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The right to examine a witness as a part of fair process in international arbitration

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2013 Autor: Anna Hlaváčová, 4. ročník

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V Praze dne 15. 4. 2013 Anna Hlaváčová

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1 INTRODUCTION

The purpose of this paper is to asses whether relying on a written witness statement without the witness who issued the statement being examined, although such examination was requested by other party, breaches a party's fundamental right for the arbitral proceedings adhere to the rules of due process. This paper will deal with both witnesses of fact and expert witnesses, as the rules regarding the conduct of their testimony are very similar.

Although the abovementioned situation might seem as a very specific one, I see great practical implications of this problem. Most of arbitral cases are decided on the facts rather than the law[1]. Along with the documents presented it is the witness statements, be it written statements or oral statements in front of the tribunal, which provide the arbitral tribunals with the necessary factual information based on which the cases are decided. In some cases, the testimony of a witness who fails to appear in front of a tribunal for cross examination might be crucial and irreplaceable for the deciding of a case. As there is no specific rule nor settled case law providing guidance how to deal with the abovementioned situation, the parties are left uncertain of on which witness testimony they might rely in international arbitration.

Unlike courts, the arbitral tribunals do not posses any way to force the named witness to appear before the tribunal and testify. In some cases, the arbitral tribunals can request help from the national courts, but due to the international nature of the conflicts, forcing witnesses to appear will rarely be a viable option. Therefore, the case where a witness fails to appear to testify in front of the tribunal is more likely than in civil litigation. This is the reason I believe the topic of this paper is of great importance.

In this paper I will be looking at the various approaches to witness examination in common law and civil law, as international arbitration has to deal with parties and arbitrators from both of the legal backgrounds and therefore has to combine the two approaches. Further, I will be looking at the standard of fair process in rules applicable to international arbitration and

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[1] BLACKABY, Nigel, Constantine PARTASIDES, Alan REDFERN, Martin HUNTER a Alan REDFERN. *Redfern and Hunter on international arbitration*. 5th ed. New York: Oxford University Press, 2009, 384, 849 p. ISBN 01-995-5719-5.

assessing, whether the cross examination falls within the definition of fair process stated within them.

2 THE RIGHT TO CROSS-EXAMINE A WITNESS

2.1 Differences between the common law and civil law approach

International arbitration is truly international in the aspect, that persons involved in it, parties, counsels and arbitrators, do not come from a particular legal background. This is a very practical for settling disputes, but when looking on the procedure, it creates certain problems usually connected with the differences between common and civil law approach to procedure.

The general differences between the two systems are many and their detailed description does not fall within the scope of this paper. One of the more visible differences, the way the two systems vary in the approach to evidence and to examination of witnesses particularly, is of importance for assessing whether the right to examine a witness is a part of due process in international arbitration. *"The differences between common law and civil law approaches are often substantial."*[2] Generally, the civil law is more inclined to use documentary evidence and produced written witness statements, whereas common law relies more on examination of witnesses. In common law countries, it is solely the parties who examine the witness whereas in the civil law, court poses the initial and most important questions and only limited space is left for the parties.[3]

Historically, written witness statements did not exist in some common law countries[4]. Nowadays, written witness statements are known to the system, however *„in common law systems, witness testimony is considered an essential element of proof without which the*

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[2] BORN, Gary, Constantine PARTASIDES, Alan REDFERN, Martin HUNTER a Alan REDFERN. *International commercial arbitration*. 5th ed. Frederick, MD: Sold and distributed in North, Central, and South America by Aspen Publishers, c2009, 2 v. (lvi, 3303 p.). ISBN 90-411-2759-3, pg. 1788

[3] 1999 IBA WORKING PARTY a 2010 IBA RULES OF EVIDENCCE REVIEW SUBCOMMITTEE. Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Abrbitration. Dostupné z: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx *„Although witness testimony is less frequently used as evidence in civil law courts, where documentary evidence is preponderant, than in common law courts, arbitration proceedings in the civil law as well as in the common law tradition very often rely on witnesses. In the common law tradition, witnesses are questioned by the parties. In the civil law tradition, they are questioned by the court; parties may at most suggest to the court questions to be asked*"

