Different Approaches to Discovery, Disclosure, Witnesses and Evidence in International Arbitration

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DONATA VON ENZBERG is a partner in Taylor Wessing’s Hamburg office and member of the Litigation & Dispute Resolution Practice Area. She represents companies in disputes before German courts as well as in national and international arbitration. Donata has acted as counsel in arbitration proceedings inter alia under the rules of the ICC, DIS and CEAC as well as in ad hoc proceedings. The focus of her practice is in the area of national and international law relating to sales, trade, product liability and product safety. She is regional chair of the German Institution of Arbitration 40 North (DIS40) and member of the German Institution of Arbitration (DIS), the Alternative Dispute Resolution Group of DRI, the International Association of Young Lawyers (AIJA) and the German-South African Lawyers Association (GSLA).

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The first panel of the DRI International Committee CLE will deal with the different approaches of the taking of evidence in international arbitration due to a great diversity of parties and jurisdictions. Whereas some of the differences that one can observe in the practice of international arbitration stem from the different levels and range of experiences of the counsel involved, the diverging approach is often more directly cultural and linked to the practice of litigation in the courts of different jurisdictions. To be aware of these differences and to not only know but be familiar with the legal background of the counsel and even more decisively of the arbitrators has a significant impact on the predictability of the procedure and outcome of an international arbitration. While each of the set of rules the parties agree upon when they opt for arbitration provides for a general framework for arbitral proceedings, all rules deliberately abstain from going into the details of the proceedings, such as witness examination, document production, or other procedural issues. This gap is filled to a large extent by the agreement of the parties and the arbitrators who need to address these topics at the beginning of an arbitration. Their respective view on these topics is guided by their legal background and the familiarity of the different approaches.

The panel with focus on three main topics where these different approaches of the taking of evidence become particularly pertinent: these are firstly the striking differences in the approach of civil and common law courts and tribunals when it comes to witness evidence, secondly the diverging understanding of the role of an expert and thirdly the disparate legal backgrounds when it comes to document evidencing, in particular discovery and document production.

The distinguished and experienced speakers will introduce the different concepts of taking of evidence in their respective home jurisdictions and then share their experience in international arbitration both regarding difficulties that may arise between the participants of an arbitration due to their diverging practices and also regarding mediatory approaches used in international arbitration in order to address these differences. Topics like written witness statements, cross examination, witness preparation as well as party appointed vs. tribunal appointed experts and also document production, discovery and the tools and guidelines regarding the taking of evidence used in international arbitration will be explained and discussed controversially.