of domestic arbitral legislation.

A fundamental principle of the Model Law, the strict limitation of the role of local courts in supervising international arbitration, is enshrined in its Art. 5:

“In matters governed by this Law, no court shall intervene except where so provided in this Law.”

The impact of the Model Law has been significant. To date, more than 60 countries and 6 US states have adopted or closely followed the Model Law. Many other countries, including “major arbitration jurisdictions” such as Switzerland, England, France, the USA and Sweden, have adopted and modernised their legislation espousing the Model Law’s philosophy and many of its principles. As a result, the legal concepts of party autonomy, competence-competence, freedom of the arbitrators to select the procedure (within the confines of due process) and the strict

³ As reflected in the Geneva Protocol of 1923 and the Geneva Convention of 1927.

⁴ More than 140 states have so far become members of the New York Convention.

⁵ Mainly to modernise form requirements and to provide a more comprehensive regime for interim measures.

limitation of court interference in the arbitral process have all become common features of domestic legislation on international arbitration.

The UNCITRAL Arbitration Rules of 1976, currently under review for adaption to modern developments⁶, are now frequently used in *ad hoc* commercial arbitration proceedings, in addition to the rules of the major arbitral institutions, but also in treaty-based arbitrations between investors and states. In the wake of the modernisation of domestic laws on arbitration, the established international arbitration institutions have revised and updated their rules, and a number of new and important institutions have emerged. Frequently, the updating of existing rules, or the creation of new ones, has been inspired by the model found in the UNCITRAL Arbitration Rules and the rules of the established institutions, with the consequence that “we see many similarities and often identical solutions”.⁷ None of these rules refer to national procedural law. Copying the approach of domestic legislation, they typically do not mention details of procedure, leaving them to the parties and the arbitrators to determine.

These changes have all brought about the internationalisation of arbitration. International arbitrators now have an unprecedented degree of discretion in determining issues of procedural and substantive law. The generally accepted removal of arbitration from the control of domestic courts represents perhaps the most significant element of a convergence in the law of international arbitration.

3. Ethical Standards for Arbitrators

The behaviour of arbitrators, both prior to their appointment and in the conduct of the proceedings, is fundamental to the arbitral process. In all national arbitration laws and in the New York Convention, the requirements of independence and impartiality appear as a vital aspect of the arbitral function. Other relevant issues of the deontology of arbitrators, although at the same time a matter of the contract between the arbitrator and the parties, are the diligent and efficient conduct of the proceedings, confidentiality, the fair and equal treatment of the parties and the avoidance of improper communications with the parties.

As regards the central issue of the independence and impartiality of the arbitrator, this is, although the phrasing may differ, established as a principle of arbitration in practically every domestic law on arbitration.⁸

⁶ The revision process, undertaken mainly to adapt the Rules to their increased use in investor-state arbitration, was started in 2006.

⁷ K.-H. Böckstiegel, 165, 174.

⁸ Although the emphasis may differ. Art. 24 (1) of the English Arbitration Act of 1996, for example, only refers to impartiality while Art. 180 of the Swiss Statute on International Private Law only refers to independence. It is recognised, however, that both

According to Art. 12 (2) of the UNCITRAL Model Law, a party may challenge an arbitrator “if circumstances exist that give rise to justifiable doubts as to his impartiality or independence”. There is no definition in the Model Law, nor typically in any of the domestic legislation on arbitration, of what is to be understood under “justifiable doubt”, “impartiality” or “independence”. Furthermore, except for requiring that a prospective arbitrator shall disclose “any circumstance likely to give rise to justifiable doubts as to his impartiality or independence”, the legislation remains silent on any specific requirements regarding disclosure. Institutional arbitration rules are also limited to mentioning the principles without providing any more specific rules. Generally, therefore, the matter is left to the application of the principles by the courts and arbitral institutions and to legal writings. And at that level, however, in view of the myriad factual settings, the potential for coming to different results in applying the principles to specific facts is significant.⁹

However, while probably not unwisely, the national legislator in all countries has stuck to an approach leaving it to the courts to come to detailed answers under the rule of the general principles of independence and impartiality, a number of arbitral institutions and other private organisations such as the International Bar Association (IBA) have moved to formulate more detailed ethical rules for arbitrators, concerning the issues of impartiality and independence as well as other aspects with regard to the conduct of arbitral proceedings. In 1977 the American Arbitration Association (AAA) and the American Bar Association (ABA) jointly published their “Code of Ethics for Arbitrators in Commercial Disputes” which, covering the obligations of party-appointed and neutral arbitrators, catered mostly for the needs of US arbitration. In 2004, however, the Code was updated, this time clearly also aimed at arbitrators acting outside the national context of the AAA or other US institutions. In 1987 the IBA adopted its “Rules of Ethics for International Arbitrators” which from the outset were addressed to international arbitrators in any jurisdiction. In 1990 the London Chartered Institute of Arbitrators presented its “Guidelines of Good Practice”, which, in 2001, were updated and integrated into a “Code of Professional and Ethical Conduct”. And, most recently, in 2004, the IBA presented its “Guidelines on Conflicts of Interest in International Arbitration, which, with regard to the issues of independence and impartiality, replace the 1987 IBA Rules of Ethics¹⁰.

concepts represent “two sides of the same coin”. See H. Raeschke-Kessler, “The Contribution of International Arbitration to Transnational Procedural Law”, in: G. Aksen *et al.* (eds.), *International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner*, 2005, 647, 654.

⁹ See, for example, H. Raeschke-Kessler, *op. cit.*, with reference to German jurisprudence on national arbitration proceedings, 655, 656.

¹⁰ For a detailed comparison of ethical rules for arbitrators see G. Sachs, “Verhaltensstandards für Schiedsrichter”, *German Institution of Arbitration* 23/2008.

All these rules and codes, in spite of their name, are essentially of a non-binding nature, with the exception of the CIArb Code of Conduct. The latter, although developed with the intention of a supra-national application, is addressed to the members of CIArb and has insofar a binding character, although it is not intended to replace any applicable law or arbitration rule.

Even to the extent they are non-binding, however, these rules and codes must be considered potentially influential as parties may not only agree upon them but may refer to them in challenge applications. The ultimate test for their impact would, of course, be their acceptance by the courts.

What makes the IBA Guidelines a special case in this context is their regulatory approach. Like the other codes, the Guidelines also provide a list of General Standards with regard to independence and impartiality, as well as disclosure requirements.

