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HEADLINE: The Implications Of A Failure To Cross-Examine In International Arbitration

BODY:

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Cross-examination is a process that permits counsel for one party to test the veracity and accuracy of the testimony of a witness called on behalf of another party. It affords the cross-examiner an opportunity to highlight inaccuracies in, and generally discredit, the testimony of his opponent's witness. However, cross-examination is not merely a right for the benefit of the cross-examining party. In most common law jurisdictions, the process has also given rise to a positive duty to cross-examine or to put one's case to the witness if the cross-examining party intends to rely upon evidence or submit argument which contradicts that witness's testimony, save in certain limited circumstances. Such a duty is aimed primarily at providing the witness with an opportunity to explain any contradiction or alleged problem in his or her evidence that is highlighted by the cross-examining party. It is in light of this secondary function of the process that a party who does not take the opportunity to cross-examine his opponent's witness is generally deemed to have accepted that unchallenged evidence as correct.

The practice in the US jurisdictions is somewhat different from most other common law jurisdictions, in that there does not appear to be a duty to "put one's case."

However, it remains true even there that counsel is expected to impeach his opponent's witness using any contradictory evidence. Certainly, evidence that is not challenged in cross-examination by the party against whom it has been adduced must generally be accepted by the jury as true unless it is incredible or contradicted by other evidence. It is submitted that this should also be the guiding principle in international arbitration proceedings, where cross-examination is now common practice. Although the tribunal in an international arbitration ultimately retains a discretion to reject unchallenged evidence or place reduced weight on it where appropriate, generally, where cross-examination is permitted, evidence that is not challenged in cross-examination by the party against whom it has been adduced, unless incredible or contradicted by other evidence, should be deemed to have been accepted as true by that adverse party, and should similarly be accepted by the tribunal.

The Practice In Common Law Jurisdictions

Cross-examination is a practice which derives from the common law. In most common law jurisdictions, this practice comprises a general rule of evidence, widely known as "the Browne v Dunn rule" or "the rule in Browne v Dunn," which provides that a party cannot rely on evidence that contradicts the testimony of a witness, without first putting that evidence to the witness in cross-examination in order to allow him an opportunity to explain the contradiction. The rule will not apply where there has been clear prior notice of an intention to impeach the credibility of the relevant testimony.

The rule and the exception to it derive from the leading decision of the House of Lords in Browne v Dunn,1 in which Lord Herschell made the following statement:

". . . it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. . . . if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; . . . that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. . . . a cross-examination of a witness which errs in the direction of excess may be more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted."2

Lord Morris, although concurring, made the following remark which is considered to lay down a further exception to the rule: "a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box."3 Accordingly, the rule in Browne v Dunn will not apply where the relevant testimony is incredible.

Following the rule in Browne v Dunn, a decision not to cross-examine a witness at all or on a particular point, is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been clear prior notice of the intention to impeach the relevant testimony. This is a logical consequence of a failure to challenge, bearing in mind the fact that the witness will not otherwise have an opportunity to defend his evidence. The rule can be rationalised as "a rule of fairness that prevents the "ambush" of a witness."4

The rule and its rationale are explained in the leading text on the English law of evidence, Phipson on Evidence:

"In general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. . . .

This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular point, he will be in difficulty in submitting that the evidence should be rejected."5

Phipson acknowledges that there may in practice be some relaxation of the rule, for example, if there is a time-limit imposed by the judge on cross-examination so that there is insufficient time to cross-examine on every minor point, particularly where a lengthy witness statement has been served.6 Further, it confirms that a failure to cross-examine will not always amount to acceptance of the witness's testimony, referring to the two exceptions laid down by the House of Lords in Browne v Dunn itself, and circumstances where "the abstention arises from motives of delicacy in the cross-examination of children, or to save time by not putting the same matters to several witnesses."7 However:

"As a rule . . . a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness or in which he had a share. . . . If he asks no questions he will generally be taken to accept the witness's account . . . and will not be permitted to attack it in his final speech; nor will he be allowed in that speech to put forward explanations where he has failed to cross-examine relevant witnesses on the point."8

The rule in Browne v Dunn has been adopted in most common law countries, including Australia, New Zealand, Canada and Singapore and Hong Kong.9 For example, Hunt J held as follows in the Australian case of Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation:10

"It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matter, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is

necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the inference sought to be drawn."11