[4] BORN, pg. 1788

tribunal cannot really judge the truth of the parties"[5]. If a party fails to examine a witness, it cannot later dispute the facts stated by this witness.[6] Therefore if a party in the civil law system cannot examine a witness at the hearing, it will consider it a much greater infringement of the right to due process than if the same situation happened during a civil law court hearing. It is suggested that in common law "*cross-examination has been extolled as a bulwark of our liberty and the most powerful weapon in the arsenal of the trial lawyer.* "[7]

In civil law, however, written witness testimonies are more common. The courts are generally more prone to give greater weight to documentary evidence rater than examination during the hearing. Some authors even suggest that "*extensive or probing cross examination of witness is looked upon (as in most European trials and arbitrations) as somewhat discourteous.*"[8] A civil law counsel will therefore rely more on documentary evidence and written witness statements and will not feel the deprivation of the right to examine a witness as such an infringement of his procedural rights as a common law counsel might. „*Witness testimony is much less significant – and sometimes almost irrelevant – in civil law traditions and, although generalizations can be misleading, civil lawyers favor proof through documents, rather than witness testimony.*"[9]

The differences between the common law and civil law approach are great, some authors[10] suggest, that in praxis, the differences are not as grave as in theory. It is even argued, that „*when procedural issues arise between common law counsel and civil law counsel, the dispute rarely results from the differences between legal backgrounds alone. Rather, the cause of such disputes is lies the result of different tactical evaluation of the case*"[11]

Even if Frieldlans's conclusion was valid, one must always count with the possibility that the counsels and arbitrators might come from different legal backgrounds and that this fact might

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[5] FOUCHARD, Philippe, Emmanuel GAILLARD, Berthold GOLDMAN, John SAVAGE a Philippe FOUCHARD. *Fouchard, Gaillard, Goldman on international commercial arbitration*. Boston: Kluwer Law International, c1999, 698, 1280 p. ISBN 90-411-1025-9.
[6] *Browne v. Dunn* (1893) 6 R. 67, House of Lords
[7] MUELLER Christopher B., KIRKPATRIC Laiud C., *Evidence under the rules – Text, Cases and Problems,* Aspen Publishers 2008, pg. 20
[8] BISHOP, R, James CRAWFORD a W REISMAN. *Foreign investment disputes: cases, materials, and commentary*. Frederick, MD: Sold and distributed in North, Central, and South America by Aspen Publishers, c2005, lv, 1653 p. ISBN 90-411-2311-3
[9] BORN, pg. 1788
[10] Ibid
[11] FRIEDLANS Paul D., A *Standard Procedure for Presetning Evidence in International Arbitration* II Mealeg's Int. Arb. Rep. 4 (1996)

have a certain influence on the way the procedure is conducted. It is extremely difficult for the lawyers in the arbitration, be it counsels or arbitrators, to free themselves of the legal tradition in which they have been practicing law their entire professional life.[12]

2.2 International Standard for Arbitration

As was stated above, international arbitration proceedings are governed by neither common law nor civil law and parties, counsels and arbitrators from different legal backgrounds often meet within the proceedings. International arbitration cannot be governed by rules known to domestic litigation. As the rules concerning witness examination often do not go into enough detail to give clear guidelines for the conduct of examination (discussed below), there was a great need to develop an international standard governing the rules on evidence.

2.2.1 IBA Rules on the Taking of Evidence in International Arbitration

In 1983, the International Bar Association (hereinafter "IBA") adopted the Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration.[13] Although this document was used, some of the authors suggested it adopted „ too common law approach to arbitration"[14] In 1999 the IBA published the IBA Rules on the Taking of Evidence in International Arbitration (hereinafter the IBA Rules on Evidence).[15]

The aim of the newly published IBA Rules on Evidence was to provide guidance to the parties and arbitrators on the issues arising from evidence in international arbitration. "*Arbitration rules and statutes are usually silent on witness testimony. The IBA Rules of Evidence thus fill in a substantial gap.*"[16] Born suggests, that the IBA Rules on Evidence balance the differences between common law and civil law well.[17]

