

CHAPTER 2

Common and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives*

SYNOPSIS

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* This chapter was jointly prepared by Michael McIlwrath, Senior Litigation Counsel for GE Oil & Gas, a division of the General Electric Company and international arbitrator Henri Alvarez of the Canadian law firm Fasken Martineau.

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The theme of this chapter is not uncommon and has been written about in other articles and publications. What makes this chapter both unusual and valuable, however, is the “point-counterpoint” style between the co-authors, illustrating the somewhat differing perspectives of a highly experienced party arbitration practitioner on the one hand, and a well-known international arbitrator on the other, and attempting to answer highly practical questions, such as: are certain procedural approaches generally better for resolving business disputes? Or, when a dispute arises, can parties make strategic use of the differences appointing counsel or arbitrators? As Senior Litigation Counsel for GE Oil & Gas, a division of the General Electric Company,

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Michael Mcilwrath frequently represents GE in international arbitration and is therefore well-positioned to answer such questions from the party point of view. Henri Alvarez, of the Canadian law firm Fasken Martineau, a highly distinguished and experienced international arbitrator selected to hear many high value cases, sets forth the arbitrator's point of view in most eloquent fashion.

§ 2.02 Importance of Flexibility with Respect to Procedural Style in International Commercial Arbitrations

As a rapid review of the chapters by the many other contributors to this book demonstrates, it would be unwise for a party to prepare for an international arbitration on the assumption that it consists of rigid, pre-ordained procedures, or even of "standard practices" that will be applied in every proceeding. While practitioners may herald the diffusion of certain harmonized international approaches, differences in legal traditions can emerge in a transnational proceeding, even one denoted as an "international arbitration." This chapter sets out in broad terms how arbitration is conducted in many common law and civil law countries. Rather than suggest a harmonized approach as a standardized or even preferred method of resolving international commercial disputes, the theme of this chapter is that parties should always consider the options available to them—whether common law, civil law, or harmonized international practice—and make a conscious choice among them to optimize the resolution of their dispute.

There are good reasons for both parties and arbitrators to keep an open mind about matters of procedure, not the least of which is that it pays to be flexible both in international business and in international arbitration. Even when parties are lucky enough to be able to insist on dispute resolution according to their home country's practices, they may find that adopting a different procedural style may lead to gains in time and cost, or in how certain evidentiary issues will be addressed. For parties, the choice of procedural approach can and should be a matter of strategy rather than a default thrust upon them. They should consider it (or the consequences of failing to) when agreeing to the place of arbitration in a contractual dispute resolution clause and selecting counsel and arbitrators once a dispute has arisen. Arbitrators who appreciate the differences in procedural approaches, as well as the expectations of the parties and counsel who appear before them, may be able to conduct proceedings so as to leave both sides satisfied with matters of procedure, even if one side may ultimately be less satisfied with the outcome.

§ 2.03 Preserving the International Character of the Arbitration versus Defaulting to Domestic Common Law or Civil Law Procedural Practices

It bears noting that in this chapter, discussion of the terms "civil law" and "common law" approaches is intended to refer to matters of procedure only, completely distinct from any issues of substantive (or "governing") law that may apply to the disputed issues in the contract. Thus, it is perfectly possible to have matters of procedure addressed according to the approaches used in certain civil law countries, such as France or Switzerland, while leaving matters of contract interpretation to the laws of

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a common law jurisdiction, such as the laws of England and Wales, and *vice-versa*. Indeed, not only is this possible, it happens quite frequently. Importantly, what determines the substantive law applicable to a dispute subject to arbitration is generally a “choice of law” clause in a contract, whereas the application of procedural style is more complex (and less certain). It is determined by the preferences of those who participate in the proceedings: the parties, their counsel and, notably, the arbitrators who are appointed to decide the dispute. The appointment of counsel and arbitrators is often determined, or at least influenced by, the place of arbitration and/or the substantive law that applies to the contract.

In terms of broadly describing the different procedural regimes, it has been aptly said that the common law involves a “search for the truth” while the civil law is merely structured so that “the claimant brings a claim.” It is a fair description considering that the major common law jurisdictions rely on an adversarial process to ensure that all relevant facts about the dispute are disclosed, whereas the civil law approaches merely require a claimant to disclose those facts needed to carry its burden of proof. The common law notably requires a party to grant access to evidence in its possession to its adversary before an evidentiary hearing (or trial) is conducted,¹ and gives considerable weight to witness testimony over documentary evidence. The civil law generally makes little provision by which parties may access evidence in the possession of the adversary, and privileges documentary evidence over witness testimony.

It is frequently noted that international arbitration has managed to successfully merge the procedural approaches of the two regimes. This convergence is seen in the rules of the leading arbitral institutions, the promulgation of international standards for use in arbitration such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration (the “IBA Rules”) and the IBA Guidelines on Conflicts of Interest in International Arbitration, and procedural practices commonly adopted in proceedings. But theory does not always coincide with real-world practice.

In theory, the result should be a form of transnational procedure that is suitable for the resolution of disputes between parties of different nationalities, represented by counsel from different parts of the world, who are appearing before a multinational tribunal. There is no question that such an ideal of international arbitration exists in the minds of many practitioners and commentators. In practice, however, international proceedings are only what those who participate are able to make of them. It is unrealistic to assume that professionals raised with certain traditions will ignore completely their training and preferences for establishing procedure or methods of assessing the quality of evidence. Even within the community of international arbitration specialists, meaning practitioners of arbitration as a delocalized and harmonized form of dispute resolution, it is not easy to generalize how an arbitration will be conducted. There are numerous variables—the parties, their lawyers, the

¹ As noted below, the method of granting access varies among the different common law systems, with the U.S.’s litigation procedures in particular offering a broad palette of discovery tools that are not available in other common law countries.

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institution (if one is chosen), the arbitrators, the nature of the dispute—each of which will influence how the various constituencies will see the procedure evolving. There are many cases in which the parties are international but the proceedings are not, because they are conducted by arbitrators and lawyers who are more familiar with national courts or domestic arbitration practice, and who are therefore inclined to follow procedures that resemble local practice more than any “transnational” arbitration-specific procedures.