The practical necessity for the Browne v Dunn rule was noted by Wells J in the Australian case of Reid v Kerr:12

". . . a judge (or a jury) is entitled to have presented to him (or them) issues of facts that are well and truly joined on the evidence; there is nothing more frustrating to a tribunal of fact than to be presented with two important bodies of evidence which are inherently opposed in substance but which, because Browne v Dunn has not been observed, have not been brought into direct opposition, and serenely pass one another like two trains in the night."13

That Canadian practice, at least in civil litigation, follows that in England, is confirmed by Williston and Rolls, leading authors on Canadian civil law procedure:

". . . failure to cross examine a witness or to cross-examine him on a vital part of his evidence may be treated as acceptance of that part or even the whole of his evidence. If a witness who has given important evidence in the case is not cross examined, it may be assumed that in all probability, his evidence will be accepted. Certainly, failure of counsel to cross-examine will be most forcefully pointed out during argument."14

Justice Gilles Renaud of the Ontario Court of Justice also confirms the adoption of the Browne v Dunn rule by the Canadian courts. In his article "The Rule in Browne v. Dunn: Should It Be Undone?,"15 he examines the rule at length and suggests that it also exists in criminal prosecutions.16

The Browne v Dunn rule is not recognized in the courts of the United States. However, as stated above, whilst cross-examining counsel in the US does not have a positive duty to put his case to the witness, he is expected to use any contradictory evidence that he has in his possession to impeach his opponent's witness. If he does not do so, the judge or jury will weigh that against the rest of the evidence and there is a risk that the testimony that was not challenged in cross-examination will be accepted as true.

As a matter of law, it is generally the case in the courts of the United States that unchallenged evidence that is not otherwise contradicted or incredible, may not be rejected by the jury and must be accepted as true. As stated by the United States Court of Appeals (10th Circuit) in Chicago, Rock Island & Pac. Ry. Co. v. Howell:17

"The fundamental rule that makes the jury the sole judge of the weight and credibility of testimony is subject to the caveat that testimony concerning a simple fact capable of contradiction, not incredible, and standing uncontradicted, unimpeached, or in no way discredited by cross-examination, must be taken as true, and no judgement can be permitted to stand against it."18

This principle was confirmed by Quintana-Ruiz v. Hyundai Motor Corp.:19

"Generally, a jury may not reject testimony that is uncontradicted and unimpeached (directly, circumstantially, or inferentially) unless credibility is at issue."20

Absence Of Cross-Examination In Civil Law Systems

Cross-examination does not exist as a procedure for assessing evidence in civil law jurisdictions. This is largely because the evidential process in civil law countries tends to be conducted primarily in writing and oral testimony has a limited role, thus there is no real need for the cross-examination procedure.21

Pejovic22 explains that in civil law jurisdictions, written evidence prevails over oral evidence. If a claim is supported by a document, the judge will not go further, and if it is contradicted by a document, the document will prevail. The use of witness evidence is very unusual in commercial cases, and in certain countries the judge may exclude the testimony of a party given in his own case. For these reasons, cross-examination of witnesses is virtually non-existent in civil law countries; although some countries will allow the direct questioning of witnesses by counsel where there is oral testimony, often questions can only be put through the judge, and even that is usually in the discretion of the judge.23

As far as 'expert witnesses' are concerned, unlike common law jurisdictions in which expert witnesses are party appointed, in civil law countries it is the court which will appoint an expert where this is deemed necessary. Accordingly, an expert appointed in proceedings taking place in a civil law jurisdiction is not even considered to be a witness; he is usually referred to as the "court's expert."24 He will generally be instructed by the court to prepare a written opinion which will be provided to the parties as well as the court. In certain jurisdictions, the parties may appoint their

own experts, but if one of the parties objects to the opinion of the court expert, or the court is not satisfied with the expert's report, the court may simply appoint another expert; the expert will not be subjected to cross examination.25

French civil procedure, generally regarded as typical of the civil law systems, is "marked by a strong preference for written proof" and the "distrust of oral evidence."26 The proceedings are conducted largely on the basis of documentary evidence presented by the parties.27 The parties do not have the right to have the testimony of witnesses taken but they may request and the court may in its discretion, upon such request or on its own motion, receive the testimony of witnesses via incidental proceedings known as enqu?te.28 However, since the court will hardly ever make use of the enqu?te procedure,29 witnesses are rarely heard by the courts.