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[12] GERLINAS, Evidence Through Witnesses, in Lévy & V.V.Veeder (eds.), Arbitration and Oral Evidence 29, 39 (2004) „*it must be realized that the most taxing hurdle for lawyers in international arbitration is to leave outside the hearing room their own procedure colored spetacles*"

[13] IBA WORKING PARTY. Commentary on the New IBA Rules of Evidence in International Arbitration. *Business Law International*. roč. 2000, č. 2, s. 4. Dostupné z: http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CK063-CH24_thumb.pdf

[14] RUBINO-SAMMARTANO, By Mauro a Foreword by Lord MUSTILL. *International arbitration: law and practice*. 2nd rev. ed. Boston, MA: Kluwer Academic Pub, 2001. ISBN 978-904-1114-259.

[15] The rules were reviewed in 2010

[16] 1999 IBA WORKING PARTY a 2010 IBA RULES OF EVIDENCCE REVIEW SUBCOMMITTEE. Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Abrbitration. Dostupné z: http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

[17] BORN, pg. 1788

The IBA Rules on Evidence are not per se binding[18] and their application is very rarely agreed on by the parties prior to the commencement of the arbitral proceedings. Parties can however agree to use the IBA Rules during the course of the proceedings and the Tribunals may adopt them. This occurred for example in the case of CME Czech Republic BV v. Czech Republic, where "*the Tribunal decided, to the extent appropriate, to apply the IBA Rules*"[19] Even if this is not the case, relevant provisions of the IBA Rules on Evidence are used as guidelines by arbitral tribunals.[20]

2.2.2 Taking evidence in international praxis

The IBA Rules on Evidence are often used as a mere guideline and even though they are quite detailed, they do not cover every particular problem which might arise during the conduct of international arbitration. Certain praxis has developed and is being used in international arbitration.

As the IBA Rules on Evidence are a compromise between the two main legal systems, the international praxis has also found certain equilibrium. "*It is now common in international arbitration for the entire direct testimony of a party's witnesses to be submitted to the arbitrators in advance of the hearing.* [21] The parties can agree that a witness needs not to appear to testify in front of the tribunal. If this is the case, it will be more difficult to dispute the credibility of a witness, however not the truth or relevance of his testimony.

It might seem that the praxis has resolved the difference between the two main legal systems and especially with the adoption of the IBA Rules on Evidence there is no need to discuss it further. This is not the case. It needs to be noted, that the abovementioned approaches are in no way binding and there is no guarantee that the IBA Rules on Evidence or the principles of creating a compromise will be used in a particular arbitration. Born claims that „*it is widely*

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[18] IBA Rules on the Taking of Evience, Preamble § 1,2
[19] Final CME Czech Republic BV v. Czech Republic, Final Award (14 March 2003), 15 WTAm 83, 100 (2003)
[20] BORN, pg. 1784
[21] ELSING, Siegfried Hl. a John M. TOWNSEND. Bridging the Common Law Civil Law divide in International Arbitration. *Arbitration International*, Vol.1, No.18 Avaliable at: http://www.hugheshubbard.com/ArticleDocuments/648489.pdf

said by common law courts that cross-examination is a fundamental procedural right in the common law legal tradition, and that it must be afforded in arbitration".[22]

It might seem as a disadvantage, especially in the aspect of legal certainty, that there is no uniform approach to the taking of evidence in international arbitration. However, this does not necessarily have to be a disadvantage. The uncertainty offers a great flexibility to the parties to govern the arbitration in the way they deem appropriate. The fact that "*institutional arbitral rules do not provide clear guidance on taking of evidence in general*"[23] creates space for parties to agree on such rules. This is very much in line with one of the main principles of international arbitration – maximal freedom of parties.

