



**FORMAL CONVERGENCE, PRACTICAL DIVERGENCE:
THE TAKING OF EVIDENCE IN INTERNATIONAL
COMMERCIAL ARBITRATION
(A FRANCE–UNITED STATES PERSPECTIVE)**

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LISTE DES ABRÉVIATIONS

A

ARIA.....The American Review of International Arbitration

C

CPC.....Code de procédure civile (France)

F

FAA Federal Arbitration Act (United States)

FRCP.....Federal Rules of Civil Procedure (United States)

FRE Federal Rules of Evidence (United States)

G

GAR..... Global Arbitration Review

I

IBA International Bar Association

IBA Rules IBA Rules on the Taking of Evidence in International Arbitration (2020)

ICC..... International Chamber of Commerce

L

LCIA..... London Court of International Arbitration

P

Prague Rules ..Rules on the Efficient Conduct of Proceedings in International Arbitration (2018)

U

UNCITRAL United Nations Commission on International Trade Law

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INTRODUCTION

1. "If international arbitration did not exist, it would be necessary to invent it."¹

2. This observation, which opens Redfern and Hunter's groundbreaking work, captures something essential about the modern global economy. As investment and commerce continue to expand across borders, transnational disputes have become an inevitable feature of business life. National courts, bound by their own procedural traditions and territorial limits, are often ill-suited to resolve them. International arbitration emerged as the answer: flexible, neutral and confidential, it has become the standard mechanism for resolving cross-border commercial conflicts. The figures confirm it clearly. In 2025 alone, the International Chamber of Commerce registered 881 new arbitration cases, involving parties from 147 countries, with the United States and France both figuring among the ten most represented party nationalities.²

3. Yet, this globalisation of dispute resolution conceals a quiet tension. When an American lawyer and a French lawyer sit across from each other in an international arbitration, one would expect them to think about evidence very differently. The American lawyer, that was trained in an adversarial system, might be expected to seek broad document production, to press witnesses in cross-examination, and to retain a partisan expert. The French lawyer, formed in a tradition where the judge directs the taking of evidence, might be expected to approach the same proceedings with restraint, with scepticism towards disclosure, and with a preference for neutral expertise. That, at least, is the intuition that any comparative lawyer would bring to the arbitral hearing room: people are, as Professor George Bermann put it in the interview conducted for this thesis, "the product of their training and their practice."³ Whether that intuition survives contact with actual arbitral practice is one of the questions this study sets out to test.

¹Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Arbitration*, 7th ed., Oxford University Press, 2022, §1.01.

²ICC, *2025 Dispute Resolution Key Statistics*, 2026

³Interview with Prof. George A. Bermann, Columbia Law School, conducted by Lila Kajari, June 2026 (hereinafter "Bermann Interview").

4. In any event, both lawyers are likely today to operate under the same rulebook: the IBA Rules on the Taking of Evidence in International Arbitration, which present themselves as a neutral instrument designed for arbitrations "between Parties from different legal traditions."⁴ So, on paper, the meeting of the two legal cultures has been organised, codified and pacified. In practice, the reality is more surprising, more interesting. Experienced observers, such as lawyers and arbitrators, report not a clash of cultures but a striking convergence; yet that convergence, on closer inspection, runs almost entirely in one direction.
5. Civil law practitioners have adopted the evidentiary techniques of the common law whilst the reverse movement is marginal. The harmonising texts promised a balanced compromise, yet the practice delivers the prevalence of one model of proof.
6. This study takes that asymmetry as its object.
7. Its central question is the following: behind the apparent neutrality of the instruments harmonising the taking of evidence, the IBA Rules foremost among them, international commercial arbitration reveals a convergence that is real but asymmetric, in favour of the common law model of proof. Beyond merely observing this prevalence, what are its sources and what do they reveal about the autonomous legal culture of international arbitration?
8. Answering that question requires, first, that its terms be defined.

⁴IBA Rules on the Taking of Evidence in International Arbitration (2020), Preamble, §1.

Definitions

1. International arbitration

9. International arbitration can be defined as "a legal process in which parties to a dispute agree to refer that dispute to a tribunal of one or more independent and impartial arbitrators chosen by or on behalf of the parties to the exclusion of the domestic courts."⁵ The task of that tribunal is to give equal consideration to the claims and defences of the parties and to arrive at a binding decision: an award. The parties are then obliged to perform the award which is underpinned by an international system of recognition and enforcement through local courts.⁶ States have widely recognised the importance of this mechanism, many adopting laws based on the UNCITRAL Model Law on International Commercial Arbitration, which signals that a country is "arbitration friendly."⁷ Meeting that standard has become a genuine concern for legislators, and many recent national reforms have been driven by it.

10. For the purposes of this study, the term refers exclusively to international commercial arbitration: disputes arising from cross-border commercial relationships, typically administered under institutional rules such as those of the ICC. Investment arbitration, which, as Redfern and Hunter note, raises distinct issues of public importance and transparency warranting separate treatment, falls outside the scope of this analysis.⁸

2. Evidence and fact-finding

11. The terms "evidence" and "fact-finding" are used in this thesis to refer to the procedural mechanisms by which parties present, obtain and contest the factual material upon which the arbitral tribunal will base its decision. This comprises three distinct but interrelated processes: the production of documents, the presentation and examination of witness testimony, and the submission and testing of expert evidence. These are the three core mechanisms addressed by the IBA Rules on the Taking of Evidence in International Arbitration.⁹

⁵Blackaby, Partasides, Redfern & Hunter, op. cit., §1.04.

⁶Ibid.

⁷Ibid., §1.12.

⁸Ibid., §1.14-1.15.

⁹Khodykin, Mulcahy & Fletcher, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford University Press, 2019, p. 1; IBA Rules on the Taking of Evidence in International Arbitration (2020), Preamble, §1.

12. A fundamental feature of international arbitration in this regard is that arbitral tribunals are not bound by the rules of evidence of any particular national legal system.¹⁰ As Born notes, arbitrators are free, but not obliged, to adopt procedural rules used in domestic litigation, and one of the very reasons parties choose international arbitration is precisely to avoid the application of any single national procedural framework.¹¹ Consistently with this, it is widely accepted that arbitrators "should enjoy the greatest possible freedom and are therefore freed from having to observe the strict legal rules of evidence."¹²

13. This study does not examine questions of the burden or standard of proof, which raise distinct considerations falling outside its scope.¹³ Nor does it address the pre-arbitral phase, including national mechanisms for obtaining evidence before proceedings begin: such mechanisms, of which Article 145 of the French Code de procédure civile is the leading French example, belong to the procedural background of the comparison rather than to arbitral practice itself, and are considered here only insofar as they underline the domestic reflexes that practitioners carry into arbitration. The focus is exclusively on the procedural and practical dimensions of how evidence is gathered, presented and contested during arbitral proceedings.

3. US and French legal cultures

14. This thesis deliberately employs the concept of "legal culture" rather than "legal system" or "legal tradition." The distinction is fundamental. What diverges in the context of international arbitration is not the formal law of evidence: neither the French Code de procédure civile nor the US Federal Rules of Evidence apply as such in international arbitral proceedings.¹⁴ What diverges is something subtler: the professional reflexes, procedural expectations and advocacy habits that lawyers carry into the arbitral hearing room as a result of their legal training and domestic practice.

¹⁰Born, *International Commercial Arbitration*, 3rd ed., Kluwer Law International, 2021 (Updated March 2024), §15.08.

¹¹*Ibid.*, §15.04[B].

¹²*Ibid.*, §15.09

¹³IBA Rules on the Taking of Evidence in International Arbitration (2020); IBA Arbitration Committee, *Report on the Reception of IBA Arbitration Soft Law Products*, September 2016, p. 12.

¹⁴Born, *op. cit.*, §15.04[B].

15. This understanding draws on the comparative law scholarship of Pierre Legrand, for whom legal practices are a reflection of a given culture and of a given legal mentalité, understood as an interiorised culture revealing "an implicit structure of attitude and reference, or a way of experiencing legal order."¹⁵ On this view, the deepest differences between the common law and the civil law lie less in their rules than in their ways of thinking about law; Legrand indeed argues that the differences between the two mentalités at the epistemological level are irreducible.¹⁶

16. The two cultures compared here are two procedural cultures. The common law model of civil procedure is conventionally described as adversarial: the parties, through their counsel, drive the proceedings, gather and present the evidence, and confront each other's witnesses. The judge's role is comparatively passive. The civil law model is conventionally described as inquisitorial: the judge directs the taking of evidence, appoints experts, questions witnesses. Lawyers occupy a more restrained position. The distinction is a matter of degree rather than an absolute opposition, and it has itself been questioned;¹⁷ but it remains the standard grammar in which the divide is expressed, and arbitration doctrine routinely uses it. Parties to an arbitration may, as Redfern and Hunter observe, choose "adversarial or inquisitorial procedures" as they see fit.¹⁸ Born himself acknowledges the cultural dimension of the divide, noting that international disputes almost inevitably involve parties from different home jurisdictions whose procedural experience and expectations are rooted in different legal cultures. One of the fundamental objectives of international arbitration is to ensure that disputes are not resolved in accordance with the procedures of one party's home jurisdiction.¹⁹ In the field of international arbitration specifically, comparative law has been described as the very ethos of the professional community,²⁰ reflecting the extent to which legal background shapes the way practitioners approach arbitral proceedings.

¹⁵Legrand, "Comparative Legal Studies and Commitment to Theory", *Modern Law Review*, 1995, 58(2), pp. 265-266.

¹⁶*Ibid.*

¹⁷See Reymond, "Common law and civil law procedures — Which is the more inquisitorial?", *Arbitration*, 1989, 55, p. 155, cited in Blackaby, Partasides, Redfern & Hunter, *op. cit.*, ch. 6, n. 75.

¹⁸Blackaby, Partasides, Redfern & Hunter, *op. cit.*, §6.09.

¹⁹Born, *op. cit.*, §15.01[A].

²⁰Karton, *The Culture of International Arbitration and the Evolution of Contract Law*, Oxford University Press, 2013, p. 295; Gaillard, "Sociology of International Arbitration", *Arbitration International*, 2015

17. This study uses the US/France comparison as a lens to examine how the two dominant procedural traditions continue to shape evidentiary practice, despite the existence of a shared procedural framework.

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

18. The IBA Rules on the Taking of Evidence in International Arbitration are the central reference point of this study. First issued in 1983 as supplementary rules, they were substantially revised in 1999, 2010 and, most recently, 2020.²¹ They represent a key component of what Redfern and Hunter describe as the "soft law" of international arbitration:²² instruments that have no binding force of their own but are widely adopted by parties and tribunals as a neutral procedural standard. A 2016 survey conducted by the IBA Arbitration Committee found that the Rules were referenced in nearly half of arbitrations worldwide, with no significant disparities between civil law and common law jurisdictions.²³

19. Parties and arbitral tribunals may adopt the Rules in whole or in part, vary them, or use them as guidelines in developing their own procedures, without limiting the flexibility inherent to international arbitration.²⁴ Designed explicitly for arbitrations between parties from different legal traditions, they provide mechanisms for document production, witness testimony, expert evidence and the conduct of evidentiary hearings, taking into account differences of approach between legal traditions and adopting various forms of procedural compromise.²⁵ In practice, as Born notes, arbitral tribunals only rarely adopt national procedural rules wholesale, instead creating ad hoc procedures or adopting international instruments such as the IBA Rules.²⁶

20. The Rules therefore stand at the exact point where the two procedural cultures meet. Whether the compromise they aim to embody is genuinely balanced, or whether it institutionalises the categories of one tradition under a neutral vocabulary, is a question this thesis examines at length.

²¹IBA Rules on the Taking of Evidence in International Arbitration (2020), Foreword; *The Guide to Evidence in International Arbitration*, 3rd ed., Global Arbitration Review, 2023.

²²Blackaby, Partasides, Redfern & Hunter, op. cit., §1.13.

²³IBA Arbitration Committee, *Report on the Reception of IBA Arbitration Soft Law Products*, September 2016, p. 8.

²⁴IBA Rules on the Taking of Evidence in International Arbitration (2020), Preamble, §1-2.

²⁵Ibid., Preamble, §1; Khodykin, Mulcahy & Fletcher, op. cit., §2.1.

²⁶Born, op. cit., §15.04[B].

5. The Prague Rules

21. The IBA compromise has not gone unchallenged. In December 2018, a Working Group drawn from some thirty countries (mainly civil law) launched the Rules on the Efficient Conduct of Proceedings in International Arbitration, known as the Prague Rules.²⁷ Their declared premise is that arbitral proceedings have become too long and too costly, and that one remedy is to encourage tribunals "to take a more active role in managing the proceedings (as is traditionally done in many civil law countries)."²⁸ Where the IBA Rules organise a party-driven procedure, the Prague Rules openly adopt an inquisitorial approach and encourage tribunals and parties to avoid extensive document production.²⁹ Their very existence is significant for this study: a counter-model drafted by civil law practitioners is the clearest institutional admission that the existing harmonised framework was not perceived, on the civilian side, as neutral. The Prague Rules will be examined in Part I as the civilian counter-model to the IBA compromise.

6. Formal convergence, practical divergence and prevalence

22. Three working concepts run through this thesis and should be fixed at the outset.

23. Formal convergence designates the harmonisation achieved at the level of texts: the codification, principally in soft law instruments such as the IBA Rules, of a shared procedural vision for the taking of evidence that are presented as a balanced meeting of the two traditions.

24. Practical divergence designates what the texts do not show: the differences that persist, or re-emerge, in the actual conduct of arbitral proceedings, in the expectations and comfort of practitioners, and in the direction in which practice has settled.

25. Prevalence, finally, is used in a precise sense. To say that the common law model of proof prevails in international arbitration is not to say that arbitral procedure has become identical to American litigation, still less that the civil law influence is absent. It is to say that one tradition supplies the dominant reference model, such as the default techniques, the vocabulary, the professional expectations, to which practitioners from the other tradition adapt. Prevalence, in other words, means the dominance of a reference model, not uniformization.

²⁷Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018), Note from the Working Group.

²⁸Ibid.

²⁹*The Guide to Evidence in International Arbitration*, op. cit.; Prague Rules (2018), Preamble.

26. A thesis built on the gap between formal convergence and practical divergence must confront, at the outset, the testimony of practice itself.

27. Professor George Bermann is an arbitrator, comparative lawyer, and one of the leading American scholars of international arbitration. He was interviewed for this thesis. His account is unambiguous: "I am seeing immense convergence. I have to just tell you that, immense convergence."³⁰ Sitting with civil law practitioners, he reports, "I don't feel that the conduct of an arbitration varies fundamentally, depending upon the background."³¹ On its face, this observation threatens the very premise of a study devoted to remaining divergence.