At the same time, however, the Guidelines take a very pragmatic approach by setting out lists of specific factual situations in relation to the General Standards, thereby allowing for an analysis of what type of factual situation is covered or not covered by a General Standard. These lists of specific factual situations are divided into a Green List (no conflict of interest), an Orange List (of conflicts which may give rise to justifiable doubts) and Red List (of conflicts which give rise to justifiable doubts), divided into waivable and non-waivable conflicts. While the lists are not meant to be, and cannot be, exhaustive, the General Standards of the Guidelines are for all cases to be the determining standard. The concept of the lists as understood by the IBA's working group is that they are not final, but should be monitored as they are used and should be continuously updated.¹¹

Based on a comparison of the aforementioned rules, codes and guidelines, although differences in phrasing are never to be underestimated, the relatively harmonious standards they reflect, at least as far as the requirement of impartiality and independence are concerned, are remarkable. With regard to this latter issue, positions taken by the various rules show a clear case of convergence. Most jurisdictions traditionally provide that the same standard of independence and impartiality applies to every arbitrator, regardless of his particular function as sole arbitrator, co-arbitrator or chairman.¹² Until fairly recently, with regard to national arbitration, on the other hand, arbitration practitioners in the United States

¹¹ Otto L. O. de Witt Wijnen, N. Voser, N. Rao, "Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration", *Business Law International* 5/2004, 433 etc.

¹² While there is agreement in principle, there are differences in practice as to the role ascribed to party-appointed arbitrators which may result in different assessments as to the proper behaviour of party-appointed arbitrators. See, e.g., H. Raeschke-Kessler, 722.

of America adhered to a different concept, admitting non-neutral arbitrators if these were to be appointed by the parties. The 1977 AAA/ABA Code of Ethics still reflected that situation by distinguishing between the obligations of the “neutral” third arbitrator and those of party-appointed “non-neutral” co-arbitrators. In contrast, in the 1987 IBA Rules of Ethics, which were adopted to reflect an internationally applicable standard, any distinction of this sort was missing.

In the “second generation” of rules, the 2004 AAA/ABA Code of Ethics and the 2004 IBA Guidelines, this conceptual difference in legal traditions is still becoming visible, but a convergence of views has clearly taken place. The 2004 AAA/ABA rules, in a reversal of the previous position taken, now establish the presumption of neutrality for all arbitrators, including party-appointed arbitrators. On the other hand, General Standard 5 of the IBA Guidelines, *inter alia* in recognition of the past legal tradition in the US creates an exception for non-neutral party-appointed arbitrators, declaring the Guidelines not to be applicable in that respect. While in a formal view the exception in the IBA Guidelines looks at first sight like a gesture of deference to other traditions, the actual practice, including national and international arbitration proceedings under AAA Rules¹³, shows that the international standard adhered to now is clearly that of requiring of all arbitrators the same standard of neutrality.

While there are differences with regard to the formulation of ethical requirements of arbitrators, both in style and in detail, there are also some striking similarities in the approach taken by the AAA/ABA, IBA and CIArb Codes. Reflecting the practical and theoretical difficulty of devising specific standards of independence and impartiality, none of the regulatory instruments provides for a definition of the concepts of independence and impartiality. In the CIArb Code of Conduct, the terms are used without any explanation. Canon I of the AAA/ABA Code refers to the requirement of the arbitrator to serve impartially and act independently from the parties, potential witnesses and other arbitrators. Only the 1987 IBA Rules of Ethics, by defining partiality and dependence, provide at least indirectly some kind of definition. These Rules, insofar as they deal with the issue of independence and impartiality, have, however, been replaced by the 2004 IBA Guidelines which, instead of defining these concepts, take recourse to defining lists of specific factual scenarios which serve to conceptualise the meanings of independence and impartiality.¹⁴

¹³ The change to the all-neutral arbitral panel was gradual, first with the adoption by the AAA of its International Arbitration Rules in 1991, and then, in 2003, with the revision of the Commercial Arbitration Rules, which, in anticipation of the 2004 Code of Ethics, provided that even in domestic US arbitration all three arbitrators are presumed to be independent and impartial.

¹⁴ See General Standard 2 (d) and the Non-Waivable Red List of the IBA Guidelines.

The 2004 IBA Guidelines therefore significantly surpass the definition detail provided by any prior rules.¹⁵

Notwithstanding these differences in regulatory approach, the following aspects of the rules show a tendency towards convergence. While under the provisions of the UNCITRAL Model Law it remained unclear whether there is a rule “when in doubt, disclose”, this rule is now clearly established in the 2004 AAA/ABA Code,¹⁶ as well as in the 2004 IBA Guidelines.¹⁷ In line with the UNCITRAL Model law the standard for the disclosure of circumstances is clearly broader in both the 2004 AAA/ABA Code and in the 2004 IBA Guidelines than the standard allowing for the challenge of an arbitrator.¹⁸ Under both rules, disclosure is viewed as a requirement to be fulfilled in the interest of the parties and therefore requires the communication of any circumstances which “may” give rise to doubts, while, at the same time, for a challenge to be successful, circumstances must exist which actually “give rise to doubts”.

In addition, while the UNCITRAL Model makes no mention of this, the standard of what is to be disclosed, following the example of the ICC practice, in both the AAA/ABA and the IBA instruments, is guided not by an objective standard but by the subjective view of the parties of the proceedings (“in the eyes of the parties”).¹⁹

The IBA Guidelines strengthen the disclosure requirement further by not only requiring a prospective arbitrator to make reasonable enquiries but by also imposing upon the parties the obligation to inform a prospective arbitrator about any relationship between it or another company of the same group of companies and the arbitrator.²⁰

Another element of convergence of standards to be mentioned here is the express permission given to an arbitrator according to General

¹⁵ See Canon I of the AAA/ABA Code of Ethics.

¹⁶ Canon II B and D of the AAA/ABA Code of Ethics.

¹⁷ General Standards 3 (c) and 7 (c) of the IBA Guidelines.

¹⁸ AAA/ABA Code of Ethics: Canon II A: any relationships which might reasonably affect impartiality or independence; Canon II B: satisfied that he can serve impartially and independently; General Standard 3 (a): may give rise to doubts, 2 (b) give rise to doubts.

¹⁹ Whether a subjective standard was to be followed, was a subject of debate within the IBA Working Group in which account was also taken of the opinions of the ICC Court of International Arbitration and other arbitral institutions. That convergence continues in this area is further documented by the rejection of the ABA Dispute Resolution Section of Proposed Arbitrator Disclosure Guidelines in May 2009, which were considered to result in excessive demands on arbitrators, inter alia, in excess of the IBA Guidelines and the AAA/ABA Code of Ethics. See S.A. Riesenfeld, “ABA Dispute Resolution Section Rejects Proposed Arbitrator Disclosure Guidelines”, *TDM* 1875–4120 May 2009, 1 etc.