3 PROTECTION OF FAIR PROCESS

3.1 Rules governing the protection of fair process

The discretion of arbitration tribunal to direct the course of the arbitration proceeding is generally very wide[24.] The UNCITRAL Model Law on International Commercial Arbitration (hereinafter the "UNCITRAL Model Law") states this discretion in its Art. 19.2[25] and other arbitral rules have similar provisions.[26] This wide space for the tribunals is emphasized in the case of evidence, as most arbitral rules have specific rules stating that it is solely the tribunal who assesses the weight and admissibility of the evidence. The language various arbitration rules use is quite similar as it uses the phrases such as UNCITRAL Model Law "*the tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered*"[27].

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[22] BORN, pg. 2754
[23] KURKELA, Matti a Santtu TURUNEN. 2nd ed. New York: Oxford University Press, c2010, xxv, 555 p. ISBN 01-953-7713-3.
[24] VON MEHREN, George M. a Claudia T. SALOMON. Submitting Evidence In an International Arbitration: A Common Lawyer's Guide. *Journal of International Arbitration*, vol. 20, Issue 3, pg. 1
[25] *„the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate."*
[26] Article 16.1.of the American Arbitration Association International Arbitration Rules *„Subject to these Rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.",* Article 14.2. of the London Court of International Arbitration Rules of Arbitration *„Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration"*
[27] Article 20.5. of the ICDR International Rules

However this discretion is not without limits. The arbitral tribunal has to adhere to a certain standard of procedural fairness. The emphasis on equal treatment of parties is usually emphasized by the rules as a limit to the tribunal's power to conduct the proceedings freely.[28]The failure to do so will result in the unenforceability of the arbitral award in the case of international commercial arbitration and annulment in the case of international investment arbitration.

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "New York Convention") arbitral awards issued by another contracting states[29] are enforceable. There are, however certain exception stated in Article 5 of the New York Convention which can prevent an arbitral award from being enforced. One o those reasons stated in Article 5 (1) (b) is the inability of a party to present its case[30.]

Where a domestic court of one of the parties to the New York Convention finds, that the right of a party to present its case has been violated, the award cannot be enforced. Therefore it is of great importance to the parties and consequently to the arbitral tribunals, to issue an award which is in compliance with the New York Convention.

The Convention on the settlement of investment disputes between states and nationals of other states (hereinafter the "ICSID Convention") governing international investment disputes provides its own mechanism ensuring its awards are final and automatically recognized by the contracting parties. Under Article 52 of the ICSID Convention[31], however, parties may seek an annulment in front of an ad hoc tribunal.

As the annulment is not an appellate procedure, factual issues might not be reviewed, only failures in procedure which are specifically named in Article 52. One of those grounds is *"that there has been a serious departure from a fundamental rule of procedure"*[32] An opportunity of a party to present its case certainly falls within a fundamental rule of procedure as this term *„was to be understood to have a wider connotation, and to include under its*

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[28] Article 19.1. of the UNCITRAL Model Law, Article 22.4 of the ICC Rules of Arbitration
[29] there are 148 parties to the New York Convention
[30] Article 5(1)(b) of the New York Convention,*„the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"*
[31] Article 52 (1) of the ICSID Convention – „*Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds*"
[32] Article 52 (1) (d) of the ICSID Convention

ambit the so-called principles of natural justice. As an example, he mentioned the parties' right to be heard. "[33] Under Article 52 (1)(d) of the ICSID Convention, the rule breached does not need to be a particular written rule. The ICSID Convention does not have particular rules on evidence, but this ground for annulment was invoked by the parties on the basis of the approach of the tribunal to evidence.[34]

It is a question whether other provisions which deal specifically with the admissibility of evidence [35] cannot be, under certain circumstances viewed as fundamental rules of procedure. The argumentation for including this provision in the definition stated in Article 52(1)(d) of the ICSID Convention stems from the inclusion of the right to comment on witness statements (both orally and in written form) into the right of the parties to be heard.

Although the language of both the New York Convention and the ICSID Convention is quite vague, it is clear, that the main objective of those provisions is to protect fair process in the proceedings. Therefore it is not going to be minor flaws, but rather fundamental excesses in the adhering to the principle of due process, which are going to allow a party to seek either unenforceability or annulment. The particular definition of the aforementioned provisions is however left or the case law and authorities to interpret.