Given this variability, what should you “expect” during an international arbitration? One thing is a certain flexibility of procedure so that, as much as possible, the dispute will be resolved in a manner consistent with the parties’ expectations of time, cost, and fairness. Before committing to a particular approach, therefore, a party would be wise to understand the main differences in the procedural practices of those hailing from different jurisdictions, so that they can apply those procedures that are most suited to their particular dispute.

§ 2.04 Opening Pleadings in International Arbitration**[1] Rules Concerning Opening Pleadings**

Open pleadings generally extend to a request for arbitration (the “Request”), an answer together with any counterclaims, and a reply to the answer. There may be further opportunities for a submission at the beginning of a proceeding, such as a reply to counterclaims and/or a rejoinder, but such submissions are not universal. The arbitration rules under which the proceedings are to be conducted generally specify the bare minimum that a party must assert in order for a respondent to provide an answer. They do not require parties to make out their case in full or submit supporting documents; this requirement comes later in the proceedings. For example, ICC Rule 4(3) provides that a request for arbitration must contain the full name and address of the parties, a description of the dispute, a statement of relief sought, the relevant arbitration agreement, particulars as to the number of arbitrators (and any nominations of the same), and any comments on the place, law, or rules of arbitration. UNCITRAL Rule 3(3) is similar, requiring parties to state only the “general nature of the claim.”

Most rules require similar or even less information from an answer to a request for arbitration. ICC Rule 5(1), for example, parallels Rule 4(3) in requiring a respondent to provide only that information that is helpful to setting up the initial procedure of the arbitration. Indeed, an answer may not even be required, as for example when the parties are arbitrating under the UNCITRAL rules. If the respondent has counterclaims, it is expected to introduce them at the time of providing its Answer, and may generally do so using the same skeletal approach that is permissible for a request for arbitration.

Although international arbitration rules do not require the parties to make extensive disclosures of facts, in practice, that is what they often do. Regardless of the jurisdiction, parties will always want to assert any objections to the tribunal’s jurisdiction at the earliest possible opportunity, or risk being held to have waived the objection. Anything more than this, however, generally falls within the domain of party choice rather than express rules, and there can be significant differences between

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the common law and civil law approaches to initial pleadings.

[2] Common Law Approach to Pleadings

The common law generally affords the last word in the opening pleadings to the claiming party, permitting the claimant an opportunity to provide a reply to any answer. In terms of the contents of the submissions, under the common law approach, especially in the U.S., a claimant generally keeps its initial pleading to the minimum necessary, on the view that it will develop its case—and better frame its allegations—as evidence is disclosed in the course of the proceedings. Thus, facts are kept to a minimum, and few documents—and often none at all—are attached to a request for arbitration.

[3] Civil Law Approach to Pleadings

Under civil law practice, there is often one fewer submission at the beginning of the arbitration, so that a claim will have its answer, as well as a counterclaim. As to the content, the general practice in the civil law is for the claimant to articulate its claims in detail in the request for arbitration and attach all documents on which the claimant intends to rely, on the view that it risks being foreclosed from raising such arguments or producing such documents later in the proceeding.

[4] International Approach to Pleadings

Because the civil law practice affords the parties the same number of submissions, international proceedings often (but not always) adhere to the civil law practice of limiting the parties to an equal number of opening pleadings. As to the contents of such pleadings, it is debatable whether there is a true international practice that is commonly followed. Typically, a claimant reproduces the full text of the arbitration clause in its request for arbitration, and attaches the entire contract as an exhibit, even if there is no strict requirement to do so. But, as noted previously, a party would be well-advised to decide at this initial stage of the proceedings whether there is a strategic advantage to adopting a common-law style approach to pleadings, which is generally skeletal, or a civil law approach, which may be in the form of a fully-articulated case.

In any event, a party will need to produce its fully-articulated case at an early stage of the proceedings. It is common practice in international arbitration for parties to offer the contemporaneous documents on which they rely with each submission (or memorial) that they make following the opening pleading stage.²

[5] Party Perspective: Pleadings

Whether a party chooses to submit a skeletal or fully-developed claim with its request for arbitration, or its answer or counterclaim, may reflect either the standard practice in that party's domestic litigation, or a tactical move designed to enhance the party's chances of obtaining a favorable outcome. Many parties simply submit what is standard practice at home, without considering whether there may be advantages to one form over the other. For example, the claimant may wish to keep the Request short

² See, e.g., IBA Rules Art. 3(1).

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for tactical reasons in order to reduce its own preparation time and start the proceeding sooner, or to avoid revealing too much of its case and its proof to the opponent at an early stage, thereby reducing the respondent's preparation time and perhaps getting it to commit to a position which is helpful for the claimant and to which it would not have committed had it previously seen the claimant's full case.

Of course, there may also be advantages to more fully articulating one's case at the inception of the proceeding, and potential negative consequences from the failure to do so. For example, the claimant may, for tactical reasons (such as a desire to impress the tribunal or the opponent), prefer to submit a full, argued written pleading as its Request, accompanied by copious documentary evidence and legal authorities.

The presentation of a request for arbitration or an answer to a request is a stage of the dispute that is fully within the control of the parties. Fortunately, a party's preference for one approach or another need not depend on the legal background or preferences of the arbitral tribunal. From a party perspective, the civil law approach to commercial arbitration, presenting a fully developed case and supporting documents, is advantageous if the respondent responds in kind. If not, there is a risk that the claimant will have led with a fully developed case, leaving the respondent the opportunity to develop its position in the course of the proceedings. This may be strategically advantageous to the respondent in some respects, but it also means that the respondent will lose the opportunity to present a convincing, supported case to the arbitrators after the claimant has just done so.

At the core of the issue is whether a party sufficiently understands its case and the evidence in order to avoid making harmful admissions. On balance, parties are probably more effective in their advocacy, and likely to identify critical issues early in the proceeding, if they begin the arbitration with more fully developed initial pleadings. That said, each case is different and parties must consider the appropriate level of detail suited to the specific facts of the case and tailor them to the composition of the arbitral tribunal and the background and culture of its members.