²⁰ General Standard 7.

Standard 4 (d) of the IBA Guidelines to “assist the parties in reaching a settlement of the dispute at any stage of the proceedings, provided he has obtained the prior express agreement of the parties to act in this way.” The possible role of the arbitrator as a facilitator for a settlement as it is practiced in many jurisdictions and rejected in others, is thereby made an internationally recognised possibility.

While with regard to the issues of arbitral independence and impartiality the developments show a clear trend towards the convergence of standards, the ethical codes do reflect some differences as concerns, for example, disclosure practice and the arbitrator’s obligations concerning communications with the parties at the pre-appointment stage and during the proceedings. The disclosure required in the AAA/ABA Code of Ethics concerns almost any relationship, past or present, with a party, without any limit in time. In contrast, disclosure requirements under the IBA Guidelines, although the arbitrator is in case of doubt required to decide himself in favour of disclosure, are more limited, while situations listed in the Green List and situations listed in the Orange List which occurred more than three years ago do generally not require disclosure. The CIArb Code of Conduct, while expressly prohibiting arbitrators from providing any legal or technical advice to persons involved in the arbitration, limits itself otherwise to generally prohibiting any form of communication “which might reasonably be perceived to be improper, partial or biased.” The 2004 AAA/ABA Code, on the other hand, provides in Canon III for a list of detailed rules of arbitrator conduct in communications with the parties, also covering the case of the non-neutral party-appointed arbitrator. Likewise, the 1987 IBA Rules of Ethics provide for a catalogue of rather specific rules on what an arbitrator may and may not do when communicating with the parties at the appointment stage or thereafter during the proceedings. The convergence which can be observed here appears to be more limited due to the fact that some perhaps rather fundamentally different notions of the role of an adjudicator in civil proceedings under the traditions of common law or civil law might come into play. One is left with the impression here that the codes provide rather rigid, detailed rules²¹ which have little chance of becoming an internationally accepted standard in this regard.

As concerns the general question of the potential impact of private non-binding codes of ethics on the development of a unified international arbitration law, the essential issue is of course the acceptance and use of such standards by domestic courts and arbitral institutions. The 1977/2004 AAA/ABA Code of Ethics is regarded as having achieved a high degree

²¹ E.g. Rule 5.4 of the 1987 IBA Rules of Ethics regulating the behaviour of an arbitrator if he becomes aware that a fellow arbitrator has been in improper communication with a party.

of judicial acceptance in the US²² With regard to the 2004 IBA Guidelines, it is similarly to be observed that parties in their challenges increasingly refer to them as a basis for their arguments. In a 2008 decision, the Swiss Federal Supreme Court has reasoned on the IBA Guidelines as follows:²³

“Certainly, the Guidelines do not have force of law, yet constitute a valuable working tool to contribute to the uniformisation of standards in international arbitration in the area of conflicts of interests. As such this instrument should impact on the practice of the courts and the institutions administering arbitration proceedings.”

The impact of rules such as the IBA Guidelines remains to be seen. As they have been drafted with the intent of continuously supplementing and updating the lists of factual settings, they certainly bear a significant potential for increasing uniformity in specific requirements concerning the independence and impartiality of arbitrators and their obligation to disclose any circumstances that may affect their independence or impartiality.

4. HYBRID PROCEEDINGS

Most modern arbitration statutes give the parties and the arbitrators the freedom to decide on the rules for the taking of evidence in the arbitration proceedings they have chosen.²⁴ Institutional arbitration rules typically take the same approach.²⁵ Art. 19 (2) of the UNCITRAL Model Law, reflecting this basic position, provides the arbitrators with broad discretion to determine all procedural matters as long as the parties have not reached any specific agreements (which is in many instances the case):

“Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such a 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”

As to the standards limiting the freedom of arbitrators to determine procedural matters, these are according to the Model Law only the requirements of equal treatment of the parties and their right to be heard.²⁶

²² B. Meyerson, J. M. Townsend, “Revised Code of Ethics for Commercial Arbitrators Explained”, *Dispute Resolution Journal* 1/2004, 1 etc.

²³ Swiss Federal Supreme Court, 1st Civil Chamber, Decision of 20 march 2008, 4A 506/2007, *ASA Bulletin* 3/2008, 565 etc.

²⁴ UNCITRAL Model Law, Art. 19 (1).

²⁵ Art. 20 ICC Rules, Art. 14 LCIA Rules.

²⁶ Art. 18 UNCITRAL Model Law.

In many countries, even in the absence of statutory provisions to this effect, the national courts have affirmed the arbitral tribunal's broad powers in determining issues of evidence.²⁷

It is a well-known fact that significant differences in procedural approaches exist in particular between the common law on the one hand which provides for detailed rules on evidence taking and gives the parties a highly active role in that process²⁸, and the civil law tradition on the other hand, which is characterised by the active, inquisitorial role of professional judges in establishing the facts. Naturally, therefore, international arbitrators, when dealing with parties from different legal cultures, in particular from common law and civil law traditions, have frequently faced the challenge to find solutions for the proceedings on evidence taking which would be acceptable to all parties and would also be in line with their own legal education and understanding.²⁹

It can therefore be said that it has been national arbitration legislation which has provided international arbitral tribunals with the power to determine to what extent common law or civil law elements of evidence taking would become integrated into international arbitral procedure. What this suggests in the first place is a development of a great variety of procedural approaches and not necessarily a convergence of practices.

While it is true, depending on the arbitrators involved and their own legal cultures, but also of course depending on the parties and their legal backgrounds, that the system of international commercial arbitration allows for a variety of approaches to evidence taking, nevertheless a clearly observable trend towards the harmonisation of the arbitral procedure has developed. Hybrid evidentiary proceedings which combine common law and civil law elements have become a common practice, and this not only when parties from the common law tradition mix with parties from a civil law tradition. As Kaufmann-Kohler/Bärtsch stress, the need for finding pragmatic solutions has most certainly been at the origin of this development³⁰, but what has developed is also the recognition

²⁷ B. M. Cremades, "Powers of the Arbitrators to Decide on the Admissibility of Evidence and to Organize the Production of Evidence", *ICC Court Bulletin* 1/1999, 49; R. Pietrowski, "Evidence in International Arbitration", *Arbitration International* 22/2006, 373 etc.

²⁸ A law tradition which finds its origin in the emphasis on the role of the lay jury not only in criminal but also in civil trials. For a detailed analysis see Demayre, "An Essay on Differing Approaches to Procedures under Common Law and Civil Law", *German Arbitration Journal* 2008, 279, 281.