The judge takes the role of interrogator on the rare occasions when witnesses are examined orally, so that during the enqu?te, it is the juge de la mise en ?tat (the "investigating magistrate") who will ask questions of the witnesses. Counsel has the opportunity to request that the judge ask further questions, but they may not question the witness directly. There is no cross-examination.30

With respect to expert evidence, it is the juge de la mise en ?tat who appoints the expert and it is the expert who cross-examines the parties, during a process known as the expertise.31 The expert conducts his own investigations and enquiries into the technical facts and circumstances relevant to the dispute between the parties during the expertise; he may interrogate the parties, request documents, and allow the parties and their lawyers to speak. The expertise also permits the expert to challenge anything that the parties say, illustrate inconsistencies in their statements, or test their truthfulness. At the conclusion of his investigation, the expert prepares a report which he submits to the court; in most cases this report is accepted by the court unchallenged.32 There is no opportunity for the parties to question the expert.

The procedure in Germany is slightly different. As in France, a court may, in its discretion, upon the application of a party, make an order for a witness's testimony to be taken; a party cannot insist that the court hear the testimony of any particular witness.33 Also, when a witness is called to testify, it is again the judge who serves as the examiner-in-chief.34 However, unlike France, the parties' legal representatives in Germany are permitted to question witnesses directly at the conclusion of the judge's own interrogation.35 Few counsel make extensive use of this freedom as doing so risks the implication that the judge has failed to ask the appropriate questions.36 Therefore, the practice of cross-examination in Germany is limited even though the process is not unheard of.

With regard to expert evidence, German civil procedure follows the general pattern in civil law jurisdictions: if an expert is required, it is the court which selects the expert and it is the court that instructs him as to the facts to be investigated and the questions to be answered. The expert prepares a report which is sent to the court and the parties. Both the parties and the court may request that the expert answer further questions. Although there is no cross-examination of the court appointed expert, a hearing will often take place after an expert has given his opinion and the parties will be able to interrogate the expert. The parties may employ their own expert to challenge findings of the court-appointed expert, but if they do and the court agrees with the party-appointed expert's criticisms, the court may appoint another expert of its own.37

To take another civil law jurisdiction, oral testimony in Brazilian civil litigation is obtained from witnesses under questioning solely by the judge, as is the case in France. The court typically puts preliminary questions to a witness of its own motion, following which it will invite the parties' legal representatives to submit questions they would like the judge to ask. In most cases, unless the questions are irrelevant, the judge will ask the questions submitted to him by counsel. However, there does appear to be a difference with French civil procedure: in Brazil, although the judge will conduct the questioning, he will put the questions of one party to the witness prior to putting the questions of the other party which will have been partly formulated on the basis of the answers that the witness has already provided. This has been referred to as the "analogue to cross-examination,"38 but it is very far removed from cross-examination as the process is known in common law jurisdictions. As Gidi notes, in Brazil "(t)here is little or no opportunity for direct examination of witnesses let alone cross-examination."39

With respect to experts, although in Brazil the parties are permitted to appoint experts in addition to the court appointed expert, there is still no cross-examination of the experts by the parties. The experts' assignment commonly consists of answering a series of questions devised by the judge and the parties. In a manner that is similar to the French expertise, the experts are empowered to take evidence from witnesses and request that the parties submit documents to them. When the experts have completed their examination of the facts, they confer and present their conclusions to the court.40

In Chile also, parties submit questions to the judge which he poses to the witnesses. As remarked by Cappalli, the "art of examination and cross-examination by crafty lawyers is absent"41 in Chile.

In many civil law jurisdictions, the court does not even maintain verbatim records of the oral testimony given. Instead, the judge will orally summarise the witness's testimony, which summary is then recorded by the court clerk and included in the court's case dossier.42 In France, the three judge tribunal of the Tribunaux de Grande Instance generally obtains oral testimony of the witnesses not by hearing them directly, but via this dossier which contains a summary dictated by its one member who was appointed as juge de la mise en ?tat.43 As noted by Kaplan:

"[t]he method does not really lend itself well to the determined and extended pursuit of detail which is often the only means of exposing mistake or falsehood."44

As discussed below, the civil law practice is very far removed from the fact finding process that is generally adopted in international arbitrations. Accordingly, the fact that there may be no implications in failing to challenge the uncontradicted testimony of a witness through cross-examination in civil law jurisdictions where the practice of cross-examination is virtually absent, will have little relevance in international arbitrations where witness testimony is widely accepted and cross-examination is standard as a means for the assessment of such evidence, as described below.