3.2 Does the right to cross-examine a witness fall within fair process?

For the purposes of this paper, I will focus on the meaning of fair process as derived from the right to present ones case in Article 5 of the New York Convention as well as the departure from a fundamental rule of procedure in Article 52 (1)(d)of the ICSID Convention. As I was unable to find any published case law regarding this matter, I will rely mostly on authorities as well as case law similar to the described the situation.

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[33] Background Paper on Annulment For the Administrative Council of ICSID August 10, 2012, pg. 8, available at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11

[34]SCHREUER, Christoph H. *The ICSID convention a commentary: a commentary on the Convention on the settlement of investment disputes between states and nationals of other states*. 2nd ed. Cambridge [England]: Cambridge University Press, 2009. ISBN 978-051-1596-490, pg. 992, „*The Convention knows no formal rules of evidence. But parties have repeatedly attacked awards in annulment proceedings for the way they dealt with evidence and the burden of proof, alleging a serious departure from a fundamental rule of procedure.*"

[35] Rule35 of the ICSID Arbitration Rules

3.2.1 The right to be heard

The overall trend to make witness statements as available as possible and the entire proceedings time efficient is visible in rules governing international arbitration. Some rules, including the UNCITRAL Arbitration Rules[36], incorporated rules allowing the witness to be examined without his physical presence at the venue where the arbitration is taking place. The rules also allow the witness statements to be presented to the tribunal in written form.[37] The parties might then agree that examination of the particular witness is not needed. In some cases, however this is not possible as one of the parties wishes to examine a witness, but the witness fails to appear.

The argumentation supporting the fact that the right to examine a witness is to be treated as a substantial part of due process stems from the premise, that it is a part of the right of a party to be heard. This right does not only include the possibility to present the party's case to the arbitral tribunal, but also have reasonable opportunity to react to what the opposing party has presented.

The main question is the extent of such opportunity. It is not decided whether a party should have a possibility to comment on every single piece of evidence submitted by the other party. If the answer to the abovementioned question would be yes, it could lead to obscure situation where one party is blocking the course of arbitration by demanding to comment on every single submission of the opposing party. This would go against one of the basic principles of international arbitration which is time and cost efficiency. Therefore, it is obvious, that there has to be a certain limit to the possibility of the parties to react.

The basic rule regarding the right of a party to be heard is that both of the parties are to be treated equally and none should have a bigger opportunity to present its argument in front of the tribunal.*"If a tribunal permits one party, and not the other, an opportunity to address an issue, to submit evidence to produce a witness or otherwise present its case, then its award will be subject to annulment."* [38] This suggests that if a party is fully denied react on the written testimony, such testimony should be disregarded, otherwise this could be found a violation of due process.

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[36] Article 28 (4) of the UNCITRAL Arbitraiton Rules

[37] Art 27 (2) of UNCITRAL Arbitration Rules „statements by witnesses, including expert witnesses, may be presented in writing and signed by them

[38] Born, pg. 2581

It needs to be noted, that when a written witness testimony is submitted, there is nothing preventing the opposing party from submitting its own written document. Therefore the failure of a witness to appear in front of the tribunal does not necessarily mean that one of the parties is going to be deprived of the possibility to comment on his testimony. *"While parties' right to comment and counter expert opinions must always be respected, this right need not necessarily be exercised through examination at hearing."* [39] Of course, the common law rule stating that without examination, the party cannot dispute the credibility of a witness does not apply here as the party requested the examination, but for reasons outside o the scope of its influence, it did not occur.

On the other hand, there is a reason why examination of a witness is counted on by the arbitral rules. This reason stems partly from the different approaches to witness statements by common law and civil law (described above). Moreover, there are situations where it is most efficient to disprove the testimony or the credibility of a witness in person. Sometimes it might be extremely difficult to do so with a written submission.

3.2.2 Law governing the right to be heard with regard to witness statements

The IBA Rules on Evidence count on the possibility of a witness not to appear in front of the tribunal. The conduct of the evidentiary hearing is governed by Rule 8 and 9 of the Rules on Evidence where in Rule 9.7 it is stated, that a tribunal shall disregard the testimony of a witness who, although he was requested to do so, failed to appear for examination.[40] This Rule is not absolute and within itself contains a possibility for a tribunal to admit such evidence in exceptional circumstances. No commentary was published on the IBA Rules on Evidence and as they are rarely binding, I was not able to find any case law regarding the interpretation of the phrase exceptional circumstances.