²⁹ G. Kaufmann-Kohler, P. Bärtsch, "Discovery in International Arbitration: How Much Is Too Much?", *German Arbitration Journal* 2004, 13, 17, emphasise that practices in procedure of international arbitration have been harmonised to a large extent as a result of necessity rather than out of a theoretical recognition that the ideal system is one situated in between the extremes.

³⁰ *Ibid.*

among international arbitrators with a common law as well as a civil law background that certain hybrid combinations in evidentiary proceedings are to be preferred as a general rule.

In many instances international arbitration procedures with the following main characteristics can be said to have become common practice:

4.1. Witness Evidence

Witnesses are typically being heard on the basis of written witness statements.³¹ Every person can be heard as a witness, including parties and party representatives. Regardless of contraindication local rules, arbitrators tend to permit counsel to a party to contact and prepare witnesses, including providing assistance in drafting the written statement, as long as the witness is not being manipulated. There are variations as to whether the written statement is treated as direct evidence or not, but written witness statements are only accepted under the condition that the witness appears to testify and submits to cross-examination. In many instances, in particular if the arbitrators are from a common law background, the cross-examination, and possibly further re-direct and re-cross-examination, is left to the parties, with the tribunal only asking additional questions thereafter if any. If the panel is made up of lawyers with a civil law background, but also not infrequently in cases where common law arbitrators sit, the arbitral tribunal may very actively engage in questioning, even taking the lead. As to rebuttal witness statements, the practice varies; typically they are allowed only, but subject to certain limitations on their contents and timing. With regard to the oral examination of witnesses, it has become commonplace to take a verbatim record of the testimony; tape-recording or dictation by the Chairman may also be used, but only in smaller matters and then typically only by arbitrators with a civil law background.

4.2. Document Discovery

Requests by one party for the production of documents in the control of the other party are entertained, but the conditions for making such requests acceptable are typically geared to allowing only the discovery of individual documents which can be shown to be of material relevance for the issues to be decided; this kind of discovery is a far cry from the US-style pre-trial discovery considered excessive by many.³² If the counsel

³¹ For an overview see R. Trittman, B. Kasolowsky, "Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – the Development of a European Hybrid Standard of Arbitration Proceedings", *University of New South Wales Law Journal Forum* 14/2008, 43 etc.

³² For a summary see *Ibid.*, 45 etc.

for the parties are from common law jurisdictions, however, discovery requests may go beyond individual documents and cover entire categories of documentary evidence. Issues of legal privilege may arise in connection with document requests, possibly leading to the difficulty that, in the case of parties from different jurisdictions, the arbitral tribunal faces a situation where different standards of privilege apply or a party cannot claim privilege at all under its local rules. No general standard can be said to have evolved yet, but the clear tendency, if one follows legal writings, is to apply the most favourable privilege standards to all parties in such situations.³³

4.3. Expert Evidence

As to the use of party experts versus the appointment of an expert by the tribunal, there is less of a convergence visible so far. But even in proceedings with a panel and parties from civil law countries it appears to getting more and more common to let the parties provide expert evidence by their own expert witnesses rather than having the arbitral tribunal work by way of a tribunal-appointed expert. The reason for this can be very pragmatic as in many instances the parties have easier access than the arbitral tribunal to finding the required technically qualified experts within their respective industry.³⁴ Moreover, parties mostly prefer to have the opportunity to present technical evidence by their own experts and are willing to incur the additional costs as the arbitral proceeding gives them only once a chance to present their case and the appointment of a single expert by the arbitral tribunal inherently involves the risk that the focus of decision-making moves from the arbitral tribunal to this expert in the selection of whom the parties may have not been involved or at least to a lesser extent than in the appointment of the members of the tribunal. To reduce the time and costs involved in hearing party experts, arbitral tribunals engage more and more in the practice of hearing expert witnesses simultaneously, in the form of witness conferencing, an approach which can prove to be helpful in bringing the differences of viewpoint between experts very quickly to the fore for the arbitral tribunal. To be successful as a technique, it requires an arbitral tribunal willing to actively engage in questioning in the style of an inquisitorial civil law judge.

A significant characteristic of this development of a hybrid common law/civil law approach in evidence taking is the fact that it appears

³³ For an argument in this direction see F. von Schlabrendorff, A. Sheppard, "Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution", in: G. Aksen *et al.* (eds.), 743.

³⁴ This aspect is also stressed by R. Trittman, B. Kasolowsky, 47.

to have evolved largely as a result of arbitral tribunals seeking pragmatic solutions to issues of evidence taking rather than on the basis of adherence to some internationally agreed rules or guidelines. But it cannot be denied that the IBA Rules on the Taking of Evidence in International Commercial Arbitration adopted and published in 1999 have given a boost to this development.³⁵ Its predecessor, though, the 1983 IBA Rules, although well received, were taken over by the developments, in international arbitral practice, leading the Working Party of the 1999 Rules to the conclusion that they “needed to be updated and revised”.³⁶ The 1999 Rules differ in many respects from their predecessor and are probably best characterised as a restatement of practices as they have developed. As the Working Party put it: “The IBA Rules of Evidence contain procedures initially developed in civil law systems, in common law systems and even in international arbitration processes themselves.”³⁷ Their express intention is to fill the gaps left by law and institutional rules with respect to the taking of evidence. They are not intended to be binding, allowing parties and arbitral tribunals to make use of them as they see fit. Rather than providing rigid rules, they offer “options” from which, like from a template, parties and arbitral tribunals can choose which procedure to follow.³⁸ Thus, the section on witness of fact provides that any person, including a party or party’s officer, “may” present evidence as a witness and that the arbitral tribunal “may” order the submission of written statements. Likewise, party-appointed experts or a tribunal-appointed expert “may” be called to testify, in each case accompanied by the concomitant set of rules for the one or the other approach. The section on the discovery of documents, however, is not formulated as an “option” but rather as a rule according to which a party is entitled to request the production of individual documents or of a narrow and specific requested category of documents from the other party and that such a request is to be granted by the arbitral tribunal, provided the documents requested are “relevant and material” to the outcome of the case. Other issues, such as that of legal privilege, are mentioned in the IBA Rules (to be decided “under the legal or ethical rules determined by the Arbitral Tribunal to be applicable”), but not answered, leaving it to international arbitral practice to determine how to answer such issues.