28. It is the starting point of the argument. For Bermann's convergence is not the balanced meeting of traditions that the harmonising texts promise. It runs in one direction. He is, in his own words, "honestly amazed at the extent to which civil law arbitrators have adapted, without apparent difficulty, to the way things are done in the common law. And I think it is asymmetric. I think that's undeniable."³² Civil law counsel and arbitrators practise cross-examination and document production, techniques they would never employ at home. The movement in the opposite direction is confined, such as the greater weight given to written submissions and a general relaxation of strict evidentiary rules.³³

29. Practical divergence is not the survival of two traditions operating side by side in the hearing room. It is, first, the gap between the neutral promise of the harmonising texts and the asymmetric reality of a convergence running towards the common law. Second, it is the residue of difference that survives beneath visible procedure, at the level not of technique but of mentality. For example, in the distinction Bermann drew between the willingness of civil law practitioners to adopt common law methods and their comfort in doing so.³⁴ The question then becomes the one Bermann himself identified as unexplored: why the common law methods have prevailed to the extent they have. The sources of the difference, he observed, are not really explored in the literature: "It is simply observed. *Constaté*."³⁵ This thesis takes up that inquiry.

³⁰Bermann Interview, op. cit.

³¹Ibid.

³²Ibid.

³³Ibid.

³⁴Ibid. ("I do think we have to distinguish between willingness and comfort.")

³⁵Ibid.

Theoretical framework

30. Because the object of this study is a culture rather than a body of rules, its analytical tools are drawn from three bodies of scholarship.

31. The first is comparative law theory, and particularly Legrand's concept of legal mentalité, presented above: the interiorised structure of attitudes through which a legal community experiences legal order.³⁶ It supplies the vocabulary for the claim, central to Part II, that divergence survives below the surface of harmonised procedure.

32. The second is the study of arbitral culture. Joshua Karton has argued that the community of international arbitration practitioners has developed a culture of its own, structured around shared values: party autonomy, service of business, neutrality and internationalism. Autonomous professional norms seem to coalesce where a corpus of specialist transnational practitioners works primarily with and among itself, outside the governance of any one state.³⁷ If such an autonomous culture exists, the question is what materials it is built from and whether its evidentiary component is as internationally neutral as its self-description suggests.

33. The third is the sociology of the arbitration field. The pioneering study is from Yves Dezalay and Bryant Garth, who analysed international arbitration as a social field in which actors compete for symbolic capital such as honours, prestige, recognition, as much as for economic reward.³⁸ Emmanuel Gaillard has extended this analysis, describing the actors, rituals and power relations of the contemporary arbitration field.³⁹ This sociological lens is essential to the final stage of the argument: the prevalence of one model of proof is also a fact of social power, inseparable from the position of Anglo-American firms, the dominance of the English language and the composition of the elite that drafts the soft law.

³⁶Legrand, op. cit., pp. 265-266.

³⁷Carter, "Book Review: The Culture of International Arbitration and the Evolution of Contract Law", *Arbitration International*, 2013, 29(3), p. 539.

³⁸Dezalay & Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, The University of Chicago Press, 1996, cited in Gaillard, op. cit., n. 4; Carter, op. cit., p. 539.

³⁹Gaillard, "Sociology of International Arbitration", *Arbitration International*, 2015

Scope and methodology

34. The scope of the study is deliberately narrow. It compares two jurisdictions, the United States and France, taken as the leading representatives of the common law and civil law procedural cultures in international arbitration. It examines one phase, the arbitral proceedings themselves, to the exclusion of pre-arbitral evidence-gathering and post-award review. It concentrates on three mechanisms: document production, witness examination and expert evidence. These are the areas where the cultural tension between the two traditions is most visible in practice.

35. The method is comparative and doctrinal, but it does not rely on doctrine alone. Because the object of the study is practice, and because, as it will be seen, the gap between what the texts promise and what practitioners do is precisely the point, the analysis draws on three types of material: firstly the instruments themselves (the IBA Rules, the Prague Rules, and the relevant national reference points); secondly the academic and practitioner literature of both traditions; and finally an original primary source, a research interview conducted by Lila Kajari (myself) with Professor George Bermann of Columbia Law School, cited here as an unpublished interview.

36. The argument will proceed in two parts.

37. Part I establishes the formal convergence. It attempts to show how the taking of evidence has been codified into a common procedural language: the IBA Rules as a centrist, transactional compromise between the two traditions, and the Prague Rules as the civilian counter-model that contests it (Title 1). Then the harmonised template that this codification has produced for each of the three mechanisms: document production organised around the Redfern Schedule, witness evidence organised around written statements and cross-examination, and expert evidence organised around the choice between party-appointed and tribunal-appointed experts (Title 2).

38. Part II confronts this idea with practical reality. It first establishes that the convergence observed in practice is real but asymmetric: civil law practitioners have adapted to common law methods far more than the reverse, and the divergence that survives does so at the level of comfort and mentality rather than visible procedure (Title 1). It then turns to the question that this asymmetry makes unavoidable, and which constitutes the original contribution of this thesis: the sources of the prevalence of the common law model, structural and normative sources at first, cultural and sociological sources then (Title 2).

PART I. FORMAL CONVERGENCE: THE APPARENT HARMONISATION OF EVIDENCE-TAKING

39. The starting point of the demonstration is the edifice of texts. Over the last four decades, the taking of evidence in international arbitration has been progressively codified into a shared grammar. This codification is the "formal convergence" of the title: a harmonisation achieved at the level of instruments, which presents itself as a balanced meeting of the common law and civil law traditions and which any practitioner, American or French, is now expected to master.

40. Part I maps this edifice. Title I examines the codification itself: the IBA Rules as the central, self-consciously centrist compromise (Chapter II), and the Prague Rules as the civilian counter-model whose very existence reveals that the compromise was contested (Chapter II).

41. Title 2 then follows the codification into each of the three mechanisms within the scope of this study : document production, witness evidence and expert evidence, to show, in each case, how a harmonised template emerged from two divergent procedural starting points. Establishing this formal convergence with precision matters for what follows: it is only against the neutral promise of these texts that the asymmetry of practice, examined in Part II, becomes visible.

TITLE I. A COMMON PROCEDURAL GRAMMAR: THE CODIFICATION OF EVIDENCE

42. Two instruments dominate the codified landscape of evidence in international arbitration, and they stand in deliberate opposition. The first, the IBA Rules on the Taking of Evidence in International Arbitration, occupies the centre of the field: drafted to serve parties "from different legal traditions", it has achieved a level of acceptance that no other evidentiary instrument approaches. The second, the Prague Rules, was drafted against the first: a counter-codification of civilian inspiration, born of the conviction that the IBA compromise was less neutral than it claimed. This Title examines them in turn, for together they define the terms of the debate that runs through the whole thesis: the first chapter shows how the common grammar was built; the second shows that its neutrality was disputed from within.

Chapter I. The IBA Rules: a centrist, transactional compromise

A. Four decades of codification

43. The IBA Rules are the product of an incremental, forty-year effort of codification. The starting point was modest. In 1983, the International Bar Association issued the Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration.⁴⁰ As their name indicates, these were supplementary rules: the drafting subcommittee was not charged with producing a uniform code of arbitral procedure, but with addressing a subject that most arbitration rules deliberately avoided and that was, in arbitrations between parties from different legal traditions, "often a minefield to navigate" the mechanics of presenting or receiving evidence.⁴¹ The choice of that narrow aim is itself revealing: evidence was identified, from the beginning, as the point where the traditions collide.

44. The 1983 text was replaced in 1999 by the IBA Rules on the Taking of Evidence in International Commercial Arbitration, prepared by a Working Party of the IBA's Arbitration Committee.⁴² A review process initiated in 2008 led to the 2010 revision, which made two significant changes. First, the word "commercial" was deleted from the title, in acknowledgment of the fact that the Rules were being used in investment as well as commercial arbitration.⁴³ Second, and more substantively, the 2010 revision introduced the express requirements of fairness and good faith. The Preamble's objective of an "efficient, economical and fair process" acquired the word "fair" only in 2010, in tandem with the new principle that each party shall act in good faith in the taking of evidence.⁴⁴ Finally, following a 2016 report on the reception of the IBA's soft law products, a Task Force was created in 2019 to review the Rules, and the current version was adopted by resolution of the IBA Council on 17 December 2020.⁴⁵

⁴⁰IBA Rules on the Taking of Evidence in International Arbitration (2020), Foreword.

⁴¹Khodykin, Mulcahy & Fletcher, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, Oxford University Press, 2019, §2.26.

⁴²IBA Rules on the Taking of Evidence in International Arbitration (2020), Foreword.

⁴³Khodykin, Mulcahy & Fletcher, *op. cit.*, §2.28-2.29.

⁴⁴*Ibid.*, §2.9.

⁴⁵IBA Rules on the Taking of Evidence in International Arbitration (2020), Foreword.

45. Each layer of this history reinforced the same ambition. The 1983 rules already gave the arbitrator the power to "exercise all the powers he deems necessary to make the arbitration effective and its conduct efficient as regards the taking of evidence";⁴⁶ the 1999 Preamble undertook to "govern in an efficient and economical manner the taking of evidence in international commercial arbitrations";⁴⁷ the 2010 and 2020 texts completed the formula with fairness and good faith. The result is a short instrument: a Preamble, definitions, and nine articles covering the presentation of documents, witnesses of fact, expert witnesses, inspections, and the conduct of evidentiary hearings.⁴⁸

B. The ambition: a text addressed to parties "from different legal traditions"

46. What distinguishes the IBA Rules from ordinary procedural instruments is that their stated purpose is comparative. The Preamble announces that the Rules are intended to provide an efficient, economical and fair process for the taking of evidence, "particularly those between Parties from different legal traditions"⁴⁹. The Foreword adds that 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."⁵⁰ The Rules, in other words, do not merely regulate evidence: they present themselves as a bridge between the two procedural cultures described in the introduction. As the leading commentary puts it, they "take into account differences of approach in different legal traditions, adopt various forms of procedural compromise, and introduce new models of practice";⁵¹ their purpose is to provide a process that will meet, so far as reasonably possible, the expectations of parties from different legal traditions.⁵²

47. The IBA's own Commentary is explicit about the hybrid construction: "[t]he IBA Rules of Evidence contain procedures initially developed in civil law systems, in common law systems and even in international arbitration processes themselves."⁵³

⁴⁶Article 7(h) of the 1983 Rules, quoted in Khodykin, Mulcahy & Fletcher, op. cit., §2.7.

⁴⁷Preamble to the 1999 IBA Rules, quoted in Khodykin, Mulcahy & Fletcher, op. cit., §2.8.

⁴⁸IBA Rules on the Taking of Evidence in International Arbitration (2020), Foreword.

⁴⁹Ibid., Preamble, §1.

⁵⁰Ibid., Foreword.

⁵¹Khodykin, Mulcahy & Fletcher, op. cit., §2.1.

⁵²Ibid., §2.5.

⁵³Commentary on the IBA Rules (2010 and 2020 versions), as quoted in Blanke, "Document Production in International Arbitration Revisited: From Civil and Common Law Dichotomy to Operational Synergies", in

48. The aim, then, is one of synthesis: something taken from each tradition, and something created by and for international arbitration itself. The doctrine has largely accepted this self-description. The Rules are routinely presented as a harmonisation of civil and common law approaches,⁵⁴ and, in the field of document production (which appears to be the most contested of the three mechanisms) as a deliberate middle course between the expansive disclosure practices of the common law and the restrictive instincts of the civil law.⁵⁵ The detail of this compromise, mechanism by mechanism, is the object of Title 2. What matters at this stage is the promise itself: a text that claims to give each tradition a seat at the table and find a shared vocabulary.

49. Preamble 3 provides that the taking of evidence shall be conducted on the principles that each party shall act in good faith and shall be "entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely."⁵⁶ The use of "shall" is significant: whatever flexibility Preamble 2 grants in applying the Rules, these two principles are drafted as non-derogable standards.⁵⁷ The good faith obligation is, moreover, backed by a sanction: Article 9 permits the tribunal to take a party's failure to act in good faith into account when allocating the costs of the arbitration.⁵⁸ It is difficult not to see, in this pair of principles, a mix of what each culture regards as fundamental: the civilian attachment to good faith as a structural principle of procedure, and the common law attachment to advance notice of the evidentiary case to be met. Even at the level of first principles, the text is transactional.

Comair-Obeid & Brekoulakis (eds), *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide*, Kluwer Law International, 2023, p. 109.

⁵⁴*The Guide to Evidence in International Arbitration*, 3rd ed., Global Arbitration Review, 2023

⁵⁵Blanke, *op. cit.*, pp. 108-110.

⁵⁶IBA Rules on the Taking of Evidence in International Arbitration (2020), Preamble, §3.

⁵⁷Khodykin, Mulcahy & Fletcher, *op. cit.*, §2.40-2.42.

⁵⁸*Ibid.*, §2.43.

C. The soft-law logic

50. The second defining feature of the IBA Rules is their normative status. They are not law, they are not institutional rules, they bind nobody unless and until the parties or the tribunal decide otherwise. They belong to what Redfern and Hunter describe as the "soft law" of international arbitration,⁵⁹ and their entire operation rests on that logic. The Rules are "designed to supplement" the legal provisions and the institutional or ad hoc rules that apply to the arbitration;⁶⁰ parties who use them must still select an institutional or procedural framework, the IBA Rules serving to "fill in gaps intentionally left in those procedural framework rules with respect to the taking of evidence."⁶¹ Parties and tribunals may adopt them in whole or in part, vary them, or use them merely as guidelines; the Foreword even proposes a model clause for anticipatory adoption.⁶² O'Malley captures the resulting status in a formula that will speak to any American lawyer: the IBA Rules should be seen as "codified soft-law standards, or as we might refer to them in US legal parlance, restatements of rules of evidence."⁶³

51. The empirical record shows both the reach of this soft authority and its deliberate softness. According to the IBA's 2016 reception report, the Rules were referenced in nearly half (48 per cent) of the arbitrations considered.⁶⁴ But in around 80 per cent of those arbitrations, the tribunal consulted the Rules as non-binding guidelines rather than as formally adopted rules⁶⁵. In practice the Rules are rarely adapted or partially adopted, the real choice participants face is between formal adoption and use as guidance.⁶⁶ The preference for guidance is not accidental. Tribunals have proved "particularly insistent on their freedom not to be bound by the IBA Rules" a caution that is intended both to preserve procedural flexibility but also to guard against attempts to set aside awards on the ground that formally adopted Rules were not strictly followed.⁶⁷

⁵⁹Blackaby, Partasides, Redfern & Hunter, *Redfern and Hunter on International Arbitration*, 7th ed., Oxford University Press, 2022, §1.13.