[6] Arbitrator Perspective: Pleadings

One of the great advantages of international commercial arbitration is the ability to determine or influence the composition of the arbitral tribunal. This can significantly affect the procedure and potentially the outcome of the arbitration. As previously indicated, it is unrealistic to assume that even experienced professionals will ignore their basic legal training and preferences in establishing the procedure and in assessing the evidence. At the end of the day, parties and their counsel must persuade the tribunal that their position is correct and that their case should succeed. Understanding the makeup of a tribunal and the background and preferences of its members may be of assistance in this regard. Depending on the specifics of a particular dispute, this may apply to one or all of the procedural aspects discussed below.

With respect to opening pleadings, an arbitrator, or an arbitral tribunal, with a common law background, may be more accepting of bare bones common law pleadings than an arbitrator or a tribunal from a civil law background. The tribunal's first impression of a case can be important and, therefore, careful thought should be

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given to a party's initial pleadings. While it is very difficult to generalize in international arbitration proceedings, experienced arbitrators generally expect, and appreciate, a clear, concise statement of a party's case so that it can effectively start to consider and identify the procedural issues likely to arise and begin planning how to achieve the most suitable procedure to address these. Arbitral tribunals generally wish to take full advantage of the flexibility of arbitration to settle on the most suitable form of procedure and, to the extent possible, accommodate the parties' joint preferences. In order to achieve this, the tribunal needs sufficient information to foresee potential procedural disagreements and problems in order to steer clear of these and suggest alternatives early on. In short, uninformative pleadings are, generally speaking, not helpful in this regard. For example, difficulties can often arise if no answer, or a very short, uninformative answer, is submitted in response to the request for arbitration. This can create considerable uncertainty and lead to surprises at the first procedural conference between the tribunal and the parties. On balance, therefore, arbitrators generally prefer more fully developed, informative pleadings, even if these are not required by the applicable rules.

§ 2.05 Fact Gathering (Discovery) in International Arbitration**[1] Tribunal Discretion Regarding Fact Gathering**

Arbitration rules or laws generally do not address with any specificity the methods of gathering evidence to be used. The matter is instead entrusted to the arbitral tribunal, which has the discretion to order whatever procedures it considers appropriate. The notion of what may be appropriate in arbitration can vary widely according to whether the tribunal conducts the proceeding (consciously or not) according to common law, civil law, or international practices.

[2] Common Law Approach to Fact Gathering

In the courts of common-law jurisdictions, each party is entitled to ask the other to provide it with documents that the other party has not already placed on the record and that the first party believes will be relevant to its case. This practice is now found in international arbitration, although the degree to which it is followed usually depends on the background of those involved in the proceeding: the greater the proportion of participants from civil-law countries, especially the arbitrators, the less probable it is that broad document production will be ordered.

Much less present in international arbitration of any type are the other discovery tools that may be available in common law courts, the extreme case being the discovery procedures available in domestic U.S. litigation. The U.S. Federal Rules of Civil Procedure provide for five discovery mechanisms in addition to document production: (i) pre-hearing oral testimony ("depositions") of witnesses;³ (ii) written

³ Oral depositions—the questioning of a party or witness, under oath and with a verbatim transcript, by counsel for a party, typically well in advance of the hearing and without the presence of the judge (or tribunal)—are a common feature in U.S. litigation. The practice is virtually unheard of in international arbitration, and is likely only to be used in cases where U.S. counsel is involved and there is agreement with the other party.

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interrogatories; (iii) physical inspections of objects or property; (iv) physical and mental examination of persons; and (v) requests for admissions.⁴ These fact-gathering tools are not widely favored in any form of international arbitration, and it is arguable even the extent to which they might be available even in a purely domestic U.S. arbitration.⁵

[3] Civil Law Approach to Fact Gathering

Generally speaking, civil law litigation systems make very little provision for disclosure, or any requirement that parties make available information in their possession that they do not wish to have surface in the legal proceedings. In some instances, parties may request a judge or arbitral tribunal in a civil law proceeding to produce a specific document in the other party's possession. But this is a rare situation, and the party must make a strong showing not only as to the need for the document and its relevance to the dispute, but also the existence of the document itself. For example, in a dispute over whether the respondent breached an obligation to involve the claimant in settlement negotiations with a third party, the respondent may be ordered to produce the settlement agreement with the third party. As noted above, the request generally does not lead to more broad-ranging or open-ended searches for all documents that the claimant believes relevant to the settlement.

[4] International Approach to Fact Gathering

International tribunals increasingly follow the IBA Rules with respect to the gathering of evidence, either on their own initiative or following an agreement by the parties. While the IBA Rules of Evidence offer a relatively comprehensive set of rules for the production of documents, they do not provide for other forms of discovery typically available in court litigation in the U.S. and other common-law jurisdictions.⁶

The IBA Rules find a sensible middle ground between the expansive document production practices of common-law jurisdictions and the reluctance in civil-law systems to compel parties to produce documents. In fact, some civil-law arbitrators use the IBA Rules to justify document disclosure that is not available in civil-law court practice while some common-law practitioners use the IBA Rules to restrict disclosure.

The thrust of the IBA Rules is that a valid request to produce documents must either be for documents that are individually identified or for narrow, specific categories of documents, and all those documents must be relevant and material to the outcome of the dispute. The existence of these two conditions should prevent "fishing expeditions"

⁴ Federal Rules of Civil Proc. Rules 26–37. *See also* G. Bernini, 'The Civil Law Approach to Discovery: A Comparative Overview of the Taking of Evidence in the Anglo-American and Continental Arbitration Systems', in *The Leading Arbitrators' Guide to International Arbitration*, ed. Newman & Hill (Juris, 2008), 268–269.

⁵ *See* D. Rivkin, 'Procedural Issues to Consider', in *Practitioner's Handbook on International Arbitration and Mediation*, ed. Rhoades, Kolkey, & Chernick, 2nd ed. (Juris, 2007), 147.