Furthermore, Article 9.7 of the IBA Rules on Evidence is not invoked, when the witness has a valid reason for not appearing in front of the tribunal to testify. Born suggests, that such valid

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[39] CATO, By D. Mark a Foreword by Lord MUSTILL. *Arbitration practice and procedure: interlocutory and hearing problems*. 3rd ed. London: LLP, 2002. ISBN 978-184-3111-399.

[40] *„pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise"*

reason is for example the death of a witness or a serious illness preventing him from attending the evidentiary hearing. The extent of the phrase valid reason is questionable in cases, where the reason for not appearing is within the sphere of influence of either the witness or one of the parties to the arbitration.

Ultimately, it is up to the arbitral tribunal to decide both on the validity of the reasons for non-appearance and whether the circumstances are exceptional enough for the witness statement to be admitted. As was noted above, the discretionary powers of the tribunals to decide approaching evidence is quite wide[41]. Moreover, the pro enforcement interpretation of Article V of the New York Convention and the rules which developed in case law regarding the interpretation of Article 52 (1)(d) of the ICSID Convention[42] must be taken into consideration.

Although the parties have sought annulment or non-enforcement on those grounds, *"annulment applications based on evidentiary decisions by the arbitral tribunal have rarely succeeded"*[43] This is the reason, why there is no case law available on this topic.[44] In order for a challenge on evidentiary decision to be deemed to qualify as a breach of due process, there needs to be a clear link to the outcome of the case.[45] *"Only where the tribunal's ruling were grossly unfair or wholly arbitrary, and demonstrably had a material effect on the outcome of the case, will- non recognition be likely"*[46]

4 CONCLUSION

Due to the fact that the discretion of tribunals when dealing with witness testimonies and generally conducting of the arbitral proceedings and the narrow interpretation of the provisions allowing non-enforcement of an award, it is extremely difficult to prove, that the

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[41] BORN, pg. 2583 *"Nonetheless, as also noted above, a tribunal is generally afforded substantial discretion in determining the need for and admissibility of evidence."*
[42] *Wena Hotels Limited. V. Arab Republic of Egypt* (ICSID Case No. ARBl98/4), *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision of December 22, 1989, *CDC Group Plc. v. Republic of Seychelles* (ICSID Case No. ARB/02/14)
[43] BORN, pg. 2582
[44] Only one case has succeed in invoking Article 52(1)(d) of the ICSID Convention
[45] *Wena Hotels v. Egypt*
[46] BORN, pg. 2755

right to examine a witness falls within the scope of due process. I was not able to find a case law which successfully dealt with this situation.

On the other hand, the IBA Rules on Evidence count with this possibility, however it is questionable whether their breach amounts to something as serious as is the breach of a right of a party to be heard. There might be situations, where the factual circumstances of the case are so severe, that the failure of a witness to appear might breach a party's fundamental right.

In my opinion, there are certain requirements for the situation to qualify as severe enough for the witness testimony to be disregarded. First of all there must be a direct impact on the outcome of the case, secondly the party disproving the witnesses written testimony, or expert report, must submit a written submission stating its reasons for challenging the witness statement or the witnesses' credibility.

It is questionable, whether the reasons why a witness did not appear in front of the tribunal to give his testimony are of importance. When talking of due process, it such reasons should be irrelevant, because it is a right of one party which is independent of factual circumstances regarding the witness. On the other hand, logic dictates, that when there is no objective possibility of the witness to appear for testimony, that the tribunal should take his written witness statement into consideration.

Ultimately, it is the arbitral tribunal who has the power to decide on the weight it gives to a particular witness or expert statement. Regardless of how the question posed by this paper is decided, if a witness fails to testify personally in front of the tribunal despite the request of the opposing party for his appearance, the tribunal should always give less weight to his witness statement.

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