THE CHALLENGES OF TAKING EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION – THE PROBLEM OF LEGAL PRIVILEGES

International commercial arbitration is much praised primarily for its ability to meet the expectations of parties and counsels coming from diverse legal backgrounds and cultures, and providing all them an opportunity to feel 'home-based' in the course of the proceedings. The arbitration process must adapt to the differing needs of parties coming from diverse legal backgrounds and cultures, and alleviate (or completely eliminate) the feeling of discomfort each party gets when being faced with rules and procedures unfamiliar to her procedural background.

The issues that may arise in the evidence-gathering procedure in international commercial arbitration are usually settled by using general terms. The UNCITRAL Model Law on International Commercial Arbitration (art.19 para.2), for instance, provides that in the absence of an express agreement by the parties '...the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate'. In this manner, the conduct of the arbitration proceedings is usually left to the wide discretion of arbitral tribunals, which might lead to concerns for the excessive arbitral discretion in deciding certain evidentiary issues:

> …leaving such issues to arbitral decision-making during the proceedings leads to the 'dark side of [arbitral] discretion' which lies in the discomfort that a party may feel when arbitrators make up their own rules as they go along, divorced from any precise procedural canons set in advance.[1]

These concerns are even more emphasized when dealing with issues covered with a stark contrast in the perception in civil-law and common-law countries, such as the objections of legal privileges in international commercial arbitration. Legal privileges, concerning the right of a party to withhold certain information and documents from the arbitration proceedings, without having to bear a negative consequence for its omission, might prove to be one of the most troublesome objections that an arbitral tribunal might face. While civil-law countries tend to regard privilege as part of the attorney's professional secrets, common-law countries link the privileges to the party's right to proper legal advice.

While both concepts arise from the party's right to a proper defense, as necessary to allow a client to seek legal advice in full confidence that the information given to the lawyer will not be used against him, these concepts might cause additional problems for the arbitral tribunal when deciding upon such an objection in the course of the proceedings.

The decision of the arbitral tribunal upon a legal privileges objection would be dependent on several factors – the procedural background of the arbitrators, the procedural background and the expectations of the parties, the *lex arbitri*, and the mere determination whether this issue should be regarded as a procedural or a substantive issue. The article will analyze the current challenges in dealing with the issue of legal privileges in international commercial arbitration, and the prospectus of its further development – the possibility of devising an autonomous set of rules regulating this issue, in order to overcome the problems.

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[1] William W.Park, Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion, Arbitration International, Vol.19, 2003, No.3, p.286.