⁶ In 2008, the ICDR promulgated its own guidelines to restrict the breadth of documentary disclosure in international proceedings, the ICDR Guidelines for Arbitrators Concerning Exchanges of Information. These largely mirror the principles reflected in the IBA Rules.

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that may occur in court litigation and domestic arbitration on some common law jurisdictions, especially the U.S. and Canada. In practice, however, requests to produce under the IBA Rules can be long and detailed, provoking similarly detailed and numerous objections, which the tribunal must determine.

The unfortunate reality, however, is that the extent to which an international tribunal is inclined to limit disclosure to the parameters contained in the IBA Rules often depends more on the quality of the arbitrators, and specifically the fortitude of the chair or sole arbitrator, rather than their common law or civil law training. “Weak” or timid arbitrators will simply find it easier to allow broad discovery if one of the parties wants it, rather than take a hard stand and impose restrictions. However, some arbitrators may simply decide not to permit any, or very little, disclosure of documents because they are unfamiliar, or disagree with, the notion of disclosure.

[5] *Party Perspective: Fact Gathering*

A party would be wise to form a view in advance of initiating arbitration whether the dispute will benefit from substantial or limited documentary disclosure, both in terms of the effect on the likely outcome and the practical implication of the costs of engaging in it. This is an obvious tactical decision that can, by itself, lead to a preference for one style of arbitration or another.

Arguably, whether a party prefers expansive or restrictive document production procedures may also depend on where the party hails from. Parties from common-law jurisdictions may feel they have an advantage because they are accustomed to the practice in their home courts, and will therefore be able to conduct a document production more effectively in an international arbitration. Such reasoning can be superficial, as it overlooks the fact that parties—large companies at least—from common law jurisdictions will also, as a consequence of their local legal practice, have document management policies in place to ensure that important documents are retained, even those that may one day present an unfavorable face to a dispute. In a dispute with a party from a civil law jurisdiction, the common law party may be the only one producing documents that are adverse to its own case. This is because parties from civil-law countries, who are not subject to regular requests for documents, may not have retained the same number of relevant documents or may simply not discharge their production obligations with the same degree of rigor. Thus, a common law party who insists on expansive documentary disclosure may find that it is helping the opposing party make its case while obtaining little or nothing in return.

But the tactical consideration of locating relevant evidence is not the only reason a party may prefer the restrictive civil-law approach to disclosure. The cost of complying with expansive disclosure can be prohibitive no matter where the parties are from. Indeed, litigation procedures in the U.S. have given rise in recent years to an entire cottage industry providing support for so-called “e-discovery”, which refers to the process of collecting, preparing, reviewing, and producing electronically stored information. The considerable expense of extracting and producing such information—often embedded within digital networks—has been heavily criticized for adding significant cost to resolving disputes, without a correspondingly significant benefit. Thus, international arbitration (especially conducted by practitioners and

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arbitrators from a civil law background) may offer U.S. companies a means of contracting out of the costs associated with domestic U.S. litigation and arbitration. Thus, parties may take a strategic decision to avoid arbitrators with a preference for common law procedure if they wish to achieve this.⁷

[6] Arbitrator Perspective: Fact Gathering

Where the parties have a common approach to evidence gathering and document production, a tribunal will normally seek to accommodate that approach, subject to any input the tribunal itself may have as to what is practical and necessary to ensure a fair and efficient procedure. From the perspective of an international tribunal seeking to satisfy the expectations of parties and counsel from *differing* procedural backgrounds, however, document disclosure can be a challenging task. In the case of a tripartite tribunal, it is often the chairperson who takes the lead and carries out the brunt of the work involved. Accordingly, an international tribunal's approach to "discovery" and disclosure will often depend on the identity of the chairperson. The other important factor is the identity of the parties and their counsel. Where the parties and their counsel are from the same legal culture, the tribunal will likely adopt the common approach suggested or expected by the parties. However, the background and legal culture of the arbitral tribunal, and particularly of the chairperson, will, nevertheless, be relevant. For example, an arbitrator from a civil law background, who is unfamiliar with or unconvinced by the utility of document disclosure may not meet the expectations of common law parties and counsel.

Again, most international arbitral tribunals will seek to meet the expectations and needs of the parties with respect to document disclosure. This usually entails adopting a procedure similar to that provided for in the IBA Rules on the Taking of Evidence. Although these Rules remain general in nature, and leave a fairly broad scope for different approaches by arbitrators, most tribunals will grant some form of disclosure. A clear identification of the specific documents sought and a demonstration of their relevance and materiality to the issues in dispute between the parties normally enhances the chances of a successful application for disclosure. In this regard, references to the parties' pleadings and/or evidence already in the record are usually helpful. Parties and their counsel should bear in mind that they will, naturally, be more familiar with their respective cases than the arbitral tribunal, particularly if document disclosure occurs early in the proceedings. As a result, they should endeavor to make their document production submissions as focused and helpful as possible. They should also understand that the degree of document production which a tribunal is prepared to grant and, importantly, the interest and energy it will bring to bear in addressing this question, will vary considerably from tribunal to tribunal.

⁷ While e-discovery has made few in-roads into arbitration outside of U.S. domestic practice, it may yet find its way into other common law arbitration procedures. For example, the Chartered Institute of Arbitrators issued, in October 2008, a "Protocol for E-disclosure in Arbitration" for cases "where potentially disclosable documents are in electronic form and in which the time and cost for giving disclosure may be an issue". See www.arbitrators.org/institute/CIArb_e-protocol_b.pdf. The ICDR and CPR have also issued guidelines addressing e-discovery.

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Whether parties should feel the need to make an impression on the tribunal through their willingness to engage in extensive or limited discovery is another issue entirely. Generally speaking, arbitrators do not have expectations as to what degree of disclosure is appropriate since this will vary considerably depending on the specifics of the dispute and the expectations of the parties and their counsel. Experienced international arbitrators do not have expectations as to what type of disclosure a party should request. For example, an arbitrator from a common law background would not see the failure of a civil law party to request extensive, or any, disclosure as indicative of a weak case.