³⁵ According to H. Raeschke-Kessler, 731, the rules on discovery were introduced by the IBA Rules on Evidence. The writer of this article, however, has had the experience of the application of discovery rules similar to those laid down in the IBA Rules prior to their publication. Nevertheless, it is certainly justified to view the IBA Rules as exercising a strong influence on arbitral practice.

³⁶ Commentary on the New IBA Rules on Evidence, p.1.

³⁷ R. Trittman, B. Kasolowsky, 44; IBA Working Party, Commentary on the New IBA Rules on Evidence, 1999, 2.

³⁸ R. Trittman, B. Kasolowsky, 44.

As the frequent use parties and arbitral tribunals make of the IBA Rules of Evidence shows, there can be little doubt that they achieved the intended purpose. In the experience of this commentator it is not often the case that the parties and/or the arbitral tribunal agree to apply the Rules. But rather frequently they are referred to in the Terms of Reference or other procedural documents as a set of rules which are to serve as a general orientation for the arbitral tribunal in formulating the procedural rules on the taking of evidence.

Time has not been standing still since the publication of the 1999 IBA Rules of Evidence and since then, due to the conversion of business and personal correspondence to electronic form, the issue of discovery has become a question of even greater significance not only in litigation, but also in arbitration. The familiar burdens of complying with discovery demands in the paper era, even if as limited as in arbitration, threaten to gain a new quality in comparison to their potential scope and surrounding uncertainties of the parties' obligations in the modern world of e-discovery. Understandably, the 1999 IBA Rules of Evidence could have no answer yet to this new aspect and the current international arbitral practice is still in the process of finding its way to adequately deal with this development.

In view of the fact that the same principles of relevance, materiality and proportionality that govern the production of paper documents in international arbitration should also apply with regard to electronically stored information, it is possible to ask to what extent it is at all to be considered necessary to deal specifically with electronic discovery in arbitration. However, as the activities of a number of institutions show, the need is perceived to specifically address this aspect of discovery because of the sheer complexity, costs and potential burden involved in e-discovery which requires the special attention of international arbitrators.³⁹

The following activities have most recently been undertaken:

In August 2007, the ICC Commission issued a report on Techniques for Controlling Time and Costs in Arbitration which, inter alia, deals with document production. In 2008, the ICC Commission established a Task Force which has been entrusted to produce a report on the Production of Electronic Documents in Arbitration. It is intended that this report supplements the report on Techniques for Controlling Time and Costs in Arbitration.

In May 2008, the International Center for Dispute Resolution (ICDR) (the international arm of the AAA) published its Guidelines for Arbitrators Concerning Exchanges of Information.

³⁹ For an overview of issues of e-discovery in arbitration see R. Smit, T. Robinson, "E-Disclosure in International Arbitration", *Arbitration International* 24/2008, 105; see also A. Meier, "The Production of Electronically Stored Information in International Commercial Arbitration", *German Arbitration Journal* 2008, 179 etc.

These Guidelines establish that e-documents can be produced in the form most convenient to the producing party and that requests must be “narrowly focused and structured to make searching for them as economical as possible”. The arbitral tribunal is empowered to direct testing or other means of focusing or limiting any search for electronic documents. What is remarkable about these Guidelines is that, although they do not provide for regulating the production of e-documents in minute detail, they have become binding in all ICDR-cases commenced after May 31, 2008 and may be adopted at the discretion of the tribunal in pending cases.

In 2009, the International Institute for Conflict Prevention and Resolution (CPR) published its CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration. This Protocol provides guidance in the form of “recommendations as to practices that arbitrators may follow in administering proceedings before them, including proceedings conducted under the CPR Rules.” They cover both the issue of disclosure of documents, including detailed provisions concerning the disclosure of electronic information, and the presentation of witnesses. In relation to both areas of procedure, the Protocol offers various “modes” which the parties can choose (modes of disclosure and modes of presenting witnesses) to adopt by agreement, before or after a dispute arises, and which provide the parties with different “mixes” of common law and civil law approaches to the taking of evidence. The intention behind this approach seems to provide a menu of options like the IBA Rules of Evidence, but to provide it in the form of four or three alternative combinations to be chosen.

In October 2008, the Chartered Institute of Arbitrators issued its Protocol for E-Disclosure in Arbitration. It is formulated in such a way that it binds members of the Chartered Institute but that at the same time it functions as a general recommendation for all arbitrators. The Protocol suggests that the parties give early consideration to e-discovery and seek to agree the scope and methods of production. It also allows the parties to adopt the Protocol as part of their agreement to arbitrate a potential or existing dispute. As concerns the specifics of e-documents, the Protocol provides *inter alia* the standards applicable to their production but also regulates that production should normally be limited to reasonably accessible data, excluding metadata, the restoration of back-up dates, erased, damaged or fragmented data, archived data or data routinely deleted in the normal course of business operations. These provisions are supplemented by rules empowering the tribunal to determine efficient procedures for the production of electronic documents and to allocate the costs of document production.

What can be said about all these “codifications” is that they attempt to provide instruments allowing to restrict certain types of US-style

discovery in international arbitration. They also show that there has been an evolutionary direction from arbitral tribunals filling the void left by national laws and institutional rules with practices of hybrid proceedings concerning the taking of evidence to an increasingly specific formulation of general standards of procedure via the IBA Rules of Evidence, and from there to recommendations such as the ICC Techniques, and additional non-binding or partially-binding rules such as those of ICDR and CIArb which seek to particularly grapple with the issue of e-discovery.

5. TRANSNATIONAL RULES OF LAW

For some time it has been accepted in legal theory, as well as in the practice of the state courts supervising the results of the arbitral process, that international arbitrators perform a genuine judicial function. In the wake of many developments strengthening arbitral activities, above all the New York Convention providing for the international recognition and enforcement of arbitral awards, the modernisation of arbitration laws in many countries in line with the UNCITRAL Model Law, the creation of uniform laws on trade such as the 1980 UN Convention on Contracts for the International Sale of Goods (now in force in more than 60 countries), as well as growing efforts to formulate internationally recognised principles and rules of law, such as by way of the UNIDROIT Principles or the Principles of European Contract Law, international business has come to view the arbitration tribunal, rather than the national courts, as its “natural” judge.

If substantive law may be “born in the womb of procedure”, as Schmitthoff has put it⁴⁰, then international arbitral tribunals would be the place where transnational rules of law, whatever the status of general recognition and however incomplete and lacking in precision and clarity such rules may be in a given context, should have an opportunity to become crystallised, applied and developed.