⁶⁰IBA Rules on the Taking of Evidence in International Arbitration (2020), Preamble, §1.

⁶¹Commentary to the IBA Rules, quoted in Khodykin, Mulcahy & Fletcher, op. cit., §2.27.

⁶²IBA Rules on the Taking of Evidence in International Arbitration (2020), Foreword and Preamble, §2.

⁶³O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, Preface

⁶⁴IBA Arbitration Committee, *Report on the Reception of IBA Arbitration Soft Law Products*, September 2016, p. 8; Khodykin, Mulcahy & Fletcher, op. cit., §2.35.

⁶⁵Khodykin, Mulcahy & Fletcher, op. cit., §2.35.

⁶⁶Ibid., §2.33.

⁶⁷ICC commentary quoted in Khodykin, Mulcahy & Fletcher, op. cit., §2.38.

52. The paradox is only apparent: the IBA report records that even where the Rules were adopted only as guidelines, they were followed in 90 per cent of such cases.⁶⁸ Authority, in this field, does not need bindingness. The Rules govern because practitioners expect them to be followed, a network logic characteristic of soft law, whose strength grows with the number of actors who rely on it.⁶⁹

53. This soft-law logic matters for the argument of this thesis. An instrument that binds nobody, yet is followed by nearly everybody, does not operate through obligation: it operates through professional culture. The IBA Rules are effective precisely insofar as they have become the shared reflex of the international arbitration community, which makes the question of whose reflexes they follow even more pertinent.

D. A centrist and transactional character

54. The ambition and the normative status of the IBA Rules is coherent: a deliberately centrist instrument, produced by committee, addressed to both traditions, and enforced by expectation rather than command. The word "compromise" is the one the literature itself uses,⁷⁰ and it should be taken in its full, transactional sense: on the points where the traditions collide, the Rules do not choose a winner they will either split the difference or leave the question open. Document production is permitted but confined, witness evidence is written and oral and experts may be appointed by the parties or by the tribunal.

55. This transactional character is the source of the Rules' success but also of their principal weakness. A text designed to be acceptable to everyone must remain imprecise on exactly the points that divide its constituencies. Professor Bermann about the role of the IBA Rules, was clear: the Rules are "very imprecise"; they are "sort of centrist. They're not strict... in any way."⁷¹ His overall assessment deserves to be quoted in full, because it frames the two chapters that follow: "I think the IBA rules are just really a kind of a superficial compromise, is what I would call it. And I understand that. I'm not disparaging it, but it doesn't really advance things

⁶⁸Khodykin, Mulcahy & Fletcher, op. cit., §2.39.

⁶⁹Rizzo Amaral, "Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills", Kluwer Arbitration Blog, citing Druzin, "Why Does Soft Law Have Any Power Anyway?", *Asian Journal of International Law*, 2017, 7(2), pp. 362-363.

⁷⁰Blanke, op. cit., pp. 108-109; Khodykin, Mulcahy & Fletcher, op. cit., §2.1.

⁷¹Bermann Interview, op. cit.

very concretely."⁷² I believe the criticism is not that the Rules failed but it is that their mode of success (centrism, flexibility, imprecision) leaves the hard questions of evidentiary culture unresolved and so to be settled elsewhere: in the practice of tribunals, therefore in the professional reflexes that practitioners bring to the hearing room.

Chapter II. A contested codification: the Prague Rules as civilian counter-model

56. The IBA Rules present themselves, as the previous chapter has shown, as a centrist bridge between the traditions. The clearest evidence that this claim of neutrality was not universally accepted is institutional: in December 2018, a rival codification appeared.

57. This chapter examines the Prague Rules in three steps: their development as a reaction against a perceived common law dominance (A); their content, which systematically inverts the evidentiary defaults of the IBA framework (B); and their contested significance, an instrument whose textual distance from the IBA Rules is smaller than announced (C).

A. A reaction against "creeping Americanisation"

58. The Prague Rules were born of a grievance. The initiative emerged from the Russian and continental arbitration communities; the tone had been set at the fourth annual conference of the Russian Arbitration Association in Moscow in April 2017, where speakers denounced a "Creeping Americanisation of international arbitration."⁷³ A working group was formed with representatives from around thirty countries on the basis of a survey of procedural traditions in its members' jurisdictions. It released a first draft in January 2018, and the final Rules on the Efficient Conduct of Proceedings in International Arbitration were opened for signature in Prague on 14 December 2018.⁷⁴ The civilian identity of the project was, in its early stages, obvious. A preliminary draft circulated in 2018 was titled the "Inquisitorial Rules on the Taking of Evidence in International Arbitration" and its accompanying note criticised the IBA Rules. They stemmed expressly "from a civil law perspective" and the criticism was worded as following "a more adversarial approach", observing that many of their procedural features "are not known or used to the same extent in non-common law jurisdictions, such as continental

⁷²Ibid.

⁷³Rizzo Amaral, "Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills", Kluwer Arbitration Blog, first published at www.kluwerarbitrationblog.com, reporting the IV Russian Arbitration Association Annual Conference, Moscow, 20 April 2017.

⁷⁴Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018), Note from the Working Group.

Europe, Latin America, [the] Middle East and Asia". They contended that an "inquisitorial model of procedure" would reduce the time and costs of arbitrations.⁷⁵ One commentator summarised the project bluntly: the Prague Rules are "a manifesto in favour of the civil law tradition and of an inquisitorial approach in international arbitration, as well as an attack on the inefficiencies of the adversarial approach."⁷⁶

59. The final text presents itself more diplomatically. The official justification is efficiency: users of arbitration are dissatisfied with the time and costs of proceedings. One way to increase efficiency, the Working Group explains, is "to encourage tribunals to take a more active role in managing the proceedings (as is traditionally done in many civil law countries)."⁷⁷ The Note adds that although the Rules were initially intended for disputes between companies from civil law countries, they could be used in any proceedings where the nature or the amount of the dispute justifies a more streamlined procedure actively driven by the tribunal.⁷⁸ The parenthesis in the first quotation nonetheless says what matters for this study: the remedy proposed for the ills of international arbitration is, by the drafters' own description, the civil law model of the active adjudicator. Efficiency is the argument and the civilian procedural culture is the content.

B. The civilian content: the tribunal restored to the centre of fact-finding

60. Read against the IBA framework, the Prague Rules operate a systematic inversion of defaults. Where the IBA Rules organise a party-driven process in which the tribunal arbitrates between competing evidentiary initiatives, the Prague Rules place the tribunal at the origin of the process, in each of the three mechanisms within the scope of this study.

61. The general principle comes first. Under Article 3.1, the tribunal "is entitled and encouraged to take a proactive role in establishing the facts of the case which it considers relevant" without, however, releasing the parties from their burden of proof.⁷⁹ The tribunal may, on its own initiative, request documentary evidence, require fact witnesses to be made available, appoint experts (including on legal issues) and even order site inspections.⁸⁰

⁷⁵Preliminary draft of the Prague Rules (2018) and accompanying note from the Working Group, quoted in Rizzo Amaral, *op. cit.*

⁷⁶Rizzo Amaral, *op. cit.*

⁷⁷Prague Rules (2018), Note from the Working Group.

⁷⁸*Ibid.*

⁷⁹Prague Rules (2018), Article 3.1.

⁸⁰*Ibid.*, Article 3.2.

62. Article 2 requires an early case management conference at which the tribunal clarifies the relief sought, the disputed and undisputed facts, and the legal grounds. It may go further and share its preliminary views on the allocation of the burden of proof, the relief sought and the weight of the evidence. The Rules take care to provide that expressing such views shall not, by itself, be treated as evidence of a lack of impartiality or a ground for disqualification.⁸¹ That precaution speaks volumes: the drafters knew that the behaviour they were prescribing, a tribunal that announces its provisional assessment of the case, would be familiar to any French litigator but would strike common law practitioners as prejudgment.

63. Document production receives the most pointed treatment. Each party submits the documents on which it relies as early as possible⁸². Beyond that, Article 4.2 provides that the tribunal and the parties "are encouraged to avoid any form of document production, including e-discovery."⁸³ Production from the opposing party is confined to the exceptional case: it must be raised at the case management conference, justified, and directed at "a specific document" which is relevant and material to the outcome, not in the public domain, and in the other party's possession or control.⁸⁴ The contrast with the IBA regime which, as will be seen in Title 2, admits requests for categories of documents, is deliberate. Indeed, it is on this terrain that observers place the Rules' strongest civilian signature: the Prague Rules "openly adopt an inquisitorial approach" and were intended by their drafters to steer tribunals and parties away from document production altogether.⁸⁵ Bermann's characterisation is consistent: the Prague Rules are "far more civilian in their approach", and they take, "in their own way, a very strict attitude toward discovery."⁸⁶

64. Witness and expert evidence follow the same logic. It is the tribunal that decides which witnesses will be called and examined at the hearing, and it may decline to hear a witness whose testimony it considers irrelevant, immaterial or unnecessary. Thus, examination takes place "under the direction and control of the arbitral tribunal."⁸⁷ As for experts, the order of the articles is itself a message: the first model regulated is the tribunal-appointed expert appointed

⁸¹Ibid., Articles 2.1, 2.2 and 2.4.

⁸²Ibid., Article 4.1.

⁸³Ibid., Article 4.2.

⁸⁴Ibid., Articles 4.3-4.5.

⁸⁵*The Guide to Evidence in International Arbitration*, 3rd ed., Global Arbitration Review, 2023

⁸⁶Bermann Interview, op. cit.

⁸⁷Prague Rules (2018), Articles 5.2, 5.3 and 5.9.

at a party's request or on the tribunal's own initiative, on terms of reference approved by the tribunal⁸⁸. Party-appointed experts appear afterwards, preserved but no longer the presumptive centre of gravity.⁸⁹ Two further provisions complete the civilian approach of the instrument. Article 7 codifies *iura novit curia*, authorising the tribunal to apply legal provisions not pleaded by the parties, subject to hearing them.⁹⁰ And Article 8.1 states a preference no common law drafter would have written: to promote cost-efficiency, tribunal and parties "should seek to resolve the dispute on a documents-only basis". Therefore, the oral hearing, which is the centrepiece of the adversarial tradition, is demoted to an option.⁹¹

C. Textual proximity, practical marginality and doctrinal significance

65. The Prague Rules invite an obvious objection, and it was raised immediately: are they as different from the IBA Rules as their rhetoric and aim suggests? Commentators observed that the IBA framework already confer substantial proactive powers on the tribunal. For example to identify relevant issues, to order production of documents, to require the appearance of witnesses whose testimony has not been offered... One may then argue that provision for provision, the two instruments are "not that different after all", and the counter-model may rest on "a misconceived view" of what the IBA Rules actually stand for.⁹² The same commentator pressed the point to its conclusion: the Prague Rules fight an "apparent war between common law and civil law armies".

66. The marginality, at least, is a matter of record. Bermann said, about their reception: "They haven't had a great deal of influence"⁹³ and nothing in the literature reviewed for this study contradicts that assessment.

67. Yet dismissing the Prague Rules as a failed product would miss what they demonstrate. Indeed, for this thesis, they demonstrate three things. First, the neutrality of the IBA compromise was contested from within. The working group judged the "centrist" instrument sufficiently tilted towards the adversarial model to warrant a counter-codification, echoing the

⁸⁸Ibid., Articles 6.1-6.2.

⁸⁹Ibid., Article 6.5.

⁹⁰Ibid., Article 7.2.

⁹¹Ibid., Article 8.1.

⁹²Rizzo Amaral, op. cit. The provisions of the IBA Rules cited in this analysis include Articles 2.3, 3.10, 4.10, 6, 7 and 8.2 of the IBA Rules on the Taking of Evidence in International Arbitration (2020).

⁹³Bermann Interview, op. cit.

complaint, recorded in the IBA's own survey, that document production under the IBA Rules "still resembles too closely discovery as it is practiced in common law litigation."⁹⁴

68. Second, it reveals where the real divide lies. If the two texts are closer than their rhetoric, then what separates them is not the inventory of tribunal powers but the default setting and the spirit in which the powers are meant to be used. A party initiative moderated by the tribunal on one side, a tribunal initiative supplemented by the parties on the other. The divide of the Rules is a divide of mentalities conducted through texts, which is precisely the register in which this thesis has proposed to analyse the gap.

69. Third, and most significantly for Part II: the market has chosen. Interestingly, Bermann judged the civilian counter-model more capable of concrete effect than the instrument that defeated it, "the IBA Rules, on his account, do not "advance things very concretely"; "the Prague rules do."⁹⁵ An instrument that is more precise and could be more effective has nonetheless remained marginal, while the imprecise centrist compromise commands near-universal adherence. Why the field settled on the common-law-inspired centre rather than the civilian alternative is not a question the texts or this study can answer but it is a question about the field itself that is answered in Part II, Title II.

70. This title has therefore examined two texts: a shared set of rules, the IBA Rules, and a challenge to them, the Prague Rules. It remains to see what the shared rules provide, mechanism by mechanism. Title 2 follows the formal convergence into document production, witness evidence and expert evidence: the three aspects where the two procedural cultures and the two codifications meet.

⁹⁴IBA survey respondents, quoted in Khodykin, Mulcahy & Fletcher, op. cit., commentary on Article 3

⁹⁵Bermann Interview, op. cit.

TITLE II. THE FORMAL CONVERGENCE OF THE THREE MECHANISMS

71. The instruments examined in Title I supply the frame and now this Title will examine the picture. For each of the three mechanisms within the scope of this study the same demonstration is conducted in three steps. First, the divergent national starting points in the United States and in France. Then, the harmonised template that the codification, principally the IBA Rules, has erected between them. Finally, the standardised practice that template has produced. The order has a meaning, it follows the intensity of the historical divide: document production first, because it is the part on which the two cultures are furthest apart. Witness evidence next; expert evidence last.

Chapter I. Document production: from the discovery / Article 145 divide to the Redfern Schedule

72. No evidentiary mechanism separates the American and French procedural cultures as radically as the obtaining of documents from the opposing party. This chapter first measures that separation at its source, in the two national systems (A). It then presents the regime through which the IBA Rules propose to bridge it (B) and the procedural tool, the Redfern Schedule, through which that regime is administered in practice (C). It closes by asking whether the resulting compromise is as balanced as it claims (D).