§ 2.06 Expert Evidence in International Arbitration**[1] Common Law and Civil Law Approach to Experts**

In many international arbitrations, the tribunal is interested in hearing “expert” evidence, especially with respect to issues of a technical nature, including methods of calculation of damages. The common law and civil law have different traditions for the presentation of expert testimony. In the common law tradition, the expert is appointed and paid by the party presenting the evidence, although the expert generally is expected to be independent of the party. In the civil law tradition, a court or arbitral tribunal appoints its own experts. Obviously, this leads to completely different sets of procedure for the management and hearing of expert testimony.

[2] Experts in Common Law Proceedings: Dueling Adversarial Experts

The management of experts and expert testimony in common law litigations is relatively straightforward. Each party presents their own experts on a matter. In common law arbitrations, this is generally done through the production of an expert’s report which is followed by the expert’s availability for cross-examination at an evidentiary hearing. The court or arbitral tribunal will attempt to sort through any divergences between the views expressed by each of the parties’ experts, often through the cross examinations conducted by their counsel.

[3] Experts in Civil Law Proceedings: Arbitration within the Arbitration

The civil law’s divergence from common law methods of managing expert evidence is not universal. Not all civil law jurisdictions provide for the court to appoint its own expert on technical matters. While court-appointed experts are contemplated in French, Italian, and German civil litigation, the Spanish Civil Code follows the common law model of leaving experts to the parties.

Even where a court or arbitral tribunal appoints its own expert, the parties are still expected (even in civil law jurisdictions) to make their own “party experts” available for the purpose of providing their technical views and answer any questions of the court-appointed expert. In civil law arbitrations, this can lead essentially to a technical arbitration within the larger arbitration, with the expert requesting the production of documentation and information regarding the disputed technical matters.

Significantly, the work of a court or tribunal-appointed expert can be decisive of the entire, larger proceeding. At the conclusion of his or her investigation, the expert produces a report that answers the technical questions posed, and, in all likelihood, the

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court or arbitral tribunal will simply adopt the expert's report as if it were its own. While the expert may on some occasions be made available for cross-examination by the parties' counsel, it is by no means a given that the tribunal will permit this in a civil law arbitration.

[4] International Approach to Expert Evidence

In an international arbitration, it is relatively common practice for tribunals to take it upon themselves to assess the quality of the parties' expert evidence, rather than follow the civil law tradition of appointing their own expert to determine disputed technical issues. But it is by no means a given that tribunals will follow one approach or the other, particularly where a majority of the parties, their counsel, and the arbitrators hail from one legal system or the other.

The IBA Rules provide guidance in this respect, and reflect what might be considered standard practice in international arbitration. Article 5 permits parties to adduce the evidence of party-appointed experts, and sets out the content of expert reports, including a description of the expert's relationship with the parties and qualifications, a statement of the facts on which the expert's opinion and conclusions are based, the expert's opinion and a description of the method, evidence, and information used in reaching conclusions.⁸

[5] Party Perspective: Expert Evidence

Whether a party wishes to adopt an adversarial approach to experts (common law) or defer technical matters to a neutral expert appointed by the arbitral tribunal (civil law) may depend on the party's confidence in the arbitrators' abilities to determine technical issues. For example, if the party strongly believes that the disputed technical issue is one that only a highly specialized expert with specific competencies can decide, then it may prefer the civil law method in the hope that such an expert will be appointed and decide them, rather than the arbitrators in their assessment of the parties' expert evidence. But by accepting the civil-law approach, the party is placing its entire bet on the hope that the arbitrators will concur with it in the qualifications of the expert to be appointed, which may not happen if the opposing party expresses a contrary view.

At the end of the day, the common law and civil law models for the handling of expert evidence may be distinctions without a tremendous difference. On a superficial level, the common law approach may afford a party more opportunity to expose any flaws in the opponent's technical case through the cross-examination of the expert. But the tribunal-appointed expert will also give the parties an opportunity to fully vet their claims. Thus, the availability of one approach to expert evidence or the other may not be a strong factor militating in a party's preference for whether the arbitration should be conducted according to the common law or civil law tradition.

[6] Arbitrator Perspective: Expert Evidence

This is an area in which the legal training and background of the members of the

⁸ Article 5.2.

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tribunal may be of considerable relevance. For many arbitrators from a common law background, using a tribunal expert is unfamiliar and raises a number of concerns. In this regard, Article 6 of the IBA Rules goes some way to address a number of these concerns. These include the requirement that a tribunal-appointed expert is independent of the parties and the degree of care required in appointing such an expert. Given the potentially important role of a tribunal-appointed expert, and the fact that the parties are expected to pay for his or her services, the parties must be given an opportunity to comment on the identity of the proposed expert. Further, the role and mandate of the tribunal-appointed expert must be carefully defined in order to ensure that he or she does not usurp the role of the tribunal and effectively decide the dispute between the parties. Further, the parties must be informed of, and have access to, the information and materials reviewed by the tribunal expert and have the opportunity to comment and question his or her report. All of the foregoing adds a layer of complexity and, potentially, cost and delay to the arbitral proceedings. Therefore, arbitral tribunals generally consider carefully the decision of appointing a tribunal-appointed expert.

In certain cases, particularly where the parties and their counsel are familiar and comfortable with the notion of a tribunal expert, the use of this type of expert will be helpful and not raise any significant concerns. However, where the parties or their counsel are from different legal backgrounds the decision to appoint a tribunal expert will be more difficult. As previously indicated, there is a tendency for international arbitral tribunals to hear and assess the quality of the parties' expert evidence rather than to appoint their own expert. This tendency has led to some interesting, useful developments such as hearing the parties' corresponding experts together after the factual witnesses. Furthermore, it is common for arbitral tribunals to require that the party-appointed experts meet prior to the hearing and prepare joint reports outlining their areas of agreement and disagreement. The cross-examination of the experts by counsel can then focus on the areas of disagreement and the tribunal often questions the parties' experts together. This has led to a welcome improvement over the more traditional handling of experts in common law court procedure.