International Arbitration

The various institutional arbitration rules appear to grant arbitration tribunals total discretion in assessing the evidence before them. Article 25.6 of the of the UNCITRAL Rules of Arbitration, for example, provides:

"The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered."

Article 20.6 of the ICDR International Arbitration Rules similarly provides:

"The tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party. . . ."

Rule 34(1) of the ICSID Rules Of Procedure For Arbitration Proceedings (Arbitration Rules) states:

"The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value."

Article 22.1 of the LCIA Arbitration Rules states with respect to "any material tendered by a party":

"Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views:

. . .

(f) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal;

. . . ."45

It is submitted that the discretion afforded to international arbitral tribunals on this issue is not a completely unfettered one, however. It is widely accepted that cross-examination is now the norm in international arbitration. As stated by William W. Park:

"International practice has created consensus on arbitral norms on matters such as witness statements and the right to cross examination."46

The position is confirmed by Article 20.5 of the LCIA Arbitration Rules which provides:

"Any witness who gives oral evidence at a hearing before the Arbitral Tribunal may be questioned by each of the parties under the control of the Arbitral Tribunal. The Arbitral Tribunal may put questions at any stage of his evidence."

and Rule 35(1) of the ICSID Arbitration Rules which states:

"Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal."

As noted by Reed and Sutcliffe, although the taking of evidence from fact witnesses is an area where there is a marked difference between the common law and civil law systems, "International arbitration practice in this area is now remarkably standard, having settled more towards the common law than the civil law end of the spectrum."47 Accordingly, it is a fact that the position in international arbitration on this particular issue is closer to the common law position than the civil law position.

This being the case, a tribunal in an international arbitration where cross-examination has been permitted should have regard to the general rules and practices which normally accompany the cross-examination procedure in common law jurisdictions, when exercising its discretion to determine the admissibility, relevance, materiality and weight of the evidence offered. If a witness is to be challenged on any issue in his testimony, this should ordinarily have been put to the witness in order to give him an opportunity to defend his evidence. It is submitted that failure to cross-examine a witness on any part of his testimony (whether oral or written), where there was an opportunity to cross-examine, is tantamount to an acceptance of that testimony by the party against whom the evidence is adduced, and that party should not generally be able to impugn the unchallenged evidence of the witness, unless the testimony is otherwise contradicted or incredible, or where there was manifest notice of the intention to impeach that testimony. Accordingly, it is submitted that where evidence is not challenged and stands uncontradicted, it should ordinarily be accepted as correct by the tribunal, subject to issues of credibility.

Such an approach is supported by the "Final Report on Construction Industry Arbitration," which was commissioned by the ICC Commission on International Arbitration and which offers guidelines to arbitrators called upon to conduct ICC arbitrations in the construction sector. Paragraph 62 of this Report states:

". . . In all events, the tribunal should inform the parties if it thinks that a witness or an expert need not attend the hearing to be questioned. It should also require the parties to state whether any witness or expert put forward by the other party is not required (in which case the evidence will be accepted subject to a decision as to its value)."48 [Emphasis added]

That is not to say that if a witness for one party is not called for cross-examination by the opposing party, this automatically renders true everything stated by that witness in his witness statement, regardless of the fact that there are documents or witness evidence that would indicate the contrary. Where the relevant witness's testimony is rebutted by other evidence which is relied upon by the opposing party, the opposing party may choose not to cross-examine that witness. However, even in those circumstances it is safer to call the witness and put the inconsistent evidence to him in case the tribunal concludes that the witness has not been give a fair opportunity to explain the divergence in evidence.

Further, as is the practice in common law jurisdictions, a tribunal may reject evidence, although uncontradicted by other evidence, where the tribunal finds the testimony to be lacking in credibility.

The IBA Rules "on the Taking of Evidence in International Commercial Arbitration" provide further support for the proposed approach. Article 8.2 of the Rules envisages that the witnesses will appear at the hearing for questioning and Article 4.9 provides:

"If the Parties agree that a witness who has submitted a Witness Statement does not need to appear for testimony at an Evidentiary Hearing, such agreement shall not be considered to reflect an agreement as to the correctness of the content of the Witness Statement."