A. American discovery vs French restraint

73. In American civil procedure, the gathering of evidence is the parties' affair, and it is expansive. Pre-trial discovery allows each litigant to compel from its adversary, and even from third parties, the disclosure of documents and information relevant to the dispute. This is acquired through document requests, interrogatories and depositions, before the case is ever tried. The philosophy is that of the adversarial model described in the introduction: truth is expected to emerge from the confrontation of two fully armed parties, each entitled to explore the other's files. American lawyers are, as civil law observers put it, "used to a broad discovery", encompassing the documents relevant to the matters in dispute⁹⁶. Therefore, requests for production cast in the widest terms are a familiar feature of that practice.⁹⁷ The instinct carries into arbitration: the Federal Arbitration Act expressly addresses the disclosure powers of

⁹⁶Tercier & Bersheda, "Document Production in Arbitration: A Civil Law Viewpoint", in *The Search for "Truth" in Arbitration*, ASA Special Series No. 35, 2011, p. 77 et seq.

⁹⁷*Ibid.*

tribunals seated in the United States, and most US courts have recognised that arbitrators seated there possess the power to order disclosure between the parties.⁹⁸

74. French procedure starts from the opposite premise. The Code de procédure civile places the burden of evidence squarely on each litigant: it falls to each party to prove, in accordance with the law, the facts necessary to the success of its claim.⁹⁹ There is no general duty to disclose documents to one's adversary, and nothing resembling American discovery. What French law offers instead are targeted judicial mechanisms. Under Article 11 of the Code, if a party holds an item of evidence, the judge may (at the request of the other party) order it to produce that item. It can be done under a monetary penalty (*astreinte*) and may likewise order the production of documents held by third parties in the absence of a legitimate impediment.¹⁰⁰

75. There is a mechanism that exists before any proceedings : Article 145: "*S'il existe un motif légitime de conserver ou d'établir avant tout procès la preuve de faits dont pourrait dépendre la solution d'un litige, les mesures d'instruction légalement admissibles peuvent être ordonnées à la demande de tout intéressé, sur requête ou en référé.*"¹⁰¹ The mechanism is judge-centred and conditioned: the applicant must show a legitimate reason, and the measure is ordered by the court, not operated by the parties. The philosophy of the system is stated by the Code itself, in a sentence that could serve as the civil law's answer to discovery: in no case may a measure of investigation be ordered in order to make up for a party's failure to discharge its own burden of proof.¹⁰² Evidence, in the French conception, is proved by the party who has it or obtained through the judge in specified circumstances but at no point is it mined from the adversary.

76. Between these two worlds stands the practice of international arbitration, which begins from a position closer to the civilian instinct. Indeed, there is no practice of automatic discovery of documents in international arbitration¹⁰³ and no obligation on a party to disclose the documents relevant to the dispute absent an affirmative order of the tribunal.¹⁰⁴

⁹⁸Born, *International Commercial Arbitration*, 3rd ed., Kluwer Law International, 2021 (Updated March 2024), ch. 16.

⁹⁹Article 9 of the French Code de procédure civile.

¹⁰⁰Article 11 of the French Code de procédure civile.

¹⁰¹Article 145 of the French Code de procédure civile.

¹⁰²Article 146 of the French Code de procédure civile.

¹⁰³Khodykin, Mulcahy & Fletcher, *op. cit.*, commentary on Article 3, §6.21.

¹⁰⁴Born, *op. cit.*, ch. 16.

77. The question the codification had to answer was therefore how much of the American mechanism to admit into that space, and on what conditions.

B. The IBA compromise: the Article 3 regime

78. The answer of the IBA Rules is a two-stage regime. At the first stage, each party discloses the documents on which it relies: under the procedure of Article 3, the documents supporting a party's case are submitted in advance, usually with its written submissions.¹⁰⁵ This is common ground between the traditions: the French party produces its *pièces*, the American party its exhibits. It carries the presumption, identified by O'Malley and others, that a party in arbitration will establish its case largely, if not entirely, on the documents within its own possession.¹⁰⁶

79. The second stage is where the compromise is supposedly struck. A party may submit to the tribunal a Request to Produce directed at its adversary's documents, but the request must identify either a specific document or "a narrow and specific requested category of documents" reasonably believed to exist". It must state how the documents sought are "relevant to the case and material to its outcome"; and it must confirm that the documents are not in the requesting party's own possession, custody or control, together with the reasons why it believes them to be in the possession of the other party.¹⁰⁷ The admission of categories of documents and not of individually identified pieces exceeds what the more restrictive civilian systems would spontaneously allow, and was consolidated in the 1999 revision¹⁰⁸. It is the common law's concession. The double requirement of relevance and materiality, conversely, connects the two traditions into a single test: as the leading commentary explains, relevance to the case is the characteristically common law criteria of disclosure, broadly understood. But the requirement that a document be material to the outcome of the case is strongly influenced by civil law concepts, under which the judge orders production of the documents necessary to establish the disputed allegations.¹⁰⁹ The requested party may object for lack of relevance or materiality: privilege, unreasonable burden, loss or destruction, commercial or technical confidentiality, special political or institutional sensitivity, procedural economy, proportionality or fairness,

¹⁰⁵ Ibid.; IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 3.1.

¹⁰⁶ O'Malley's analysis, as discussed in Khodykin, Mulcahy & Fletcher, op. cit., commentary on Article 3, §6.22.

¹⁰⁷ IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 3.3; Born, op. cit., ch. 16.

¹⁰⁸ Khodykin, Mulcahy & Fletcher, op. cit., commentary on Article 3, §6.22.

¹⁰⁹ Commentary quoted in Blanke, "Document Production in International Arbitration Revisited: From Civil and Common Law Dichotomy to Operational Synergies", in Comair-Obeid & Brekoulakis (eds), *The Plurality and Synergies of Legal Traditions in International Arbitration*, Kluwer Law International, 2023, pp. 111-112.

and, since the 2020 revision, the illegal obtention of the document¹¹⁰. The tribunal rules, ordering production or rejecting the request on one of the grounds of Article 9.2. Non-compliance is sanctioned in the arbitral manner: by adverse inferences and costs consequences rather than by contempt.¹¹¹

80. What the regime excludes is as significant as what it admits. There are no depositions and no interrogatories, there is no obligation of general disclosure and the purpose assigned to production is deliberately narrower than the American one. In the formula originated on the civilian side and now standard in the literature, the purpose of document production in international arbitration is to enable a party "to prove its case but not to build its case". Marghitola's definitional point completes the picture: a "Document", however broadly defined by the Rules to include electronic and audiovisual records, must already exist. A production request cannot require a party to create information it does not hold, which excludes the interrogatory function of American discovery by construction.¹¹²

C. The Redfern Schedule: the compromise

81. The administration of this regime has itself been standardised, in the form of a table. The Redfern Schedule (named after Alan Redfern, the arbitrator credited with introducing the mechanism¹¹³) has become a widely accepted tool for the conduct of document production in international arbitration, under the IBA Rules.¹¹⁴ It has four columns. The first contains the request: the document or narrow and specific category sought, identified by presumed author or recipient, date or timeframe, and presumed content. The second states the relevance and materiality of the documents to the outcome, confirms that they are not in the requesting party's possession, and explains why they are believed to be in the adversary's. The third contains the requested party's objections, typically framed on the Article 3.3 requirements or the Article 9.2 grounds. The fourth records the tribunal's decision: an order to produce, or a rejection.¹¹⁵

¹¹⁰IBA Rules on the Taking of Evidence in International Arbitration (2020), Articles 3.5 and 9.2; Blanke, op. cit., p. 112.

¹¹¹Blanke, op. cit., p. 112.

¹¹²Marghitola, "Definition of Document Production and Distinction from Other Terms", in *Document Production in International Arbitration*, International Arbitration Law Library, Vol. 33, Kluwer Law International, 2015, §2.01, pp. 5-6.

¹¹³Born, op. cit., ch. 16; Blanke, op. cit., p. 110.

¹¹⁴Blanke, op. cit., pp. 110-111.

¹¹⁵Ibid., pp. 111-112.

Variants exist, some schedules can add a reply column for the requesting party. Practitioners speak also of the "Stern Schedule" and, more recently, of the "Armesto Schedule", each proposing refinements to the same architecture¹¹⁶. But the four-column logic remains the standard.

82. The Schedule deserves the emphasis this chapter gives it, because it is the formal convergence made visible. A single page stages the entire transaction between the traditions: an adversarial, party-driven request in the first column; a party-driven objection in the third; and, in the fourth, a deciding tribunal that intervenes only to arbitrate — more active than an American trial judge, far more passive than a French *juge de la mise en état*. Conducted properly, the exercise is credited with making document production efficient and time- and cost-saving.¹¹⁷ It is, in tabular form, the centrist settlement described in Title 1.

D. A balanced text?

83. On its face, the Article 3 regime sits between the extremes, and much of the literature accepts it as such: a document production mechanism that reconciles the two approaches between the overly wide disclosure obligations prevalent in common law jurisdictions and the too restrictive limits of civilian systems.¹¹⁸ The assessment is fair as far as the text goes. Indeed, measured against the Federal Rules of Civil Procedure, Article 3 is a drastic reduction of the American mechanism; and measured against the Code de procédure civile, it is a notable enlargement of the French one.

84. Yet the balance of the text was contested almost from the start, and from the civilian side. The IBA's own survey records respondents, from civil and common law jurisdictions alike, complaining that disclosure under Article 3 "still resembles too closely discovery as it is practiced in common law litigation, or at least in the US", and calling for the scope of production to be narrowed further.¹¹⁹ Practitioners describe it in harsher terms. Zuleta, endorsing Fernandez-Armesto's quip that the "most dangerous words in the world of arbitration" are the IBA formula "a narrow and specific requested category of documents", reports that requests framed as "any and all documents" have become the norm, in schedules

¹¹⁶Born, op. cit., ch. 16 (Stern Schedule); Zuleta, "Requiem for Civil Law in International Arbitration?", *ICC Dispute Resolution Bulletin*, 2025 Issue 3 / 2026 Issue 1, p. 62 et seq. (Armesto Schedule).

¹¹⁷Blanke, op. cit., p. 112.

¹¹⁸Ibid., pp. 108-110.

¹¹⁹IBA survey respondents, quoted in Khodykin, Mulcahy & Fletcher, op. cit., commentary on Article 3, §6.20.

running to a hundred requests or more.¹²⁰ And when Yves Derains proposed, from the continental side, that production should be available only to the party bearing the burden of proof on the issue concerned, arguably a rule that would have re-anchored the mechanism in the civilian philosophy of Article 146, the proposal was supported by civil law practitioners but strongly rejected by common law commentators.¹²¹

Chapter II. Witness evidence: written statements and cross-examination

85. If document production is where the two procedural cultures are furthest apart in what they permit, witness evidence is where they are furthest apart in what they value. The common law builds its trial around the oral examination of witnesses whilst the French tradition treats testimony with something close to distrust. This chapter will follow the same route as the previous one: the two national conceptions of the witness (A). The harmonised template that international arbitration has erected between them (B), and an assessment of the transactions embedded in that template (C).

A. Two conceptions of the witness

86. In the common law tradition, witness testimony stands at the centre of the trial. Litigation follows the adversarial model: the parties present the evidence and challenge their opponent's, while the judge, comparatively passive, decides on what the parties elect to put before the court.¹²² Within that model, oral testimony is regarded as the single most fertile source of evidence for the fact-finder,¹²³ and its questioning belongs to counsel: examination, cross-examination and re-examination are conducted by the parties' representatives, not by the bench.¹²⁴ There is no requirement that a witness be independent of the parties : a party, its officers or employees may testify.¹²⁵

¹²⁰Zuleta, op. cit., p. 62 et seq.

¹²¹Derains, "Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint", *ICC International Court of Arbitration Bulletin*, Special Supplement 2006

¹²²Haridi & Kabbouri, "Witness Testimony and Cross-Examination in International Arbitration: A Civil Law and Common Law Blended Approach?", in Comair-Obeid & Brekoulakis (eds), *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide*, Kluwer Law International, 2023, pp. 134-135.

¹²³Authority quoted in Haridi & Kabbouri, op. cit., pp. 134-135.

¹²⁴Haridi & Kabbouri, op. cit., p. 135.

¹²⁵*Ibid.*, p. 138.

87. Cross-examination is "revered", in Smit's words, "as one of the great 'engines of truth' in the U.S. adversarial system of justice". It is seen as hard, frequently dramatic, and a powerful tool of advocacy for the American trial lawyer.¹²⁶

88. The civil law conception is almost the inverse. In the inquisitorial model, the judge is primarily in charge of the conduct of proceedings, the investigation of the facts and the collection of the evidence.¹²⁷ Documentary evidence carries the greater weight. In the sense that if a claim is supported by a document, the judge may go no further and if it is contradicted by one, the document will prevail¹²⁸. Testimony, correspondingly, plays a minor role. Its admissibility is traditionally conditioned on the independence of the witness: in civil law jurisdictions, parties cannot be witnesses in their own case, France occupying an intermediate position in which the parties may be heard, not as witnesses, but through the distinct procedure of the personal appearance of the parties (*comparution personnelle*).¹²⁹ Full written witness statements of the common law type have been generally unknown in civil law jurisdictions, and even prohibited in some¹³⁰ and where witnesses are heard at all, questioning belongs to the court.

89. The practical consequence, on the civilian side, is inexperience with the common law's central skill. Because counsel in civil law systems rarely question witnesses, civil law lawyers simply have fewer opportunities to cross-examine adverse witnesses and less exposure to cross-examination generally¹³¹. The exercise itself is culturally suspect: unlike a neutral judge's questioning, a common law lawyer's cross-examination is often perceived by civil law arbitrators as an advocate's effort to trick and embarrass the witness.¹³²

¹²⁶Smit, "Cross-Examining Witnesses Before Civil Law Arbitrators", in *Take the Witness: Cross-Examination in International Arbitration*, p. 243

¹²⁷Haridi & Kabbouri, op. cit., p. 135.

¹²⁸Ibid.

¹²⁹Ibid., pp. 135 and 138.

¹³⁰Ibid., p. 138.

¹³¹Smit, op. cit., pp. 243-244.

¹³²Ibid., p. 243.