Nevertheless, in arbitrations involving highly complex technical matters, the tribunal itself may find the appointment of an expert to be very helpful. In certain cases, the arbitral tribunal will appoint a tribunal expert to assist it in understanding and addressing the evidence led by the parties' own experts. In particularly complex cases, the tribunal-appointed expert can assist in organizing the party-appointed experts' evidence and facilitating the preparation of joint reports and focusing the tribunal's attention on the relevant points of disagreement between the parties.

§ 2.07 Hearings in International Arbitration**[1] Common Law and Civil Law Approach to Testimony of Witnesses**

In very broad and general terms, common-law courts and lawyers often accord greater weight to oral testimony of witnesses, whereas civil-law courts and lawyers give greater weight to documentary evidence over oral testimony. International arbitration practice generally distinguishes "witnesses" from "experts."

Most arbitration laws and rules say little about witness evidence. They neither

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require it nor prohibit it, instead leaving it to the parties and the arbitrators to determine whether to permit and how to present witness evidence. If there is no specific party agreement—and there usually is none—the tribunal will be free to give directions as to whether and how witness evidence will be heard. For example, the UNCITRAL Model Arbitration Law says nothing directly about witnesses,⁹ and the ICC Rules say only that “the Arbitral Tribunal may decide to hear witnesses”.¹⁰

[2] Common Law Approach: Hearings Measured in Weeks

Presentation of evidence through witnesses is more typical of litigation in common-law courts than of litigation in civil-law countries. As a result, witness testimony will generally play a more significant role in international arbitrations with a common-law flavor. The practical consequence of the common law’s emphasis on witness testimony is that arbitration hearings can take weeks to be completed, as counsel for each side engages in cross-examination and re-direct examination. (The practice of direct examination, *i.e.*, eliciting testimony from one’s own witnesses, had largely been supplanted by the practice of providing written “witness statements,” even in domestic common law arbitrations.)

[3] Civil Law Approach: Hearings Measured in Days, or No Hearings At All

While an extreme statement of the common law may be that documents can only be considered if they are introduced through a witness, the extreme corollary of the civil law is that a witness is not needed if a document exists.

The civil law preference for documentary evidence substantially reduces the time necessary for hearings, and occasionally dispenses with the need for any hearing at all. As a rule of thumb, civil law arbitration hearings—even in relatively complex cases—rarely devote more than one or two days to hearing of witnesses. And the witness testimony will, in most instances, be limited to fill any gaps in the documentary record.

[4] International Approach to Hearings

In this area, most international arbitrations resemble a simplified hybrid of common-law and civil-law litigation, with a general preference for the latter: witness testimony is generally permitted or even expected, but in the majority of cases it is likely given less weight than the contemporaneous documents—or at least less weight than would be the case in a common-law court.

This may be because in an international transaction (and any subsequent dispute) documents are far easier to translate and manage than oral testimony. Still, it is not always the case that documents are the preferred form of evidence. Where the arbitration involves parties and arbitrators who are from a common-law litigation

⁹ However, Art. 20 (Place of arbitration) and Art. 26 (Expert appointed by arbitral tribunal) make passing mention of “hearing witnesses” and “expert witnesses”.

¹⁰ Article 20(3).

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background, they may as a matter of training and experience accord more weight to oral testimony (and less to documentary evidence).

[5] *Party Perspective: Hearings*

Witness evidence may not be needed in the rare arbitrations where the dispute is a purely legal matter, in which case a party may simply prefer a civil law arbitration to effectively dispose of the case. In most cases, however, it would be unusual *not* to offer witness testimony, especially in a highly contested dispute. The issue really turns on the extent of the weight given to witness testimony and whether the party believes lengthy cross-examinations are effective at helping it to assemble its own case or expose weaknesses in the case presented by the adversary. The availability and quality of potential witnesses are important factors, as are the availability and quality of contemporaneous written evidence.

For many and perhaps most business disputes, parties are likely to prefer the civil law approach in the abstract because contemporaneous records will be the true historical record of the facts leading up to, or comprising, the dispute, and with the passage of time the most relevant witnesses may no longer be available to testify. Thus, the civil law approach—in the abstract—may appear the superior approach to adopt as a general principle for business disputes. But that may not always be the case, especially at the moment in time when a dispute arises. For example, if the contemporaneous documents supporting a party's case are not conclusive but credible witnesses are available to fill the gaps, a party may well prefer a common law approach with the weight accorded to witness testimony. Of course, a party is only in a position to exploit the differences in these approaches if it has carefully investigated its case, and especially the quality of its evidence, *before* the proceedings are underway and counsel and the members of the tribunal are appointed.

[6] *Arbitrator Perspective: Hearings*

The hybrid practice which has developed in international commercial arbitration preserves the right to an oral hearing and to question witnesses while attempting to enhance efficiency and effectiveness. This is achieved by the common use of written witness statements and the requirement that relevant evidence be submitted in advance of the hearing. This practice is reflected in the IBA Rules and, generally speaking, has been well-accepted. The use of written witness statements and the advance submission of documentary evidence permit the arbitral tribunal to focus on the cross-examination and re-examination of witnesses at the hearing. This permits the tribunal to minimize the time required for the hearing. This is generally welcome since finding long periods of contiguous hearing time may be difficult to coordinate among counsel, parties, witnesses and a tripartite tribunal. In addition, the cost of the hearing and the related travel and living expenses of the tribunal, counsel and witnesses is kept to a minimum.

In keeping with the goal of efficiency, international tribunals often divide the available hearing time between each of the parties and keep them to their allotted times. Normally, the time is divided equally between the parties. However, this may vary depending on the number of witnesses presented by each of the parties and other considerations such as the need to interpret witness evidence. Generally speaking, this

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brings a welcome measure of efficiency to the hearings.

§ 2.08 Costs and Cost Allocation in International Arbitration**[1] Cost of Arbitration**

For many of the reasons discussed above with respect to evidence gathering and the management of witness testimony at evidentiary hearings, there appears to be little debate today that arbitration conducted in the purely common law tradition generally comes with few expectations of any advantage of costs. Indeed, it can be as expensive as court litigation in the world's major common law fora, London and New York. What is often not discussed is that arbitration is considered many times more expensive than litigation in the courts of civil law countries, often by a significant factor. Thus, if the choice is between arbitration and court litigation and the party's concern is the cost of dispute resolution, there is rarely good reason to prefer arbitration in any form. On the contrary, and especially in civil law countries, a party wishing to save on costs above all else may want to avoid arbitration altogether.

