Chapter 31

Evidence in International Commercial Arbitrations: Some Issues*

The UNCITRAL[1] *Model Law on International Commercial Arbitration*, which is given force in Australia by the *International Arbitration Act 1974* (Cth) does not have much to say on the subject of evidence. Article 18 provides that each party shall be given a full opportunity of presenting his case. Article 19 provides:

> (1) Subject to the provisions of this law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
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> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the tribunal incudes the power to determine the admissibility, relevance, materiality and weight of any evidence.

The formula used in the concluding sentence is repeated in the *UNCITRAL Arbitration Rules* and similar language is used in the *IBA Rules on the Taking of Evidence in International Arbitrations*[2] and in the rules of some arbitral institutions. The International Chamber of Commerce *Rules of Arbitration* require the tribunal "to establish the facts of the case by all appropriate means".

There is deliberate lack of specificity upon a topic which, in an Australian commercial court, is the subject of elaborate rules sourced in legislation and common law and which is often the occasion of disputes in the course of conduct of a trial. Legal cultures have different approaches to the role of a fact-finder in a process of dispute resolution. The common law tradition assumes an adversarial process in which the parties present such information as they seek to rely upon, and there are laws of evidence which, in the event of dispute, bind the court as to what information will be received and what must or may be rejected. In the civil law tradition there are, of course, principles and rules that guide the judge in making decisions of fact, but the common law technique does not apply. As between common law jurisdictions themselves, the rules of evidence vary. In an international commercial arbitration where the hearing takes place in Australia, and the law of the arbitration is Australian law, it may be that the arbitrators are from different backgrounds of legal culture. It may also be that, in the case of a contractual dispute, the governing law of the contract is that of some other jurisdiction. It would be unsafe to assume that disputes about evidence will be resolved in the same way as in

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* Address to the Chartered Institute of Arbitrators (Australia), Melbourne, 23 June 2015.

1 United Nations Commission on International Trade Law.

2 The International Bar Association, with headquarters in London, is the international umbrella organisation for law societies and Bar associations – *Ed.*