B. A harmonised template: written statements, then cross-examination, under tribunal control

90. The template that international arbitration has settled on rests on four elements.

91. The first is a universal conception of the witness. Arbitral practice has abandoned the civilian independence requirement: arbitrators generally admit that any person may be heard as a witness, whether connected to a party, any pre-existing relationship going to weight rather than admissibility.¹³³ The rules codify the solution. Article 4.2 of the IBA Rules provides that "any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative", echoing Article 27(2) of the UNCITRAL Rules.¹³⁴

92. The second is the written witness statement as the standard vehicle of direct testimony. A written witness statement is a signed statement of testimony containing the witness's direct evidence, submitted to the tribunal and the other parties in advance of any hearing.¹³⁵ The mechanism was not adopted without resistance: historically unknown in many civil law systems, it entered the international instruments only after extensive debates and objections from civil lawyers, some arguing that it posed difficulties with national laws and could even offend public order, before agreement was reached to refer to it expressly in the 1976 UNCITRAL Rules.¹³⁶ Today it is commonplace: provided for in the UNCITRAL Rules, the IBA Rules and numerous institutional rules, the written statement has become the standard method by which the direct testimony of witnesses is submitted into evidence in international arbitration, generally replacing oral examination-in-chief.¹³⁷ Its purposes are practical: the statement streamlines the proceedings, informs the tribunal and the opposing party of the testimony before the hearing, allows the adversary to prepare its examination, and lets the tribunal decide what oral evidence it still needs to hear.¹³⁸ If a witness who has submitted a statement refuses without valid reason to appear for examination, the tribunal may disregard the written statement.¹³⁹

¹³³Haridi & Kabbouri, op. cit., p. 139.

¹³⁴IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 4.2; UNCITRAL Arbitration Rules, Article 27(2), quoted in Haridi & Kabbouri, op. cit., p. 139.

¹³⁵Haridi & Kabbouri, op. cit., pp. 137-138.

¹³⁶Ibid., p. 140.

¹³⁷Ibid., pp. 140-141.

¹³⁸Ibid., p. 141.

¹³⁹Ibid., p. 143; IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 4.7.

93. The third element is cross-examination as the default oral phase. Whether and how witnesses are questioned is, formally, left to the tribunal's discretion. But in practice, cross-examination has become standard as the means of testing witness evidence in international arbitration.¹⁴⁰ It is, however, a tempered version of the domestic institution: the usual common law rules of evidence do not apply, and the confrontational, dramatic, hostile questioning of courtroom rarely occurs in international arbitration.¹⁴¹

94. The fourth element binds the other three: tribunal control. Article 8.2 of the IBA Rules states the principle in terms that deserve quotation, because they define the harmonised hearing: "The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading."¹⁴² The compromise between the questioning judge of the civil law and the cross-examining counsel of the common law is thus institutionalised: counsel conduct examination and cross-examination, the tribunal intervenes, limits and may question the witness at any stage. This is an allocation reflected in institutional rules such as Article 20.9 of the LCIA Rules, under which witnesses are questioned by the parties "under the control of the Arbitral Tribunal", which "may put questions at any stage."¹⁴³

C. The transactions of the template and their direction

95. As with document production, the witness template is presented as a synthesis, and as with document production, each element has an identifiable provenance.

96. Consider each element in turn. The universal capacity to testify is a straightforward common law solution, adopted over the civilian independence requirement, which survives only as a factor of weight.¹⁴⁴

¹⁴⁰Haridi & Kabbouri, op. cit., pp. 149-150.

¹⁴¹Ibid., p. 150.

¹⁴²IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 8.2, quoted in Haridi & Kabbouri, op. cit., p. 150.

¹⁴³LCIA Arbitration Rules (2020), Article 20.9, quoted in Haridi & Kabbouri, op. cit., p. 150.

¹⁴⁴Haridi & Kabbouri, op. cit., p. 139.

97. The written witness statement might seem, at first sight, a concession to the civilian culture of the written record. In fact, it is an Anglo-American artefact, written statements are commonplace in common law practice, with roots in the nineteenth century¹⁴⁵, which packages the common law's examination-in-chief in written form. What civil lawyers obtained in the UNCITRAL debates was the accommodation of a common law mechanism they had initially resisted, not the adoption of one of their own. The default oral phase, cross-examination, is the most distinctively common law institution in the entire law of evidence. Only the fourth element the controlling, intervening, questioning tribunal genuinely descends from the civilian judge, and even it is framed, in Article 8.2, as a limit on a party-conducted examination rather than as the tribunal's own inquiry.

98. The treatment of witness preparation makes the direction of the transaction explicit. In the United States, an attorney may (and even should) prepare a witness thoroughly : interviews, familiarisation, mock cross-examination and rehearsals are accepted, provided the testimony remains truthful.¹⁴⁶ England, by contrast, prohibits content-specific preparation: witness familiarisation is permitted, but training or coaching is not "There is no place for witness training in this country, we do not do it. It is unlawful", in the words of the Court of Appeal in *R v Momodou*.¹⁴⁷ Many civil law countries go further still, prohibiting counsel, on pain of disciplinary sanction, from discussing the content of the evidence with a witness at all.¹⁴⁸ France maintains precisely such a standing prohibition against counsel discussing the case with a witness before a hearing and yet, for international arbitration, the prohibition has yielded. By a resolution unanimously adopted on 28 February 2008, the Conseil de l'Ordre des avocats de Paris declared that, in international arbitration proceedings in France or abroad, the preparation of a witness by counsel "does not violate the essential principles of the legal profession and is part of a commonly accepted practice."¹⁴⁹ It has even been argued that equality of arms requires it: one party's counsel cannot be free to prepare witnesses while the other's is forbidden to do so.¹⁵⁰ The IBA Rules complete the normalisation, providing that it "shall not be improper" for a party or its representatives to interview its witnesses and discuss their prospective

¹⁴⁵Ibid., p. 138.

¹⁴⁶Ibid., pp. 143-144.

¹⁴⁷*R v Momodou*, quoted in Haridi & Kabbouri, op. cit., pp. 144-145.

¹⁴⁸Haridi & Kabbouri, op. cit., p. 145.

¹⁴⁹Resolution of the Conseil de l'Ordre des avocats de Paris, 28 February 2008

¹⁵⁰Haridi & Kabbouri, op. cit., p. 146.

testimony¹⁵¹, a phrasing that betrays the state of affairs it corrects: conduct is declared "not improper" only where, somewhere, it was.

99. It displays in miniature the mechanism this thesis will examine at full scale in Part II: confronted with a practice generated by the common law model, the French legal profession did not resist it, rather it amended its own deontology to accommodate it. At the level of texts, then, the witness template is a genuine hybrid: statements, cross-examination and a controlling tribunal. At the level of provenance, the traffic has flowed overwhelmingly from one side. Whether the same is true of the third mechanism, expert evidence, as Bermann observed, "the American view has sort of prevailed" is the question of the next chapter.

Chapter III. Expert evidence

100. The third mechanism presents the divide in its purest form. For documents and witnesses, the two traditions disagreed about scope and method but for expertise, they disagree about the very identity of the expert: an instrument of the party or an auxiliary of the court. This chapter sets out the two models (A), the double regime through which the IBA Rules accommodate both (B), and the significance of a codification that, unlike the previous two, resolves (C). A short conclusion then closes Part I.

A. The two identities of the expert

101. In American practice, the expert is a witness like the others. He is retained, instructed and paid by a party, presented in support of that party's case, and tested by the adversary in cross-examination. Expert evidence is adversarial evidence: each side arrives with its own expert, and the confrontation of the two opinions is expected to inform the tribunal in the same way the confrontation of the parties' cases is expected to reveal the truth. The French tradition reasons from the opposite premise. Expertise there is a judicially ordered measure of instruction: the expert (*the expert judiciaire*) is selected and commissioned by the judge, owes his duties to the court rather than to a litigant, and delivers a single, neutral opinion. Bermann stated the resulting expectation gap plainly: the American practice of each party having its own expert "is not adopted elsewhere in the world"; in many civil law jurisdictions the appointment

¹⁵¹IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 4.3.

of an expert by the tribunal "would be a normal approach", and "there would be a lot of suspicion about party appointed experts."¹⁵²

102. Arbitration practice long reflected, and to a degree still reflects, this divide. As Sachs observes, in proceedings involving parties and counsel from a common law background, expert testimony is, generally, provided by party-appointed experts. In proceedings involving primarily civil law representatives, tribunal-appointed experts are still the rule, albeit with a certain trend towards party appointment.¹⁵³ Institutional practice confirms the split: providing for tribunal-appointed experts has become a standard feature of institutional rules, but, as Derains and Schwartz note of ICC practice, the actual appointment of such experts "is still much more prevalent among civil law lawyers than their common law counterparts, who are more accustomed to weighing expert evidence presented by each of the parties."¹⁵⁴

103. What is striking is that the divide is one of practice, not of law. The UNCITRAL Model Law expressly empowers the tribunal to appoint one or more experts to report to it, and says nothing of party-appointed experts; national laws inspired by it, in civil law countries such as Austria, Spain and Germany but equally in Section 37 of the English Arbitration Act 1996, provide for the tribunal-appointed expert. The French and Swiss arbitration laws and the US Federal Arbitration Act are silent on both figures and everywhere the admissibility of both types of experts is beyond doubt, the choice being left to the tribunal's discretion.¹⁵⁵ The formal materials, in other words, are neutral or even lean towards the civilian figure. The divide lives in the habits of the practitioners, which is exactly where this thesis has proposed to look for it.

¹⁵²Bermann Interview, op. cit.

¹⁵³Sachs, op. cit., §8.

¹⁵⁴Derains & Schwartz, *A Guide to the ICC Rules of Arbitration*, p. 279

¹⁵⁵Sachs, op. cit., §§9-13, citing Article 26 of the UNCITRAL Model Law, Section 37 of the English Arbitration Act 1996, and the arbitration laws of Austria, Spain, Germany, France, Switzerland and the United States.

B. The IBA Articles 5 and 6

104. The IBA Rules address the divide in their characteristic manner: they codify both models, in parallel and in detail, without choosing between them.

105. Article 5 regulates the party-appointed expert. A party may rely on such an expert as a means of evidence on specific issues, identifying the expert and the subject-matter of the testimony within the time ordered by the tribunal.¹⁵⁶ The core of the regime is the Expert Report, whose required content reads as a checklist of the concerns the figure attracts: the expert's background and qualifications, a statement of any present or past relationship with the parties, their counsel or the tribunal, a description of the instructions under which the opinion is given and most importantly "a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal."¹⁵⁷ The requirements of independence and of cooperation between experts represent the most significant modern additions to Article 5, introduced to encourage transparency and confidence in a figure structurally exposed to the suspicion of partisanship.¹⁵⁸ Two further provisions discipline the figure: the tribunal may order party-appointed experts who have reported on the same or related issues to "meet and confer" to attempt to reach and record agreement and to narrow their disagreements¹⁵⁹. This practice is known as expert conferencing and the expert who fails without valid reason to appear for examination sees his report disregarded, on the model applicable to witnesses of fact.¹⁶⁰

106. Article 6 regulates the tribunal-appointed expert, transposing the civilian figure into an adversarial environment. The tribunal, after consulting the parties, may appoint one or more independent experts to report on issues it designates, and settles the expert's terms of reference after consultation.¹⁶¹ The guarantees are the mirror image of Article 5's: the prospective expert submits a description of qualifications and a statement of independence before accepting appointment, and the parties may object to his qualifications or independence.¹⁶² The expert's investigative powers are aligned with the tribunal's : he may request information, documents or access to goods, sites and systems to the extent relevant and material, disagreements being

¹⁵⁶IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 5.1.

¹⁵⁷Ibid., Article 5.2, Article 5.2(c).

¹⁵⁸Khodykin, Mulcahy & Fletcher, op. cit., commentary on Article 5

¹⁵⁹IBA Rules on the Taking of Evidence in International Arbitration (2020), Article 5.4.

¹⁶⁰Ibid., Article 5.5.

¹⁶¹Ibid., Article 6.1.

¹⁶²Ibid., Article 6.2.

decided by the tribunal. The parties retain the right to receive the information and attend inspections.¹⁶³ The expert reports in writing, the parties respond, and the expert may be examined at the hearing including, in a nice adversarial touch, by the party-appointed experts themselves.¹⁶⁴

107. The drafting is even-handed: two figures, two statements of independence, two reports, one hearing. Formally, no default is expressed. The Rules are, as commentary on Article 5 notes in passing, far more detailed than the national laws and institutional rules on both figures, and concern about the independence of a tribunal-appointed expert is much less likely to arise than for his party-appointed counterpart.¹⁶⁵

C. A choice but a prevalence revealed by practice

108. The expert chapter of the codification thus differs in kind from the two that precede it. For documents, Article 3 states a substantive compromise: production exists, but confined. For witnesses, Articles 4 and 8 impose a sequence: statements, then cross-examination, under control. For experts, Articles 5 and 6 impose nothing: they set two fully equipped models side by side and leave the selection to the parties and the tribunal. Of the three mechanisms, expertise is the one where the formal framework is most genuinely neutral because neither tradition's figure is preferred, and if anything, the surrounding legal materials (the Model Law first among them) speak the civilian language of the tribunal's expert.

109. That neutrality is precisely what gives the practice its evidentiary value for this study. Where the text chooses, practice may simply be following the text; where the text offers a 'menu', practice reveals a preference. The literature already records which way the preference runs, the party-appointed expert dominates, to the point that Sachs can ask whether it has "become a given in international arbitration practice that expert evidence should be provided only by party-appointed experts"¹⁶⁶. The full measure of the asymmetry, however, belongs to Part II, where Bermann's testimony (that in his entire career as arbitrator he has never once sat in a case where the tribunal appointed an expert) will be given its proper weight.¹⁶⁷

¹⁶³Ibid., Article 6.3.

¹⁶⁴Ibid., Articles 6.4-6.6; Sachs, op. cit., §21.

¹⁶⁵Sachs, op. cit., §19; Khodykin, Mulcahy & Fletcher, op. cit., commentary on Article 5.

¹⁶⁶Sachs, op. cit., §2.

¹⁶⁷Bermann Interview, op. cit.

Part I Conclusion

110. The formal convergence announced in the introduction is now established. At the level of instruments, a single centrist codification that soft in form yet near-universal in reach occupies the field, its only rival a civilian counter-model that contested its neutrality and remained marginal (Title I). At the level of mechanisms, the codification has produced three templates: a substantive compromise for documents; a sequential hybrid for witnesses and, for experts, a symmetrical menu that declines to choose between the party's expert and the tribunal's (Title II).