Following the lead of the UNCITRAL Model Law⁴¹, many modern arbitration laws have provided for special conflict of laws rules which give the arbitrators a considerable amount of freedom to apply not only any law of a given state but to also apply any “rules of law” agreed by the parties.⁴² Some of these laws have gone beyond the UNCITRAL Model

⁴⁰ C. Schmitthoff, “International Trade Usage”, Institute of International Business Law and Practice Newsletter, Special Issue 1/1987.

⁴¹ Art. 28.

⁴² E.g. § 1051 (1) and (2) German Code of Civil Procedure, except that (2) refers the arbitrators to applying the law with the “closest connection” while Art. 28 (2) Model Law allows the arbitrators to choose the law they consider “appropriate”.

Law and do not only allow the arbitrators to apply rules of law when chosen by the parties but also expressly provide for the possibility of applying rules of law in cases where the parties have refrained from making any choice of law⁴³. Similarly many institutional rules provide the arbitrator with the freedom to apply any kind of law, including transnational legal principles in case he is asked to determine the applicable rules without reference to a choice made by the parties.

In addition, another development of “internationalisation” is to be observed at the level of the rules governing the choice of law to be performed by international arbitration. In a number of jurisdictions, but also in many institutional rules, arbitrators have been freed from the complexities of the task of identifying applicable national choice-of-law rules by empowering them to determine the applicable law or rules of law directly by way of which rules they find appropriate to apply (*voie directe*).⁴⁴

An overview of how international arbitrators have dealt with the freedom granted to them to apply and formulate transnational rules of law must by necessity remain highly sketchy and limited. What can be said here on the basis of this commentator’s personal experience and what seems to be confirmed by the ICC’s study of the application of UNIDROIT Principles by ICC tribunals⁴⁵ and the Unilex Collection of awards⁴⁶, however, indicates that transnational rules of law, while not being frequently referred to by arbitral tribunals, appear to be recognised and accepted as a basis for resolving international commercial disputes. The practice of international arbitral tribunals allows the conclusion to be drawn that, in certain settings, if the parties have agreed upon their applicability or the domestic laws appear insufficient in answering the issues, pre-formulated standards such as the UNIDROIT Principles can either be the basis or at least assist in finding a law based solution.

⁴³ Art. 1496 French N.C.P.C.; Art. 1054 Sec. 1 and 2 Netherlands Arbitration Act of 1986; Art. 187 Sec. 1 Swiss Law on Private International Law; K.-P. Berger, *The Creeping Codification of the Lex Mercatoria*, 1999, 80 etc., intending to reconcile the approach of the UNCITRAL Model Law with that of the liberal view reflected in the Dutch, French and Swiss legislation, argues that the term “the law” used in Art. 28 (2) UNCITRAL Model Law was not meant by the drafters to exclude any transnational considerations in the arbitrators’ law finding process.

⁴⁴ New Zealand Arbitration Act, First Schedule, 28 (2); Danish Arbitration Act, § 28 (2); Greek International Commercial Arbitration Law, Art. 28 (2); English Arbitration Act, § 46 (3); French N.C.C.P., Art. 1496; Netherlands Code of Civil Procedure, Art. 1054 (2). While this liberal standard does not mean that arbitrators don’t have to observe legal reasons anymore in determining the applicable law or rules of law, it certainly opens an easier path to arrive at applicable rules of law instead of some state law.

⁴⁵ UNIDROIT Principles of International Commercial Contracts. Reflecting on their use in International Arbitration, Special Supplement – ICC International Court of Arbitration Bulletin, 2002 (various authors).

⁴⁶ www.unidroit.org; database Unilex on CISG and UNIDROIT Principles.

In the great majority of cases, if the past experience of the ICC is to be taken as an indicator⁴⁷, international arbitrators do not decide at all on the basis of any transnational rules but simply apply the law as agreed by the parties. With the growing sophistication of international business transactions, including the quality of the legal advice provided for such transactions, a specific trend towards a denationalisation of the substantive law applicable to such transactions is not necessarily to be expected. However, some harmonisation of applicable national legal standards seems to be taking place. The driving elements of this general development in the area of international commerce are manifold, including uniform laws adopted by way of international conventions, such as the Convention on Contracts for the International Sale of Goods (CISG), international trade and investment regulations⁴⁸, contract drafting techniques aimed at making contract provisions increasingly functionally independent of any local rules, trade usages followed and “formulated” in many areas of commerce and industry, the harmonisation of laws and regulations in free or liberalised market zones and, last but not least, law reforms aimed at achieving the same solution for the same problem as in other countries.

What is to be observed in this context, and what characterises perhaps the application of national laws in particular, is the indication of international arbitrators to use the comparist method in the application of domestic laws in their awards. Such an, in the words of Berger,⁴⁹ “internationally useful” interpretation of domestic laws is, in this commentator’s experience, often used by international arbitrators in order to arrive at an interest-oriented, commercially sensible solution of international disputes or also simply for the purpose of confirming their interpretation of a domestic law they find to be applicable. This is an area where use can be, and is, made of written transnational rules such as the UNIDROIT Principles⁵⁰ in order to check upon and arrive at a construction of a domestic law which is in line with the requirements of the international setting in which it applies.

In contrast to the CISG, which covers sales contracts, the UNIDROIT Principles cover commercial contracts in general. They can be seen as a general part of the CISG⁵¹, but there is also an important distinction in terms of the regulatory approach to the unification of law. While the CISG

⁴⁷ As can be gleaned from Pierre Mayer’s investigation of ICC awards between 1996 and 2000, see P. Mayer, “The Role of the UNIDROIT Principles in ICC Arbitration Practice”, in: *ICC UNIDROIT Principles Study*, 105 etc.

⁴⁸ E.g. the World Bank’s “Guidelines on the Treatment of Foreign Investment”.

⁴⁹ K.-P. Berger, 189.

⁵⁰ Others are, e.g., the Principles of European Contract Law and many more specialised rules such as INCOTERMS and others.

⁵¹ H. Kronke, “The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond”, *Journal of Law and Commerce* 25/2005–06, 451, 457, quoting Pierre Karrer.

is an international convention which, within its scope, provides for uniform commercial law for international transactions in its member states, the UNIDROIT Principles, being developed on the basis of the functional comparative methodology, limit themselves to restating principles and rules with regard to international commercial contracts, principles and rules which, in the words of Goode, “represent unconditional commitment and consensus of scholars of international repute from all over the world”.⁵²

The UNIDROIT Principles are neither an international convention nor a model law, but can be qualified as meta-legal principles and rules of a non-binding character, formulated by an intergovernmental organisation. As they have been put into a “statutory” form, they can be considered to assume “a normative quality”.⁵³

The UNIDROIT Principles were first adopted in 1994 and were then extended in 2004 to cover additional topics such as agency, set-off, assignment, limitation periods and electronic contracting. Currently, there is work taking place to further cover the topics of unwinding of failed contracts, illegality, plurality of obligors and of obligees and conditions and termination of long-term contracts for cause.