The inference is that an agreement not to challenge your opponent's witness testimony through cross-examination, would ordinarily reflect an acceptance of that testimony. Since this provision only applies if both parties agree that the witness need not be called, it can be implied that if the party who has submitted the evidence does not agree that the evidence can go unchallenged where it is not accepted, the party against whom it has been adduced should be deemed to have accepted the correctness of the witness statement where he fails to go on to challenge the same, in the absence of a ruling to the contrary by the tribunal.

The consequence of a failure to challenge witness testimony through cross-examination arose as an issue in a recent international arbitration, involving the construction of a power station in Latin America, conducted under the auspices of the UNCITRAL Rules of Arbitration. The seat of arbitration was Miami, Florida. The authors acted for the claimant whilst the respondent was represented by counsel from a civil law background. The respondent chose to call only twelve of the thirty one witnesses who had provided written witness testimony on behalf of the claimant, and a

large proportion of the testimony of those called was not challenged in cross-examination. It was submitted on behalf of the claimant that the respondent had therefore accepted the detailed written testimony which it had not sought to contradict. The respondent argued that its abstention in this respect did not imply that the testimony of the claimant's witnesses was not in dispute.

In accepting the claimant's unchallenged witness testimony on the relevant issues, the tribunal stated as follows:

"While (the respondent) has not agreed that the witness statements it did not specifically challenge in cross-examination are to be considered true and accurate, it did not take advantage of the opportunity to test the veracity of the witnesses and only sought to challenge their evidence indirectly and (the claimant) has been very emphatic throughout that it considered unchallenged witness statements to be admitted as truthful and undisputed. Further, (the respondent) did not lead specific, detailed contrary evidence. In these circumstances, direct, probative witness statements will normally be accepted by the Tribunal unless there is a valid basis for discounting them. With respect to witness evidence central or critical to a claim, there is generally considered to be an onus on a party to challenge the witness in cross-examination, particularly if the party is challenging that witness's credibility. This is particularly so when the witness is available and is cross-examined on other issues."

It is submitted that this approach should be followed in any international arbitration where counsel has the opportunity to cross-examine the witnesses proffered by his opponent.

Conclusion

It is not suggested that as a matter of law a tribunal in an international arbitration should automatically accept all unchallenged evidence as true. Such matters are in the discretion of the tribunal. However, it is submitted that the tribunal should, in the exercise of its discretion, accept as correct any witness testimony that is not challenged by the party against whom it is adduced, in the absence of direct evidence to the contrary, where the witness is not otherwise lacking in credibility.

Further, as noted by Redfern and Hunter,49 in general, arbitral tribunals give greater weight to the evidence of a witness that has been tested by cross-examination. If a party chooses not to cross-examine a witness, despite the probative significance of the procedure to the tribunal, it may well be inferred that the unchallenged testimony is accurate and that counsel does not feel that he can discredit the evidence or witness in any way. Accordingly, a party who feels that evidence from a witness is untrue or misleading, should take the opportunity to cross-examine that witness to illustrate the false nature of that evidence, thereby increasing the evidentiary weight of his own evidence. Failure to do so is tantamount to conceding the point at issue and may be considered negligent.

Endnotes

1. Browne v Dunn (1893) 6 R. 67, H.L.
2. Ibid. pp. 70-71.
3. Ibid., p. 79.
4. *Verney v The Queen [1993] 67 O.A.C. 279, p. 288.*
5. Phipson on Evidence, (16th edn, 2005), p. 322.
6. Ibid., p. 323.
7. Ibid., p. 332.
8. Ibid., p. 332. The author goes on to acknowledge, however, that "a failure to put a matter in cross examination does not render evidence about that matter inadmissible."
9. The rule in Browne v Dunn also appears to have been adopted in the Rules of Procedure and Evidence of several International Criminal Tribunals for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law. See, for example, Rule 90(G)(ii) of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for Genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Security Council resolution 955 of 8 November 1994 and Rule 90(H)(ii) of The International Tribunal for the Prosecution of

Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council resolution 827 of 25 May 1993: "In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness."

10. Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation [1983] 1 NSWLR 1.

11. Ibid., p. 16.

12. Reid v Kerr (1974) 9 SASR 367.

13. Ibid., pp. 373-4.

14. Williston & Rolls, The Conduct of an Action (1982), p. 107.

15. Gilles Renaud, "The Rule in Browne v. Dunn: Should It Be Undone?," 6 Gonz. J. Int'l L. (2002-03).

16. However, he does cast doubt on the application of the rule in Irish, Scottish and South African criminal proceedings.