111. Three findings should be carried forward. First, the shared procedure is real: an American and a French lawyer entering an international arbitration today operate under one framework, and that framework is not the domestic law of either. Second, its neutrality was contested from the start, from the civilian side, both within the IBA's own constituency and through the Prague rules. Third, at several points the texts themselves already disclose a direction of travel: the categories of documents conceded to the common law, the witness statement's Anglo-American, the Paris Bar's deontological accommodation of witness preparation. Whether the practice built on it is the balanced meeting the texts promise, or a convergence running one way, is the question the texts cannot answer. Part II answers it.

PART II. PRACTICAL REALITY: AN ASYMMETRIC CONVERGENCE AND THE SOURCES OF THE COMMON LAW'S PREVALENCE

112. Part I closed on a question the texts cannot answer. The codification of evidence has produced a common procedure; whether the practice conducted is the balanced meeting of traditions the texts promise is a question of fact and questions of fact require evidence of practice. Part II supplies it and draws from it the argument that constitutes this thesis's contribution.

113. The demonstration proceeds in two movements. Title I will establish what practice actually shows: first, that the convergence is real: more complete, indeed, than a comparative lawyer would predict (Chapter 1). Second, that it is asymmetric: a one-way adaptation of the civil law to the common law model, leaving a residue of divergence that survives not in visible procedure but in comfort and mentality (Chapter 2). Title II then confronts the question that this asymmetry makes unavoidable, and which the literature has left largely unexplored: the sources of the common law's prevalence - structural and normative (Chapter 1), cultural and sociological (Chapter 2).

TITLE I. A CONVERGENCE THAT IS REAL BUT ASYMMETRIC

114. The first Title of this Part is an exercise in intellectual honesty. A thesis organised around divergence must resist the temptation to overstate it and the strongest evidence available to this study: the testimony of a leading arbitrator and comparatist, gathered at first hand, points, at first sight, the other way. This Title therefore begins by conceding, and documenting, the convergence of practice in its full extent (Chapter 1), before establishing that the concession, properly analysed, is the thesis: the convergence is real, but it runs in one direction, and what survives beneath it is precisely the layer of legal culture that this study set out to examine (Chapter 2).

Chapter I. The reality of practical convergence

A. The “participant-observer’s” report

115. The central evidence of this chapter is the research interview conducted with Professor George Bermann, whose double position (scholar of comparative procedure and sitting international arbitrator) makes him what the sociology of law would call a participant-observer of the field. His report on the state of practice is categorical, and it is worth setting out in his own words, because the argument of this Part is built on taking it seriously rather than explaining it away.

116. Asked whether the cultural background of counsel shapes the way evidentiary hearings unfold, Bermann answered: "I am seeing immense convergence. I have to just tell you that, immense convergence. I mean, I sit with a lot of civil law practitioners, and I don't feel that the arbitrations I conduct with them are any procedurally different."¹⁶⁸ He seemed aware of what the observation did to the premise of this research "this may not be welcome news to you because you want to explore differences" and doubled down on its evidentiary status: "That's a fact from my experience, and I don't think I'm unusual."¹⁶⁹ The conclusion he drew from it is the one this chapter adopts as its finding: "I don't feel that the conduct of an arbitration varies fundamentally, depending upon the background. That's counterintuitive. We would always say, you're a product of your background."¹⁷⁰

117. The convergence, moreover, is not confined to arbitrators. Bermann had opened the interview with the observation that even lawyers who were trained in a system were very ready to adopt as arbitrators the practices of other systems. In particular he mentioned how French arbitrators who don't experience discovery and don't experience cross-examination actually practice it. He extended the point expressly to lawyers: "civil law counsel are engaging in conduct that they wouldn't engage in at home."¹⁷¹ The picture is one of a professional community whose members, whatever their formation, operate a common evidentiary technique with no fundamental variation traceable to origin.

¹⁶⁸Bermann Interview, op. cit.

¹⁶⁹Ibid.

¹⁷⁰Ibid.

¹⁷¹Ibid.

118. One of his illustrations deserves separate mention, because it captures how deep the standardisation runs. Bermann noted, in arbitration, that "there's always a transcript, and they're always quoted in the submissions". He was, at the time of the interview, writing an award containing extensive direct quotations from witnesses, whereas some civil law jurisdictions traditionally had no verbatim transcripts of testimony at all, the judge instead recording a summary of what the witness had said. The verbatim transcript, an unremarkable piece of common law hearing logistics, has become so universal in international arbitration that its cultural specificity has disappeared.

119. A methodological point is in order, and it was stated in the introduction: an interview is qualified testimony, not proof. Bermann's report establishes what one highly placed, comparatively minded observer experiences; standing alone, it could be unrepresentative. Yet it does not stand alone.

B. Corroboration: the literature of blended practice

120. The scholarship of the last two decades corroborates the report from every angle from which the question has been examined.

121. On documents, Blanke records "a marked trend towards the convergence of adversarial and inquisitorial techniques in the presentation of documentary evidence" culminating in production rules that are the result of a procedural compromise and create, in his phrase, operational synergies out of the common law/civil law dichotomy.¹⁷² On witnesses, Haridi and Kabbouri, surveying the field under the telling title of a "blended approach", find that written statements are the standard vehicle of direct testimony. Further, that cross-examination "has become standard as a means to assess such evidence", and that the examination unfolds under a tribunal exercising the control codified in Article 8.2 of the IBA Rules.¹⁷³ At the level of general observation, the standard account is the one Lew and Mistelis gave and which commentators still quote: rigid distinctions between civil law and common law approaches "are not imposed upon international commercial arbitration", whose emerging practice of evidence-taking "comprises elements of both civil and common law type procedures, other legal systems, and practices especially appropriate for an international process."¹⁷⁴

¹⁷²Blanke, op. cit., pp. 104 and 108-110.

¹⁷³Haridi & Kabbouri, op. cit., pp. 149-150.

¹⁷⁴Lew, Mistelis et al., *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 556, quoted in Rizzo Amaral, op. cit.

And at the level of theory, Karton's study of arbitral culture proceeds from what its reviewer calls the uncontroversial fact that international arbitral practice "has evolved as a set of procedural practice norms independent of national court rules."¹⁷⁵

122. Two precisions keep the finding honest. First, the convergence is a convergence of international practice, not of the domestic systems themselves: the American trial and the French instance remain as far apart as ever. What has converged is the conduct of the specialised, transnational proceedings this thesis studies. Second, the civilian pole of the comparison should not be treated as a single uniform tradition. As a Swiss specialist quoted by Redfern and Hunter observed, "there is no such thing as 'Civil Law procedure'" in civil and commercial litigation: the common law countries share basic principles descended from English procedure, but continental systems are heterogeneous blends, such that there may be as much difference between the outlook of a French *avocat* and a German lawyer as between an English and an Italian lawyer.¹⁷⁶ The convergence of arbitral practice is thus, on the civilian side, a convergence from many starting points at once.

C. The civilian contribution

123. If the convergence was total and symmetrical, nothing civilian would be detectable in the common practice. That is not the case, and the honest measure of the counter-current matters for the argument. Bermann, pressed on whether any influence runs the other way, identified two items.

124. The first is the weight of the written record. In international arbitration, he observed, "there is more respect and more weight given to written communications, written submissions, than is customary in American practice. We're very oral."¹⁷⁷ The memorial-style proceeding, full written submissions carrying the argument, the hearing concentrated and comparatively short reflects the civilian, not the American, centre of gravity. It coheres with the documentary primacy that the comparative literature attributes to the civil law tradition.¹⁷⁸

¹⁷⁵Carter, "Book Review: The Culture of International Arbitration and the Evolution of Contract Law", *Arbitration International*, 2013, 29(3), pp. 539-540.

¹⁷⁶Swiss specialist quoted in Blackaby, Partasides, Redfern & Hunter, op. cit., §6.78.

¹⁷⁷Bermann Interview, op. cit.

¹⁷⁸Haridi & Kabbouri, op. cit., p. 135.

125. The second is the relaxation of the law of evidence itself. American lawyers are formed in a dense, exclusionary law of evidence "We have entire semester-long courses on evidence" and international arbitration has nothing of the kind: tribunals accept most anything and give it the weight it deserves. In his formulation, "Americans and common law folk are operating more in a civil law attitude toward evidence, greater relaxation";¹⁷⁹ arbitration is "simply relaxed as a general rule, now, I'm not sure it's relaxed compared to France, but it's certainly relaxed as compared to common law."¹⁸⁰ The point is structural rather than anecdotal: the common law's rules of evidence exist largely to police what may reach a lay jury in a proceeding decided by professional arbitrators, as in one decided by a professional judge, the exclusionary tendency loses its purpose. On this one dimension, the arbitral room is a civilian room.

126. These are real, and they will be given full weight in the balance. But their modesty should already be apparent: neither touches the three mechanisms in which the taking of evidence consists of. What documents are produced, how witnesses are examined, who presents expertise on all three, as the next chapter shows, the traffic has flowed the other way.

D. From the fact of convergence to its shape

127. The finding of this chapter can be stated in one sentence: the practice of evidence in international commercial arbitration has converged, to the point that a leading participant-observer detects no fundamental procedural variation attributable to legal background, and the literature concurs. The finding immediately raises the question that gives Part II its structure. Convergence is a meeting and every meeting has a place. Two traditions can converge midway, each abandoning half its habits or one can travel to the other. Bermann's own explanation of how civil law practitioners came to master techniques "they never would have done in domestic practice" "experienced arbitrators are quick learners"¹⁸¹ already hints at the answer: learning is what the visiting party does. The next chapter establishes where the meeting took place.

¹⁷⁹Bermann Interview, op. cit.

¹⁸⁰Ibid.

¹⁸¹Ibid.

Chapter II. The asymmetry and its residue: willingness, comfort, and the survival of mentality

128. The previous chapter established the fact of convergence, and this one will establish its shape. It first draws up the balance sheet of the adaptation and shows that the traffic has run overwhelmingly from the civil law towards the common law (A). It then triangulates that conclusion against the accounts of persistent friction in the literature, which confirm rather than contradict it (B). It closes on the distinction that Bermann offered this research and that this thesis adopts as its analytical key: between the willingness of civil law practitioners, which is complete, and their comfort, which is not the register in which divergence survives (C).

A. A one-way adaptation

129. Bermann's own characterisation of the convergence, given in the first minutes of the interview, contained the qualification on which this entire Part turns: "there's kind of a convergence. It's a little bit asymmetric. I think the common law influence has been greater."¹⁸² By the middle of the conversation, the qualification had hardened into a verdict: "I'm honestly amazed at the extent to which civil law arbitrators have adapted, without apparent difficulty, to the way things are done in the common law. And I think it is asymmetric. I think that's undeniable."¹⁸³ The claim can be tested against the three mechanisms.

130. For document production, the question is who travelled to whose mechanism. The answer is not in doubt. The Redfern Schedule administers a managed, confined version of an institution that exists in the American procedural world and has no equivalent in the French one because nothing in the harmonised practice descends from the logic of Article 145, under which evidence is obtained through the judge upon a showing of legitimate reason. The civilian practitioner arriving in arbitration must learn to draft requests, object to them and live with orders to produce internal documents to an adversary, conduct without domestic precedent. The asymmetry of that learning curve is visible at the level of individual practice. During my internship in the arbitration and litigation department of a Paris firm, I asked a French-trained and French-qualified associate what she made of the Redfern Schedule in the case we were working on. She replied that the exercise had been awful, that she had not understood a thing at first, and that it had been painfully long.

¹⁸²Bermann Interview, op. cit.

¹⁸³Ibid.

131. The remark is anecdotal and is offered as an illustration rather than as evidence. But it illustrates the asymmetry with unusual economy, and in precisely the register in which Section 3 of this chapter will locate the surviving divergence. The associate did the work: the Schedule was drafted, the objections were made, the case went on. What the remark records is not refusal but difficulty, an exercise for which her formation had not prepared her, which she will not encounter again in her domestic practice and which she had to learn on the case itself. No symmetrical experience awaits her American counterpart, who meets in arbitration a reduced version of something already taught at law school. Adaptation, in other words, has a cost, and the cost falls on one side.

132. For witness evidence, the sharpest proof of asymmetry is where the living controversy now lies. Cross-examination, "like it or not, has become a regular feature of international arbitration."¹⁸⁴ Robinson and Smit, writing from a combined practice spanning both sides of the Atlantic, recall opposing civil law lawyers "who viewed cross-examination as unnecessary and barely bothered with the exercise";¹⁸⁵ the exercise nonetheless became the default, and the civilian bar adapted, to the point, seen in Part I, of amending its own deontology to permit witness preparation.¹⁸⁶ But the truly telling fact is the subject of their 2018 article: the significant clash over cross-examination in international arbitration today is not between the common law and the civil law at all but it is among common law traditions, between the American style of controlled, incremental impeachment and the English barrister's duty of "putting the case" to the witness.¹⁸⁷ When the live methodological debate in a procedural field opposes two variants of one tradition, the other tradition has left the field.

133. For expert evidence, the asymmetry is cleanest of all because the formal framework is genuinely neutral: two fully equipped models, no textual default, and surrounding materials (the Model Law first among them) that speak the civilian language of the tribunal's expert. Practice chose. Bermann's testimony on the point is the single most striking passage of the interview and deserves full quotation: "The American practice of each party having its own expert is not adopted elsewhere in the world. And yet, I don't see any civil law lawyers having

¹⁸⁴Robinson & Smit, "Cross-Examination in International Arbitration: A Clash Among Common Law Traditions", *The American Review of International Arbitration*, 2018, 29(2), p. 105 et seq.

¹⁸⁵*Ibid.*, pp. 105-106.

¹⁸⁶Resolution of the Conseil de l'Ordre des avocats de Paris, 28 February 2008, quoted in Haridi & Kabbouri, *op. cit.*, pp. 145-146; see Part I, Title 2, Chapter 2, Section 3 above.

¹⁸⁷Robinson & Smit, *op. cit.*, pp. 105-106

a problem with that. Nobody expects the tribunal to appoint an expert. I don't think I've ever sat in a case where the tribunal appointed an expert... Not once. It's striking. And yet, that would be a normal approach in many civil law jurisdictions. And there would be a lot of suspicion about party appointed experts. But again, the American view has sort of prevailed."¹⁸⁸ A career-long record of zero tribunal appointments, from an arbitrator who sits with civil law colleagues, in a field whose written law leans the other way: it is difficult to imagine a cleaner measurement of where the menu's real default lies. And Bermann's explanation of the outcome names the deeper phenomenon: the party expert prevailed because "they're in combat. It's adversarial. And the adversarial mentality carries over to even the use of experts."¹⁸⁹ What prevailed was not a rule but a mentality.