[2] Common Law Approaches to Cost Allocation

What may offset some of the cost of common law arbitration is the potential availability of cost recovery, or cost allocation, in some common law procedures. There are two general rules on whether and how costs should be allocated among parties to common law arbitration, and they are not equal. The first, which parties experienced in arbitration will likely disfavor, is the "American rule" that costs sit with the party that spent them, *i.e.*, in a purely domestic U.S. litigation (as extended to arbitration) losers are generally not held to pay any of the legal or arbitration fees of the winner—unless provided by a particular statute or rule to the contrary, as in certain types of discrimination cases, which are generally not applicable in a commercial dispute. The disadvantage of applying the American rule to arbitration is that it does nothing to discourage a frivolous claim, nor compensate a prevailing party who has incurred the cost of defending one.

The more pervasive common law rule on costs is that of "cost follows the event," *i.e.*, the party that prevailed on a claim or defense should be compensated for the costs it incurred in doing so. While attractive in theory by promising the possibility of a full recovery of each penny spent, as a practical matter it can generate satellite litigation regarding the extent to which certain of the claims or defenses prevailed and the appropriate amount of recoverable costs. It is not unheard of, for example, for a "final arbitration award" to be followed by months of continued submissions that lead to a second "award as to costs."

[3] Civil Law Approach to Cost Allocation

The rule on costs adopted in many civil law jurisdictions, especially in continental European proceedings is a broad, "loser pays" rule in which the arbitral tribunal simply "assesses" a sum that it feels appropriate on the basis of the outcome and cost statements received from the parties. While parties may not recover all of their expenditures under this approach, it is simple and does not require substantial work at the conclusion of the arbitration.

[4] International Approaches to Cost Allocation

Unfortunately, in a truly international arbitration, which of the three approaches will be applied can be anyone's guess. It may not be known until the conclusion of the proceedings.

[5] Party Perspective: Cost Allocation

Comparing arbitration to arbitration, *i.e.*, common law versus civil law versus an international approach, civil law approach wins without much, or any, debate. It is substantially less expensive than the purely common law or even international style of arbitration. If cost considerations are paramount among a party's concerns, then it would be folly to base arbitrations in common law countries or appoint counsel and arbitrators who are likely to adopt a common law approach.

As to the method of cost allocation to be applied, most parties will likely feel comfortable with the civil law approach, and some discomfort or even annoyance with either or both of the common law approaches. Regardless of the type of regime in which the parties find themselves, it is useful to raise this with an arbitral tribunal at the commencement of the proceedings. Some tribunals may not be willing to provide an immediate answer to which regime they intend to apply at the conclusion of the proceedings, which is unfortunate since parties should be entitled to know whether they may recover—or become liable to pay—considerable expenses incurred in the course of the proceedings.

[6] Arbitrator Perspective: Cost Allocation

The ability to award costs is another important potential advantage of arbitration. From a business perspective, the idea that the party which prevails in its position should recover its costs makes good sense. Accordingly, the party which is required to commence an arbitration in order to vindicate its rights should be compensated for the additional cost of doing so. Conversely, a respondent which successfully defends its position should be compensated for the additional costs caused to it by an unsuccessful claimant. However, the outcome of the arbitration, and the conduct of the parties, is not always clearly defined and the expectations of the parties as to costs often differ. Further, the legal background and training of the members of the arbitral tribunal is also relevant. As a result, broad formulations of a general rule that the "loser pays" or "costs follow the event" is not as broadly accepted as one might think. Often, in international commercial arbitration, the general notion that the successful party should recover some or most of its reasonable costs is tempered by a different allocation on the basis of the relative degree of success of the parties on the various individual issues and claims. However, in international investment disputes, the general approach has been that each party bears its own costs and it is only recently that certain arbitral tribunals have departed from this approach.

Unfortunately, the allocation of costs often does not receive sufficient attention from either the parties or the arbitral tribunal until late in the procedure. As a result, a number of the potential benefits flowing from the arbitral tribunal's authority to award costs are not achieved. Early discussion of the question of costs and their allocation by the arbitral tribunal would permit the parties, and their counsel, to take the question of

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costs, and their potential recovery of, or liability for, into account in the preparation and presentation of their respective cases. This would likely have a beneficial effect on the conduct of the parties during the course of the arbitration. Further, it would facilitate the keeping of relevant, accurate records for the presentation of costs claims. Finally, a clear articulation of how costs will be addressed and allotted at the end of the arbitration can be a very relevant factor in the parties' arbitration strategies and consideration of settlement.

§ 2.09 Developing Party Preferences for Style of Arbitration Before Choosing Counsel, Arbitrators, or Even Place of Arbitration**[1] Applying Domestic or International Approach**

A threshold question facing parties to an arbitration getting underway is whether to adopt a domestic (local) or international approach. Unless a party takes steps to preserve the international character of the proceedings, an arbitration can easily (and quickly) default to local, domestic practice. Adopting a preference for domestic arbitration over an international arbitration is something that parties can do either by choice or out of ignorance. For the present purposes, let us assume it is by choice.

[2] Extent of Party Ability to Choose Domestic or International Approaches to an International Arbitration

Where the parties are from different countries, the option of having a domestic arbitration generally remains open to the respondent, who can choose to appoint an arbitrator from the same country as the claimant, and agree that the chair may also be from the same country. In this situation, it is unlikely that three arbitrators, all hailing from the same procedural background, will adopt a procedural approach much different from their common domestic practice.