17. *Chicago, Rock Island & Pac. Ry. Co. v. Howell, C.A., 401 F. 2d 752,* (10th Cir. 1968).

18. Ibid., p. 754.

19. *Quintana-Ruiz v. Hyundai Motor Corp., 303 F. 3d 62 (1st Cir. 2002).*

20. Ibid., p. 75.

21. The focus of this article is on civil matters. The practice in criminal matters may vary and resemble the common law position in certain respects.

22. Caslav Pejovic, "Civil Law And Common Law: Two Different Paths Leading To The Same Goal," *(2001) 32 VUWLR 817.*

23. Ibid., p. 833. See also Antonio Gidi, "Class Actions In Brazil - A Model Law For Civil Law Countries," American Journal of Comparative Law, Vol. 51, 2003, p.319.

24. Caslav Pejovic, op. cit., p. 834.

25. See e.g. John H. Langbein, "The German Advantage in Civil Procedure," *52 U. Chi. L. Rev. 823 (1985),* pp. 837 ? 840.

26. James Beardsley, "Proof of Fact In French Civil Procedure," *34 Am. J. Comp L. 459 (1986).*

27. Wouter Le R De Vos, "French Civil Procedure Revisited," 9 Stellenbosch L. Rev. 217 (1998), p. 219.

28. George W. Pugh, "Cross-Observations Of The Administration Of Civil Justice In The United States And France," *19 U. Miami L. Rev. 345* (1964-65), p. 361.

29. Wouter Le R De Vos, op. cit.. See also James Beardsley, supra note 26, p. 478: he states that the enqu?te is common practice only in family law matters.

30. James Beardsley, supra note 26.

31. James Beardsley, supra note 26, p. 483.

32. Richard W. Hulbert "Comment on French Civil Procedure," *45 Am. J. Comp. L. 747, p. 749.*

33. Herbert L. Bernstein, "Whose Advantage After All? A Comment On The Comparison Of Civil Justice Systems," *21 U. C. Davis L. Rev. 587 (1998),* p. 593.

34. Ibid. See also John H. Langbein, supra note 25, p. 828.

35. John H. Langbein, ibid.

36. Benjamin Kaplan, Arthur T. von Mehren and Rudolf Schaefer, "Phases of German Civil Procedure I," *71 Harv. L. Rev. 1193 (1958),* p. 1235.

37. John H. Langbein, supra note 25, pp. 837 ? 840.

38. Keith S. Rosenn, "Civil procedure in Brazil," 34 Am. J, Comp. L. 487 (1986), p.496.

39. Antonio Gidi, supra note 23.

40. Keith S. Rosenn, op. cit., p.498.

41. Richard Cappalli, "Comparative South American Civil Procedure: A Chilean Perspective," *21 U. Miami Inter-Am L.Rev. 239* (1989-90), p. 271.

42. See for example John H. Langbein, supra note 25.

43. Previously the "juge charg? de suivre la procedure" - see George W. Pugh, supra note 28, p. 362.

44. Benjamin Kaplan, Arthur T. von Mehren and Rudolf Schaefer, supra note 36, p. 1236.

45. The ICC Rules of Arbitration are silent on the subject of evidence and how it should be assessed by the Tribunal.

46. William W. Park, "Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion," Mealey's Intl. Arb. Rep. (Vol. 19, Issue #5)30 (2004), p. 37.

47. Reed and Sutcliffe, "The "Americanization" of International Arbitration?," Mealey's Intl. Arb. Rep. (Vol. 16, Issue #4) 37 (2001), p. 41. The authors also note that ". . . aspects of Anglo-American legal procedure, in particular document disclosure and cross-examination, are now firmly embedded in the international arbitration landscape" at p. 37.

48. See Final Report on Construction Industry Arbitration commissioned by the ICC Commission on International Arbitration, para. 62.

49. Redfern and Hunter, Law and Practice of International Commercial Arbitration (2004), p. 308.

EDITOR-NOTE:
[Editor's Note: Ms. Anjomshoaais a seniorassociateand Mr.Bellhouse is a partner in the Londonoffice of White & Case LLP. Both are members of theFirm's InternationalArbitration Group. The views expressed in this commentary do not necessarily reflect that ofWhite & CaseLLP or its clients. Replies to this commentary are gratefully received.]

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