134. Set against this balance sheet, the civilian countercurrents measured in the previous chapter (the weight of the written record, the relaxation of exclusionary rules) appear in their true proportion: real, structural even, but peripheral to the three mechanisms in which the taking of evidence consists of.

B. Friction beneath the adaptation

135. If the adaptation were as frictionless as the phrase "without apparent difficulty" might suggest, the asymmetry would be a curiosity rather than a problem. The practitioner literature shows otherwise: beneath the converged surface, the encounter still grinds and the grinding is instructive, because it reveals who is adapting to whom.

136. The advocacy literature written for civil lawyers is, in substance, a literature of remediation. Pinsolle's guidance on cross-examination "from the civil law perspective" proceeds from the premise that counsel formed under inquisitorial systems have lacked the opportunity to develop the skill, and oscillate between mechanical closed questioning and undirected open questions, neither of which serves them; it teaches, in effect, how to perform a common law exercise before a mixed audience.¹⁹⁰ No mirror-image literature teaches American lawyers to conduct an instruction civiliste, for the simple reason that no such exercise awaits them in the arbitral room.

¹⁸⁸Bermann Interview, op. cit.

¹⁸⁹Ibid.

¹⁹⁰Pinsolle, "Cross-examination of fact witnesses: the civil law perspective", in *The Guide to Advocacy*, 7th ed., Global Arbitration Review

137. The literature written for common lawyers, conversely, is a literature of calibration: how to deploy their own techniques before decision-makers whose instincts differ. Smit's advice on cross-examining before civil law arbitrators is explicit that the technique must be inflected for its audience: he may, for instance, commit the witness to an untenable position and then withhold the final, devastating question, leaving it for the arbitrators to ask.¹⁹¹ His story shows why the calibration matters. Mid-way through a textbook American cross-examination of the opposing party's chief executive, before a senior German sole arbitrator, the examination was halted: "Mr. Smit, your examination of this witness is making me very uncomfortable" uncomfortable, the arbitrator explained, because in his tradition representatives of a party were never required, expected or even allowed to testify against the company they represent.¹⁹² The episode ended in an improvised compromise, counsel handed his script of questions to the arbitrator, who put a selection of them to the witness himself, and the award ultimately relied on the answers thus elicited¹⁹³. That is, in a spontaneous re-enactment of the civilian allocation of roles, the judge questioning on the parties' proposals. The common law mechanism prevailed in substance, but the civilian mentality governed its form.

138. Zuleta's "requiem" for the civil law in Latin American international arbitration traces the same sequence this thesis has traced for France, American firms, common law-style procedures, evidence and experts on the adversarial model, English as the working language. Its describes its endpoint bluntly, as a practice in which document production has become "the most sophisticated instrument of torture developed in the 20th century" and the region's civilian procedural identity survives mainly as something to be "reclaimed".¹⁹⁴ Marghitola's chapter on production strategies completes the picture from the inside: document production is treated by counsel as "one of the key factors to winning arbitration proceedings", an arena of strategy and even of guerrilla tactics¹⁹⁵ the strategic, weaponised relationship to evidence that is native to adversarial culture, now simply the ambient professional attitude.

¹⁹¹Smit, "Cross-Examining Witnesses Before Civil Law Arbitrators", op. cit., pp. 250-251.

¹⁹²Ibid., pp. 251-252.

¹⁹³Ibid., p. 252.

¹⁹⁴Zuleta, op. cit., p. 62 et seq.

¹⁹⁵Marghitola, "Document Production Strategies", in *Document Production in International Arbitration*, International Arbitration Law Library, Vol. 33, Kluwer Law International, 2015, §6.01, p. 117.

C. Willingness versus comfort

139. What, then, is left of the divergence this thesis set out to study? Bermann's answer, given when asked about cultural tension in cross-examination, supplies the concept on which Part II turns: "I do think we have to distinguish between willingness and comfort. You know, I think there may be a difference in level of comfort. But experienced arbitrators are quick learners. They learn quickly, and they conduct cross-examination well, if they're experienced, even though that's something they never would have done in domestic practice."¹⁹⁶

140. The distinction deserves to be unfolded, because it is the precise answer to the question posed in the introduction. Willingness is behavioural: it is measured in what practitioners do, and on that register the convergence is complete. Civil law counsel request documents, cross-examine witnesses and retain party experts without visible reluctance. Comfort is dispositional: it is measured in how the practice sits with the practitioner, in the German arbitrator's discomfort at a party representative testifying against his company, in the civil law arbitrator's residual perception of cross-examination as an exercise in tricking the witness,¹⁹⁷ in the instinct, still noted by advocacy guides, that arbitrators from inquisitorial backgrounds want to hear why and when a witness acted and continue to regard the contemporaneous document as more reliable than anything said in the hearing room.¹⁹⁸ Willingness converged but comfort did not and comfort is not a minor register. It is, almost word for word, what Legrand calls *mentalité*: the interiorised structure of attitude and reference through which a legal community experiences legal order.¹⁹⁹ Divergence, in other words, has not been abolished; it has been driven below the visible procedure, from the rules to the reflexes that survives in the questions arbitrators choose to ask, the weight they would give the written record, the point at which an examination begins to feel improper.

141. The finding of Title I can now be stated in full. The practice of evidence in international commercial arbitration exhibits a convergence that is real, no fundamental procedural variation by background. But it is asymmetric: on each of the three mechanisms, practice settled at the common law's defaults, the civilian contribution surviving as counter-current and as mentality.

¹⁹⁶Bermann Interview, op. cit.

¹⁹⁷Smit, "Cross-Examining Witnesses Before Civil Law Arbitrators", op. cit., p. 243.

¹⁹⁸Pinsolle, op. cit.

¹⁹⁹Legrand, op. cit., pp. 265-266; introduction, definitions and section 3 above.

142. That finding transforms the thesis's question rather than closing it. An asymmetry this complete, achieved without coercion, in a field whose formal texts aim at being neutral and whose written law sometimes leans the other way, does not explain itself. Title 2 takes up that question: why the common law prevailed? First in the structures and norms of arbitration itself, then in the culture and sociology of the field that operates it.

TITLE II. THE SOURCES OF THE PREVALENCE OF THE COMMON LAW

143. Title I ended on Bermann's observation that the asymmetry of convergence has been observed but not explained.²⁰⁰ This Title undertakes the explanation, and it is the contribution this thesis claims as its own. The inquiry is organised in two chapters along the nature of the causes. Chapter I examines the sources internal to arbitration itself: the structural affinity between the arbitral process and the adversarial model, and the normative channels (soft law, "international standards", and the English language as infrastructure) through which the common law's solutions circulate. Chapter II turns to the sources external to the process: the mentality of the common law and its export disposition, and the sociology of a field whose dominant actors were never neutrally distributed between the traditions.

Chapter I. Structural and normative sources: a procedure built for the adversarial model

A. An arbitrator in the position of a common law judge

144. The first source of the common law's prevalence is not a preference but a geometry. International arbitration reproduces, by construction, the allocation of roles that defines the adversarial model and it does so for reasons that owe nothing to the influence of any legal tradition.

145. Consider what an arbitral tribunal structurally is. It is a creature of contract, constituted for a single dispute, chosen and paid by the parties, and dissolved with the award. It commands no *greffe*, no *huissiers*, no standing corps of court experts: it cannot fine, imprison or, in most respects, compel third parties, and its characteristic sanctions — adverse inferences, costs — operate by persuasion on the parties before it.²⁰¹

²⁰⁰Bermann Interview, op. cit.

²⁰¹ Blanke, op. cit., p. 112; Born, op. cit., ch. 16.

146. It is, in Bermann's phrase, the organ of "very much a procedural endeavor"²⁰² whose procedure, however, must be generated case by case: since no national code applies of its own force, the conduct of the proceedings chiefly reflects, a combination of party autonomy, arbitrator discretion on matters the parties have not addressed, and a measure of soft procedural law "rightly... not... a wholesale borrowing of the byways of any single national jurisdiction's civil procedure."²⁰³

147. Now place the two domestic models against that structure. The civilian model presupposes an institutional judge: a permanent organ of the state, backed by investigative machinery, empowered to commission its own expert, master of an instruction that the parties attend more than they conduct. Almost none of that presupposition survives in arbitration. The adversarial model presupposes the opposite: parties who gather and present the evidence, examine the witnesses and finance the expertise, before an adjudicator whose role is to preside and decide. That presupposition describes the arbitral tribunal almost without remainder. The consensual, party-funded is, structurally, a common law judge. Indeed a purer one, since even the residual investigative powers the codes confer on him are exercised under the shadow of challenge: the Prague Rules' own working group conceded that many arbitrators are reluctant to manage proceedings too actively for fear of a challenge²⁰⁴ and the drafters felt it necessary to provide expressly that a tribunal sharing its preliminary views is not thereby exposed to disqualification.²⁰⁵ An adjudicator who must be cautious about even announcing his provisional thinking will not lightly take over the fact-finding.

148. This structural reading was, as it happens, tested in the interview. When I suggested that the withdrawal of the common law judge is what allowed the parties to move to the forefront, Bermann concurred "There is a degree of passivity" having himself framed the point moments earlier in his own terms: in the common law system "the judge does not play a major role. He's not inquisitorial. Which is, again, combat."²⁰⁶ Party autonomy completes the geometry.

²⁰²Bermann, "Applicable Law and the Civil and Common Law Divide", in Comair-Obeid & Brekoulakis (eds), *The Plurality and Synergies of Legal Traditions in International Arbitration*, Kluwer Law International, 2023, p. 233.

²⁰³Bermann, "'International Standards' as a Choice of Law Option in International Commercial Arbitration", *The American Review of International Arbitration*, 2016, 27(4), pp. 423-424.

²⁰⁴Note from the Working Group of the Prague Rules, as discussed in Rizzo Amaral, op. cit.

²⁰⁵Prague Rules (2018), Article 2.4.

²⁰⁶Bermann Interview, op. cit.

149. The principle that the parties may confer on the tribunal such powers as they consider appropriate, choosing adversarial or inquisitorial procedures at will,²⁰⁷ is formally neutral between the models. But it is a procedure whose very design is chosen by the disputants is already, in its constitutional principle, party-driven and the arbitral community has, as Karton's study documents, dedicated itself expanding that principle across treaties, laws, rules and awards.²⁰⁸ A process constituted by party will, conducted by party initiative, and financed by party money did not need to be persuaded into the adversarial model. It was born and stemmed from there.

150. Two consequences documented in Title 1 fall into place at once. The party-appointed expert prevailed not only because "the adversarial mentality carries over"²⁰⁹ but because the alternative presupposes an institution arbitration lack: the civilian court expert is an auxiliary of a permanent judiciary, drawn from its lists, working under its supervision. None of which, in principle, a one-off contractual tribunal can supply. The absence of any automatic disclosure which is the feature that makes arbitral document production a managed, request-based exercise reflects the same geometry: with no state power behind the tribunal, production exists only where the parties' agreement or the tribunal's order, backed by inference and costs, creates it.²¹⁰

B. Soft law and "international standards"

151. Structure explains receptivity but it does not explain content. An adversarial-shaped process could in principle have been furnished with civilian techniques. That it was furnished, instead, with document requests, cross-examination and party experts is the work of the normative channels through which arbitral procedure is specified.

152. The first channel is the soft law examined in Part I. Because no national procedure applies of its own force, the instruments that codify "best practice" enjoy, in arbitration, an influence out of proportion to their formal authority: the prevalence of soft law on arbitral procedure (the IBA Rules first among instruments) is, in Bermann's word, "conspicuous",²¹¹ their success in

²⁰⁷Blackaby, Partasides, Redfern & Hunter, op. cit., §6.09.

²⁰⁸Carter, op. cit., p. 540, reporting Karton's findings on the enshrinement of party autonomy.

²⁰⁹Bermann Interview, op. cit.

²¹⁰Born, op. cit., ch. 16; Khodykin, Mulcahy & Fletcher, op. cit., commentary on Article 3, §6.21.

²¹¹Bermann, "International Standards", op. cit., p. 424.

practice, as Gaillard notes, "huge".²¹² Part I established what those instruments contain: templates where every default; categories of documents, witness statements packaging direct examination, cross-examination as the oral phase, settled at the common law's address. The soft law channel therefore does not merely permit the common law model it does more, it distributes it, with the network logic proper to soft law: the more the field relies on the standard, the more authoritative the standard becomes²¹³ and the 90 per cent compliance rate recorded even where the IBA Rules are mere guidelines²¹⁴ shows a norm that has passed from option to expectation. Norms of this kind are generated, as Gaillard's sociology of the field describes, by the field's own institutions and value providers²¹⁵ a point resumed in the next chapter, for who staffs those institutions is a question of sociology, not of texts.

153. The second channel is the vocabulary of "international standards" itself. Tribunals and rules routinely appeal to internationally accepted practice as the measure of proper procedure; Bermann's study of the notion shows both its attraction because distance from any single national model is precisely what the parties bargained for, and its indeterminacy.²¹⁶ For present purposes, the significant point is the one his article registers in passing, as a "longstanding critique": international arbitration's "apparent capture by the U.S. procedural institution of discovery and, to a much less extent, evidentiary objections and rigorous cross-examination of witnesses."²¹⁷ The formula deserves attention. What circulates under the neutral label of international standard practice is, on this account, recognisably American procedural technology. A standard that presents a national inheritance as the international default is the most efficient transmission belt imaginable, because it converts adoption into mere professionalism: the civilian practitioner who masters the Redfern Schedule is not capitulating to a foreign model, he is simply learning his trade.

²¹²Gaillard, "Sociology of International Arbitration", op. cit., n. 45.

²¹³Druzin, "Why Does Soft Law Have Any Power Anyway?", op. cit., pp. 362-363

²¹⁴Khodykin, Mulcahy & Fletcher, op. cit., §2.39.

²¹⁵Gaillard, "Sociology of International Arbitration", op. cit., in particular the analysis of "value providers" and norm generation within the field.

²¹⁶Bermann, "International Standards", op. cit., pp. 423 et seq.

²¹⁷Ibid., p. 424.

C. English as infrastructure

154. The third source is the most banal yet perhaps the most powerful. International arbitration is conducted, overwhelmingly, in English. And the language is not a neutral pipe.