The UNIDROIT Principles contain general principles that deal with fundamental notions of contract law such as freedom of contract, freedom of form and proof, *pacta sunt servanda*, good faith and fair dealing and the primacy of usages and practices in international transactions. In addition to legal principles, they also contain rules with a clearly defined scope of application with regard to matters such as the conclusion of contracts, mode of payment, currency of payment, costs of performance, calculation of interest claims and many other technicalities of the conclusions and performance of contracts. Similar to the interpretation of a law on commercial contracts the UNIDROIT Principles are therefore to be “filled with life”⁵⁴ by weighing legal principles against rules in a complex assessment process taking account of the interests involved in particular factual settings; in order to promote unity, comparable to the provisions found in the Vienna Sales Convention and in the CISG⁵⁵. Art. 1.6 UNIDROIT Principles provides for their autonomous uniform interpretation without reference to any domestic law (gaps are “as far as possible to be settled in accordance with their underlying general principles”). In the context of international commerce, international arbitrators have shown to be very receptive to fulfilling this function and to integrate UNCITRAL Principles in their law-finding process.

⁵² Quoted in K.-P. Berger, 154.

⁵³ *Ibid.*

⁵⁴ H. Van Houtte, “The New UNIDROIT Principles of International Commercial Contracts, A New Lex Mercatoria?”, in: *ICC Institute of International Business Law and Practice*, 184–186.

⁵⁵ Art. 7 (2) Vienna Sales Convention, Art. 17 CISG.

Looking at the role of the UNIDROIT Principles in International Commercial Arbitration it is not only instructive to see how receptive arbitrators have been to this “codification” of non-binding transnational principles and rules, but also how arbitrators have made use of them and how this, in turn, has led the authors of the Principles encouraged to describe the uses to be made of the Principles in the Preamble of the 2004 version in bolder terms than before. The 2004 Preamble states (with changes to the prior version marked):

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.

New: *They may be applied when the parties have not chosen any law to govern their contract.*

New: *They may be used to interpret or supplement domestic law.*

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national and international legislations.

The acceptance and use of the Principles as transnational contract law rules as reflected in the some 150 published or otherwise known arbitral awards covers a wide range of types of transactions beyond the sale of goods, varying from contracts on work and services to construction, licences, BoT, shareholder agreements, partnership agreements, and merger and takeover agreements.⁵⁶

As concerns the options for the applications of the UNIDROIT Principles as set out in their Preamble, it appears that this “menu” is generally followed if not surpassed by international arbitrators.

To the extent the published awards available on the internet are a valid indicator when the parties have agreed that their contract be governed by the UNCITRAL Principles or by general principles of law, arbitrators, almost invariably appear to arrive at the applicability of the Principles. They fully recognise the parties’ right to agree on transnational rules and, if general principles of law are chosen, appear to have a clear preference for referring to the UNCITRAL Principles in such instances.⁵⁷

⁵⁶ H. Kronke, 455.

⁵⁷ In the Channel Tunnel case, the applicable law clause provided for an application of the principles common to both English and French law, and in the absence of such common principles of such general principles of international trade law as have been applied by national and international tribunals. The arbitral tribunal decided to apply the

International arbitrators have also shown their willingness to refer to the Principles in cases “when the parties have not chosen any law to govern their contract.” In part, as in ICC Award 15089 of 15 September 2008, such decisions are based expressly on the negative choice-of-law doctrine, which is based on the view that the parties’ decision not to agree on the applicability of a domestic law must be interpreted as a choice against the application of any domestic laws and therefore a choice in favour of transnational rules. But this doctrine is not widely adhered to⁵⁸. In other decisions a wider, more objective approach is taken, finding, for example, that the conflict rules do not result in any clear connection of the contract with any domestic law⁵⁹ or come very straightforwardly to the application of the UNIDROIT Principles on the basis of the lack of choice of the contracting parties⁶⁰. In a Russian Award of 5 November 2002 the arbitrators found the agreement of the parties to have both their laws apply to the contract tantamount to not agreeing on any domestic law and applied UNCITRAL Principles instead. But international arbitrators have also decided in no-choice settings in favour of the applicability of a domestic law and against UNCITRAL Principles, arguing, *inter alia*, that even if the Principles should be regarded as trade usages, such usage would not be relevant in the face of the applicable domestic law⁶¹.

In some cases, international arbitral tribunals have gone as far as opining that the UNIDROIT Principles are “the better law” for international contracts, even though some domestic law might be applicable on the basis of conflict rules.⁶²

UNCITRAL Principles. See Berger, *op. cit.*, at 35/36. See also the decision of an *ad hoc* tribunal of 19 August 2005 which, on the basis of the parties’ agreement to apply “principles of international law”, based its decision on the UNCITRAL Principles (abstract published in Unilex). ICC Award 12.111 of 6 January 2003, deciding a dispute in which the parties had agreed on the applicability of international law, esteemed that the Principles of European Contract Law were not yet applicable and were an “academic exercise” (abstract published in Unilex).

⁵⁸ K.-P. Berger, 82 etc., ranks it as a “premature application of the *lex mercatoria*”, arguing that the lack of a choice of law clause may be due to a number of reasons, none of which necessarily indicates the parties’ intention to “transnationalise” their contract.

⁵⁹ E.g. ICC Award of 2004 or ICC 11265 of 2003 (abstract published in Unilex).

⁶⁰ ICC Award 12.111 of 3 October 2003 (abstract published in Unilex).

⁶¹ CIETAC Award of 2007 with regard to Chinese law; CIETAC Award of 2 September 2005 considered that the Principles have no subsidiary validity in relationship to the applicable domestic law (abstracts published in Unilex).

⁶² See ICC Award 7110 of 1999, quoted by Y. Derains, “The Role of the UNIDROIT Principles in International Commercial Arbitration, A European Perspective”, in: *ICC Court of International Arbitration, UNIDROIT Principles of International Commercial Contracts, Special Supplement – ICC International Court of Arbitration Bulletin* 2002, 18.

In a significant number of cases concerning sales contracts, where arbitral tribunals come to the applicability of uniform legislation such as the CISG, the arbitrators have referred to the UNIDROIT Principles, occasionally also to the Principles of European Contract Law, as a set of supplementary rules providing answers to the issue in question⁶³. These decisions demonstrate the functionality of the Principles as an instrument for the gap-filling interpretation of the CISG, although the Principles, in contrast to the CSIG do not have the force of law.