Let us take by way of example a hypothetical contract between a Norwegian and Italian company. The parties agreed in their contract that any dispute be resolved through ICC arbitration in London, according to the substantive laws of England and Wales. If, when a dispute arises, the claimant Norwegian company appoints English counsel, and then nominates an English barrister of Queens Counsel rank, the Italian respondent will be forced to decide whether to respond in kind by appointing its own English counsel, who may advise it to appoint an English QC as arbitrator so as not to be the disadvantaged party on matters of English law. The appointed counsel and co-arbitrators are likely to agree that the chair should also be an English lawyer of high rank, a QC. Despite the parties themselves having no connection at all with England, they will quickly find themselves in an arbitration conducted as if it were a domestic English proceeding. It is likely there will be considerable emphasis on document disclosure, and substantial time spent on witness statements. The tribunal may decide to set aside several weeks of hearing time in order to allow for witnesses to be examined and arguments presented. This may be what the respondent desires if, for example, it believes that its documentary evidence is not as strong as what it may have to offer through witnesses, and (as discussed below) it is undaunted by the additional costs doing so.

If the parties prefer an international arbitration, they must take steps to ensure that

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the proceeding will not quickly default to the domestic procedures of a particular jurisdiction. For example, the Italian respondent above could have appointed international arbitration counsel based in Paris and then nominated a well-regarded Belgian arbitrator. Even if the claimant succeeds in obtaining an English chair of the tribunal, whether through negotiation or by appointment by the ICC, it is unlikely such a diverse tribunal (and counsel) would permit the proceeding to lapse into strictly domestic practice. Thus, the respondent, through its choice of arbitrator (and counsel) from a different country, preserves the international character of the arbitration.

[3] *Party Perspective: Common Law, Civil Law, or International*

As previously noted in this chapter, a party's preference among the available approaches to apply in a dispute—common law, civil law, or hybrid practice—should not be a matter of default, but rather a strategic decision based on the type of procedure the party believes would be optimal for resolving disputes arising under a particular contract. Nevertheless, many parties unwittingly overlook the viability of different approaches and base their preferences on the basis of their own formal training, home jurisdiction, or merely adopt the preferences of the lead lawyer (law firm or in-house counsel) involved in the case, *i.e.*, based on the lawyers involved rather than the substance of the dispute.

Even hybrid international practice, while often attractive, should not be assumed as the most appropriate for every dispute. For example, if the party's dispute involves a relatively simple breach of an international commercial contract and the breach (or its defense) can be demonstrated through a few documents exchanged by the parties, there would be little sense in urging a tribunal to adopt common law procedures of extensive, pre-hearing discovery of documents, the presentation of witness statements, and a substantial evidentiary hearing. The dispute could be decided in a relatively short period of time, potentially without the benefit of an evidentiary hearing. Thus, in this case, rather than a "hybrid international" approach to dispute resolution, the parties would be well placed just to follow the civil-law model. But if the party is concerned that expert evidence will be critical, and it prefers to have the experts managed by the parties directly rather than by the arbitral tribunal, then it may wish to avoid a purely civil law approach to procedure.

Thus, before agreeing in a contractual dispute resolution clause to base arbitration in a particular country, or before engaging counsel or considering the appointment of any arbitrator once a dispute arises, a party would be wise to have at least some sense of the dispute itself and an opinion on how to most effectively resolve it. Or, put differently, if a party reasonably concludes that certain procedures may provide the optimal approach to disputes that are likely to arise under a contract, why would it agree to arbitrate those disputes in a country with different practices? Or, when a dispute arises, why would it appoint counsel or arbitrators who lack experience or familiarity with the preferred procedural style?

As a final thought, in assessing how their contractual disputes are likely to come into existence and the optimal methods for resolving them, business parties will likely desire predictability of outcome and efficiency of process. As the summary of the different procedural approaches discussed above suggests, a business might reasonably

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conclude that the clear winner among the available options often is the civil law approach, rather than the common law or the internationalist versions of arbitration. In very general terms, the civil law approach decides disputes in a shorter time-frame, less expensively, and more on the basis of the documents that constitute the parties' historical record than the ability of available witnesses to provide their recollections of what occurred. Again, this may change with a particular dispute, but parties should certainly consider whether a civil law approach to procedure is, in effect, a more optimal approach for the more common business/contractual disputes that are likely to arise.

§ 2.10 Arbitrator Perspective: Appointing Counsel or Arbitrators

In most cases, the arbitral tribunal seeks to accommodate the expectations of the parties to the extent these are consistent with the tribunal's sense of fair and efficient proceedings. Very often, a party's expectations are informed and articulated by the counsel they appoint. Parties unfamiliar with international commercial arbitration are likely to rely heavily on counsel. As a result, counsel has a significant impact on how the tribunal perceives the expectations of the party they represent and on the conduct of the arbitration. As a result, parties must carefully consider who they appoint as counsel. While this is true in any legal transaction or form of litigation, it may be particularly important in international commercial arbitration where the parties have broad freedom to choose and agree on much of the governing procedure. Examples run from the drafting of the arbitration clause, choice of the form of arbitration and institutional rules (if any) and the selection and appointment of the members of the arbitral tribunal. Counsel strongly influences these fundamental aspects of the arbitral procedure. Further, many important aspects of the procedure will also be shaped by counsel. These include the approach to drafting pleadings and witness statements, document disclosure and the examination of witnesses. Furthermore, counsel may significantly affect more subtle issues such as privilege and professional confidentiality, as well as conflicts of interest. While not all of these issues and their potential impact on the arbitration are foreseeable at the outset of the arbitration, many of them may well be. Therefore, it is well worth the time to consider such matters as the nature of the dispute (whether at the time of drafting the clause or once a dispute has arisen), the seat of the arbitration, the most suitable procedure in view of a party's case, the need for the disclosure of documents and information or the importance of oral evidence in selecting counsel.

The same is true with respect to the appointment of the members of the arbitral tribunal. As indicated in the preceding sections of this chapter, arbitrators, like counsel, are influenced by their legal background, culture and experience. In light of the broad discretion and flexibility afforded arbitral tribunals in international commercial arbitration, the composition of the tribunal is potentially very significant. Therefore, parties, and counsel, should carefully and reasonably exercise the freedom which international commercial arbitration affords in the selection and appointment of the arbitral tribunal.

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