155. Bermann's testimony connects the linguistic fact directly to the procedural one. Asked whether the prevalence of the common law might have to do with the proceedings being in English, he answered: "I think it could be a big factor, even though it's not logical. There's no logic there. But I do think there is almost an expectation that arbitrations will be in English, and there's an expectation that they will resemble the way common law communication is conducted."²¹⁸ The mechanism suggested is worth making explicit, as an interpretive claim of this thesis: language carries with it a rhetorical form. Proceedings in English draw on English-language models of written and oral advocacy, on a literature of practice overwhelmingly produced in English, and on the professional habits of those for whom English is native. The linguistic default quietly imports the procedural one, without any rule ever being adopted. The empirical correlates are consistent. In ICC arbitrations, practitioners from the United Kingdom constitute the single most represented nationality among arbitrators, accounting for some 13 per cent of all confirmations and appointments in 2024;²¹⁹ and Zuleta's account of Latin American practice shows the language operating exactly as infrastructure: cases conducted in dual languages, or in English against Spanish-language documents, because counsel or arbitrator does not speak the parties' language, with the procedural style following the tongue.²²⁰

156. The three structural and normative sources assembled in this chapter share a property that should be made explicit before turning to the cultural ones: none of them is anyone's project. The geometry of the tribunal, the gravity of soft law, the pull of a working language : these operate impersonally, and they would have favoured the adversarial model even in a field of perfectly balanced actors. But the field was not balanced. Why the common law arrived with the assertiveness to occupy the space these structures opened is the question of the final chapter.

²¹⁸Bermann Interview, op. cit.

²¹⁹ICC, *2024 Dispute Resolution Statistics*, 2025

²²⁰Zuleta, op. cit., p. 62 et seq., including the account of a dual-language arbitration imposed by the linguistic limitations of counsel.

Chapter II. Cultural and sociological sources: mentality, assertiveness and the power relations of the field

157. Structure and norm, the previous chapter concluded, opened the space; they do not explain who filled it. This final chapter of the body supplies the remaining causes. It examines, first, the cultural source: a common law mentality whose assertiveness disposes it to export its methods (A); second, the sociological source: a field whose dominant actors, generations and institutions were never neutrally distributed between the traditions (B); and third, the compatibility of American exceptionalism with international standards, and the emergence of an autonomous arbitral culture that is more than the sum of its origins (C).

A. The common law mentality: assertiveness and the export mode

158. The introduction adopted, with Legrand, the concept of legal mentalité: the interiorised structure of attitude and reference through which a legal community experiences legal order.²²¹ Title I located the surviving divergence at exactly that level, in comfort rather than conduct. The present section makes the further, bolder claim that mentality is not only where divergence survives but one of the reasons the convergence ran the way it did: the common law prevailed, in part, because of what the common law is like.

159. The claim requires honesty about its footing, and the interview supplies both the claim and the honesty. Asked why the common law methods have prevailed to the extent they have, Bermann offered, alongside the English language, a second explanation: "I think there's a kind of aggressiveness in common law practice. And that might even manifest itself in the greater degree of influence of common law over civil law... I do think the common law is very much in an export mode. Like, we know how things are done best, and we'll teach the rest of the world. There's a little bit of that."²²² He returned to the disposition later in structural terms: "I think the adversarial dimension is accentuated in the common law... There is a lot of assertiveness in the common law. And I don't see it in French law. I don't see that degree of assertiveness. And that assertiveness manifests itself, I think, in the degree of influence... I think it carries over from the assertiveness of the practice."²²³

²²¹Legrand, op. cit., pp. 265-266.

²²²Bermann Interview, op. cit.

²²³Ibid.

160. The hypothesis, in other words, is offered as a hypothesis: under-documented in the literature, endorsed by a participant-observer, and grounded theoretically in Legrand's claim that the differences between the two mentalités are, at the epistemological level, irreducible.²²⁴ This thesis takes up the exploration on that footing.

161. Two bodies of evidence give the hypothesis substance. The first is historical. Bergsten's account of the Americanisation of arbitration locates the encounter precisely: when American lawyers entered international commercial arbitration in numbers (the petroleum disputes of the 1970s marking the turn) they "brought and used American litigation skills", deploying "a more aggressive form of advocacy than the continental Europeans were used to", before European arbitrators who were the "Grand Old Men" of their legal community; and the encounter opposed not merely two styles but two orientations: "The American attorneys tended to be fact-oriented while European attorneys tended to be law-oriented."²²⁵ The last observation deserves emphasis, because it connects the mentality directly to the subject of this thesis. A fact-oriented professional culture is an evidence-hungry one: the three mechanisms studied here namely production, examination, expertise are precisely the technology of facts. A profession whose instinct is to win on the record will build, refine and export record-building tools; a profession whose instinct is to win on the law will not. The evidentiary tilt of international arbitration is, on this reading, the procedural shadow of a deeper epistemic disposition.

162. The second body of evidence is pedagogical, and Bermann offered it from his own classroom. Some 80 per cent of his Columbia students come from civil law jurisdictions, and their difficulty is not the content of American law but its method "the fact that you have to prepare for class, the very fact that you have to perform."²²⁶ Legal formation is where mentality is instilled generation after generation, through common law classrooms: performing, preparing, arguing facts. It absorbs the disposition along with the doctrine. The export mode does not need to persuade the importing tradition because it trains it.

²²⁴Legrand, *op. cit.*, n. 35

²²⁵Bergsten, "Americanization of International Arbitration", *Pace International Law Review*, 2006, 18(1), p. 289 et seq., at pp. 294-295. The anecdote of the American lawyers who had verbatim transcripts prepared, at great expense, for bemused European arbitrators is reported *ibid.*, citing Dezalay & Garth, *op. cit.*, p. 108.

²²⁶Bermann Interview, *op. cit.*

B. The sociology of the field: symbolic capital, generations, and the soft power of firms

163. Mentality explains a disposition when sociology explains an outcome. The analytical framework was announced in the introduction: international arbitration is a social field. It is a structured space of actors, rituals and institutions in which positions are won and defended in terms not only of money but of symbolic capital: honours, prestige, recognition.²²⁷ In such a field, procedural models are not weightless ideas that prevail on their merits, they are carried by actors.

164. The actors' history is documented, and it runs in one direction. The sociological literature describes the succession of three generations of arbitrators: the European "Grand Old Men" of the founding era, the law-oriented notables Bergsten encountered on the early tribunals; displaced by the "Technocrats" identified by Dezalay and Garth, and these in turn by today's "Managers".²²⁸ The technocratic turn was not nationally neutral: it was the entry into the field of the large-firm litigation professional, and the large firm was, above all, the American firm. Alford's assessment, made from within the American academy, is unusually direct: "it is indisputable that the American influence is growing in international arbitration. The principal instrument for that influence is the meteoric rise of the American law firm in the global marketplace. The style, technique, and training of lawyers based in these firms dramatically influences the manner in which international arbitration is conducted. It is the soft-power of these firms that is one of the defining features of international arbitration as we know it today."²²⁹ Zuleta's requiem chronicles the same conquest regionally: the spread of the large American firms across Latin America, carrying with them the language, the procedures and the adversarial relationship to evidence documented in Title I.²³⁰

165. The sociological lens also closes the circuit left open in the previous chapter. Soft law, it was said there, is the transmission belt of the common law's defaults; the question deferred was who drives the belt. The field's answer: its norms are generated by its own institutions and "value providers" the committees, associations and guideline-writers whose output, the IBA

²²⁷Gaillard, "Sociology of International Arbitration", op. cit., pp. 1-2 of the article and n. 4-6, citing Dezalay & Garth, *Dealing in Virtue*, op. cit., and Bourdieu's concept of symbolic capital.

²²⁸Gaillard, "Sociology of International Arbitration", op. cit., n. 14, citing Dezalay & Garth, op. cit., p. 34 et seq., and Schultz & Kovacs, "The Rise of a Third Generation of Arbitrators – Fifteen Years after Dezalay and Garth", *Arbitration International*, 2012, 28, p. 161; Bergsten, op. cit., pp. 294-295.

²²⁹Alford, "The American Influence on International Arbitration", *Ohio State Journal on Dispute Resolution*, 2003, 19(1), p. 69 et seq.

²³⁰Zuleta, op. cit., p. 62 et seq.

Rules first among them, has been a "huge success in practice."²³¹ Those institutions are staffed from the field's dominant positions and a field whose dominant positions were captured, from the technocratic turn onwards, by Anglo-American firm lawyers will produce soft law in their professional image. Not by design, but by the ordinary sociology of drafting: committees codify the practice their members know. This final step is an interpretive synthesis of this thesis rather than a claim any single source states, but it is one the field's own participants come close to conceding. The editors of the leading recent volume on legal traditions in arbitration, a volume dedicated to synergy, acknowledge "a common complaint about whether all these common standards and assumptions on international arbitration are culturally neutral or whether they are skewed towards Common law cultural understandings", and add, remarkably: "Whether or not such complaint is valid (and there is probably a good amount of truth in it), international arbitration constantly evolves and corrects itself."²³² A good amount of truth, conceded by the editors of the book of synergies: the sociological explanation may fairly rest there.

C. Two nuances: compatible exceptionalism, and a culture that is more than its origins

166. The explanation assembled over these two chapters could be too firm: an American procedural empire imposed on a captive field. Two nuances forbid the caricature and refine the thesis.

167. The first concerns the nature of the American presence. The prevalence documented in this study is not the execution of a national project. The United States was, as Alford recalls, "largely absent at creation": it took no substantive part in the drafting of the New York Convention, acceded twelve years late, and its influence in the field has ebbed and flowed.²³³ And Bermann's study of American exceptionalism concludes on a distinction that matters here: the United States exhibits "highly distinctive features that separate US law from the law of so many jurisdictions... along recurring lines yes"; but "premises and practices that are so dissonant with prevailing international understandings as to impair the functioning of the New

²³¹Gaillard, "Sociology of International Arbitration", op. cit., n. 45 and the analysis of value providers.

²³²Comair-Obeid & Brekoulakis, "Introduction", in Comair-Obeid & Brekoulakis (eds), *The Plurality and Synergies of Legal Traditions in International Arbitration*, Kluwer Law International, 2023, ch. 1.

²³³Alford, op. cit., pp. 69-71.

York Convention or suggest an American unwillingness to play by the rules of the game — no."²³⁴

168. The American legal culture, in other words, is a distinctive player within the international regime, not a sovereign above it which is precisely why its procedural model could spread as "international standard practice" rather than being resisted as national imposition. The prevalence is systemic, not imperial. That is what makes it durable, and what made it, for so long, invisible.

169. The second nuance concerns the destination of the convergence. The field has not simply become American; it has become something of its own. Karton's study finds an arbitral culture with values of its own: party autonomy, service of business, neutrality, and an internationalism defined as the dedication to "subordinating national perspectives and distinctions in favour of a transnational or global ideal"²³⁵. Gaillard's theoretical work goes further, representing international arbitration as an autonomous arbitral legal order;²³⁶ principles, practices and even ethics that "transcend national arbitrations as well as legal cultures and traditions."²³⁷ The practice examined in this thesis bears the marks of that autonomy: cross-examination softened, discovery confined, exclusionary rules abandoned, the written record honoured.

170. The two nuances, joined, yield this thesis's final formulation, and its answer to the last clause of the research question. The autonomous legal culture of international arbitration is real, but autonomy is not immaculate conception. The culture's evidentiary component was assembled, as this study has shown, overwhelmingly from common law materials, moderated by civilian instincts and by the structural constraints of arbitration itself; its neutrality is a neutrality of function, not of origin. What the prevalence of the common law reveals about the arbitral culture, then, is its birthmark: a transnational culture that genuinely transcends the traditions it came from while still speaking, on matters of evidence, with a recognisable accent.

²³⁴Bermann, "American Exceptionalism in International Arbitration", in *Contemporary Issues in International Arbitration and Mediation*, ch. 3, conclusion

²³⁵Karton's findings as reported in Carter, op. cit., pp. 539-541.

²³⁶Radicati di Brozolo, "Emmanuel Gaillard's theory of international arbitration: The basis for a uniform law of international arbitration", in Racine et al. (eds), *Liber Amicorum Emmanuel Gaillard*, Brill, forthcoming 2024, p. 1.

²³⁷Comair-Obeid & Brekoulakis, op. cit., ch. 1.

Conclusion

171. This thesis opened with a paradox. The instruments that govern the taking of evidence in international commercial arbitration present themselves as a neutral meeting point between the two great procedural traditions; yet the practice conducted under them, on the testimony of its most qualified observers, has converged towards one of the two. The research question asked what the sources of that asymmetric convergence are, and what they reveal about the legal culture of international arbitration. The answer can now be assembled.

172. The first part of the demonstration established the formal convergence and gave the paradox its precise shape. On paper, each tradition gave and received.

173. The second part confronted the paper with the practice, in two steps that together resolve what the introduction called the Bermann objection. The convergence of practice is real, "immense". No fundamental procedural variation follows from legal background, and the literature concurs. But it is asymmetric, and undeniably so: on each of the three mechanisms, practice settled at the common law's defaults. Nowhere more strikingly than for experts, where, against a formally neutral menu and written materials leaning the civilian way, a career-long record of party appointment could be summarised in three words: "Not once. It's striking." The civilian contribution survives more profoundly, as mentality: in Bermann's distinction, the willingness of civil law practitioners converged completely, their comfort did not.

174. The sources of the prevalence proved overdetermined. Four causes converge. Structurally, the arbitral tribunal is a common law judge in all but name. Normatively, the field's procedure is specified through channels with a direction of flow, a vocabulary of "international standards" that converts a national inheritance into professional competence. The English language, an infrastructure that imports the rhetorical and procedural expectations of those born to it. Culturally, the common law arrived assertive, fact-oriented and in export mode. A mentality that builds and propagates the technology of facts, and that trains, in its classrooms, the very elite that staffs the field. Sociologically, finally, the field's technocratic turn handed its dominant positions, and hence its norm-producing institutions, to the Anglo-American litigation firm, whose soft power the American literature itself describes as a defining feature of the field.

175. What does this reveal about the legal culture of international arbitration? Something more interesting. The arbitral culture is genuinely autonomous. Its values, from party autonomy to internationalism, are its own; its practice has softened and denatured everything it borrowed. But its autonomy has a genealogy, and the genealogy shows. On matters of evidence, the autonomous culture speaks with a common law accent, because structure, norm, mentality and power all conspired to have it learn that language first. Neutrality of function, not neutrality of origin: that is the precise sense in which the promise of the harmonising texts is both kept and broken.

176. "If international arbitration did not exist, it would be necessary to invent it." The maxim with which this study opened deserves, at its close, a comparatist's amendment: it was invented and, like every invention, it bears its makers' hands.

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