Last, but not least, mention should be made of the high number of arbitral decisions, although arriving at the application of a domestic law, nevertheless refer to the UNIDROIT Principles, be that in the form of providing for an “international” interpretation of that law or be that merely for the purpose of confirming the results found by way of interpretation of the applicable domestic law⁶⁴. While, on closer analysis, in some of these instances references to the UNIDROIT Principles may not signify much more than setting the result found on the basis of a domestic law in an international light, thereby giving them a more dignified status of acceptability⁶⁵, such additional reasoning nevertheless must be seen as an indicator of an effort by international arbitrators to fully grasp the transactional character of international commercial transactions and to strive for legal solutions which are based on common principles of law and justice.

6. CONCLUSIONS

The internationalisation of international arbitration has resulted in a convergence of legal standards, not only in general, but also with regard to ethical rules for arbitrators, procedures of evidence taking, and the application of substantive law and rules of law. While differences continue to exist

⁶³ Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, decision of 23 January 2008; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Award of 30 January 2007; N.A.I. Award of 10 February 2005; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Award of 19 May 2004; ICC Award 11630 of 2002 (abstracts published in Unilex).

⁶⁴ Corte Arbitrale Nazionale ed Internazionale di Milano, decision of March 2008, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Award of 27 March 2007; WIPO Award of 25 January 2007; ICC Award 9 October 2006; ICC Award of June 2004; Ad hoc Award of 4 March 2004; ICC Award 12591 of 2004; ICC Award 11256 of 2003; ICC Award 11295 of December 2001; ICC Award 9078 of October 2001; ICC Award 11051 of July 2001 (abstracts published in Unilex).

⁶⁵ These are instances of an “internationally useful interpretation” of domestic laws; see K.-P. Berger, 189.

in all three chosen areas of the law, this movement towards uniformity generally helps to render arbitration a reasonably foreseeable and acceptable way for parties to resolve their international commercial disputes.

As the developments show, the trend towards a higher degree of harmonisation of legal standards is characterised by complex interactions between domestic laws, international conventions, various types of rules and standards formulated by “formulating agencies” such as arbitral institutions, intergovernmental organisations, bar organisations, and other private bodies, and by the common practice of the international arbitral tribunals which apply such laws, conventions and privately formulated rules and standards. There is not a single source of law which can explain the development towards greater uniformity. Typically, rules, guidelines, or standards produced by formulating agencies are by their nature non-binding in character, often not representing more than a “menu” of rules or practices to be followed, leaving parties and arbitrators the freedom and the pragmatic flexibility reach their own answers. But they acquire a law-like character when consistently applied and implemented by the arbitral tribunals whose awards are recognised and enforced by national courts.

Comparing developments in the three areas of arbitration law, the following is to be noted:

The development of unified ethical standards for the conduct of arbitrators is characterised by the fact that decisions as to compliance with such standards are still largely left in the hands of domestic courts.⁶⁶ There are rules and guidelines published by formulating agencies in this area, such as the IBA Rules of Ethics, the IBA Guidelines on Conflicts, the CIArb Code of Professional and Ethical Conduct and the AAA/ABA Code of Ethics, but up to now it remains open to what extent these have actually found widespread international acceptance in the courts and arbitral institutions beyond the level of generalities. The IBA Guidelines pursue an innovative approach as an instrument which attempts to define concrete factual settings and contextualise them with general principles. While these factual settings may be used as points of orientation, it remains to be seen whether they will have a significant effect on the development of harmonised detailed rules on arbitrators’ conduct. The first reactions in the judiciary indicate that in particular the IBA Guidelines may have a lasting impact.

The development of a widely accepted concept of hybrid proceedings, on the other hand, seems to be due largely to arbitral practice, with

⁶⁶ There are only some jurisdictions, such as Switzerland or France, where the courts will refrain from reviewing decisions on challenges taken by arbitral institutions on the basis of a doctrine of non-interference in administrative interim decisions.

the IBA Rules on Evidence rather restating that practice than formulating new standards. As described, the IBA Rules on Evidence provide for a menu of options from which arbitral tribunals and parties can select and which provides for pragmatic solutions for issues of evidentiary procedure in the form of pre-formulated rules. A desirable degree of flexibility is therefore maintained. In this sense the IBA Rules on Evidence probably provide a generally adequate approach to harmonisation in this area even though areas such as legal privilege or the handling of request for electronic documents still require the development of more detailed procedural solutions. The attention paid to these issues by arbitral institutions, formulating agencies and the arbitral tribunals themselves, however, raises the expectation that a more or less uniform practice with regard to these issues will develop as well.

In the area of the substantive law applied by the arbitral tribunals two general trends are to be ascertained – the inclination of international arbitrators to transnationalise domestic law found to be applicable by way of an “internationally oriented interpretation” and the acceptance by international arbitrators of the UNIDROIT Principles as the embodiment of recognised principles of law applicable to international commercial contracts. While these trends exist, however, arbitrators do not generally engage in finding transnational rules of law by creating such rules themselves. Rather, they orient themselves by way of a comparative approach which might cover various domestic laws, and in which context UNIDROIT Principles are made use of as a supplementary source of law in relation to one or several domestic laws or, when parties have not made a choice of law or have referred to general legal principles, they refer to the Principles as rules reflecting the elements of a non-national law for commercial contracts..

Proponents of the *Lex Mercatoria* doctrine often rely on the growing uniformity of international arbitration law as evidence of the existence of an independent supranational legal system created not by the states but by the international business community. In the view of this commentator the developments in the law of international arbitration as set out above do not provide sufficient evidence for the existence of a *lex mercatoria*, understood as an autonomous system of rules of procedural and substantive law for international commerce. When international arbitrators create hybrid proceedings, transnationalise domestic laws, or apply general principles of law, they are doing nothing more than using the powers given to them under the authority of the states. They fulfil a recognised adjudicatory function sanctioned by national courts which refrain from interfering in this process, but this function is given to international arbitrators because state legislation so provides. If, however, *lex mercato-*

ria is viewed as a method⁶⁷ applied by international arbitrators in order to remove a dispute between parties from different jurisdictions from the ambit of national laws and procedures inconsistent with the requirements of international commerce and dispute resolution, then the developments towards a uniform law of international arbitration can be viewed as *lex mercatoria* in action.

⁶⁷ E. Gaillard, “Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules”, *ICSID Review: Foreign Investment Journal* 10/1995, 208; E. Gaillard, *Aspects philosophiques du droit de l’arbitrage international*, 2008, in particular 60 etc.