How Civil Law Principles Could Help to Make International Arbitration Proceedings More Time and Cost Effective

The most recent Queen Mary Survey[1] "*Improvements and Innovations in International Arbitration*" reaches one conclusion again that it shares with its predecessors, ie the "lack of speed" in international arbitration proceedings.[2] Reducing time and cost continue to be apparently in the forefront of the participants' concern of the Queen Mary Survey.

These issues were also addressed in a recent SIArb sponsored talk in Singapore entitled "Is There a Common Law/Civil Law Divide?". During the conference, a participant asked the speaker an interesting question, ie whether she could name any specific civil law features that the speaker thought would be beneficial to be introduced into international arbitration proceedings?

In furtherance of the question what benefits civil law principles might have in store for international arbitration proceedings, this brief article will attempt to provide some additional answers to take this discussion further and highlight a few civil law aspects that should be considered to be applied in international arbitration proceedings. It will be explained in detail how the civil law approach to party submissions, discovery, experts, witness and document evidence could save a significant amount of time and money for the parties.

The author feels qualified to provide some insights, as he is equally rooted and educated in both common and civil law and admitted to practice in a common law jurisdiction (USA) as well as in a civil law jurisdiction (Germany).

The Starting Point

When evaluating how time and costs in international arbitration proceedings could be saved, the first question to be asked is whether it matters at all in international arbitration proceedings whether international arbitrations are more common law or civil law oriented? In the author's opinion it does matter, because any proposal how to reduce costs and further enhance the efficacy and conduct of international arbitrations cannot ignore the basis of the legal tradition international arbitration proceedings generally follow. The politically correct answer regarding the basis of international arbitration is usually that arbitration follows the "best principles" of both the common law and the civil law world. The author tends to disagree.

After having participated for almost two decades in international arbitrations, the author is of the firm belief that international arbitration proceedings are deeply rooted (predominantly) in the common law legal tradition and are by and large a common law affair.[3] This is also no surprise,

given the fact that the world's largest law firms engaged in representing parties in international arbitration proceedings tend to be Anglo-American law firms that follow the common law tradition. Also, one of the most prominent institutions dedicated to international arbitration, the Chartered Institute of Arbitrators, is also located in a common law jurisdiction in London.

The different procedural approaches between common law and civil law are not just "*l'art pour l'art*". Procedural rules differ significantly in a number of respects between common law and civil law traditions and represent a principal analytical dividing line, ie, there are fundamental differences between common law and the civil law with respect to how a dispute is commenced, developed and presented.

In common law jurisdictions (in use in most English-speaking countries) the dispute resolution process is characterised by two adversaries pitted against each other with the task of presenting their respective cases to the tribunal which has the task of deciding between them.

In civil law jurisdictions, in use in Continental Europe and the many countries around the world influenced by Continental Europe, from Germany, Japan to most of Africa and all of Latin America, in contrast, the tribunal plays a much more active ("inquisitorial") role in investigating the case before the tribunal, with the role of the parties' counsel having the task to aid the tribunal in this process to find the right answers.

Consequently, the greatest differences between the two legal traditions are the allocation of responsibility for identifying and investigating disputed issues of fact. The author's main theme is that by assigning arbitrators rather than lawyers to investigate the facts, substantial time and costs could be saved helping to resolve the issues repeatedly criticised in the Queen Mary Survey.

Statements of Claim/Opening Submissions

In both civil and common law jurisdictions, parties have to prove their case and produce all documents on which they intend to rely. While in common law jurisdictions the parties usually present relevant documents after the submission of their written statements, civil law systems expect the parties to do so immediately when filing their statement of claim. Statements of claim under common law often contain only a brief outline of the facts and a theory of the claim. Statements of claim under civil law usually include already a detailed account of the facts and all the evidence the party needs to support it, with all necessary documents attached.[4]

The common law concept of filing first and filling out the details only after obtaining documents in the adversary's possession strikes most civil law lawyers as reckless and unfair.[5]

Obliging parties to file a statement of claim which already includes all details of their case, with all necessary documents and a list of witnesses available attached would significantly reduce the time necessary in the beginning of the arbitration. The respondent could start preparing a similarly detailed statement while the proceedings are initiated, so that the tribunal would immediately have a complete overview over the parties' detailed positions, relevant documents and possible witnesses, once the arbitrators are selected.

Written Proceedings

Common law systems tend to rely heavily on witnesses to introduce and verify documents and witnesses generally are the preferred source of evidence. Civil law jurisdictions tend to give higher regard to written documents. Documents created before the dispute arose, are what they are and were in all probability prepared before the dispute could influence any party. So as long as the authenticity is not disputed, there is no need for any witness to be heard. This opens up the possibility of purely documents-only proceedings – provided the parties agree – where documents contain all the evidence necessary for the tribunal to reach a decision.

Most arbitration rules provide already the possibility to proceed on a "documents-only" basis. But this option seems to be chosen rather seldom, even in cases with straightforward facts and little complications. Documents-only proceedings in arbitration where the facts are relatively straightforward could lead to significant reductions in costs and time necessary for all parties. Ie, there would be no loss of time due to problems of scheduling hearings and counsel, witnesses and arbitrators would not have to travel and spend (billable) hours attending hearings.

Discovery[6]

The concept of discovery,[7] which can require parties to disclose evidence that is potentially relevant, is considered an important tool in common law systems, while barely used in civil law proceedings.[8]

In civil law systems the judge/arbitrator will be responsible to gather all evidence necessary to reach a justifiable decision on the matter. The bench/tribunal will decide which documents, expert opinions and witnesses are necessary,

while the parties can propose evidence to be considered. At the same time the court/tribunal is supposed to know the law ("*iura novit curia*") so that the parties do not necessarily have to present it (while they may still discuss details), unlike in common law, where the law is treated as a fact, to be proven by the parties.[9]

The major common law jurisdictions rely on the adversarial process to ensure that all relevant facts about the dispute are disclosed, whereas the civil law requires a claimant to disclose only those facts needed to discharge its burden of proof.[10]

If the tribunal rather than the parties decides the sequence of the fact gathering, it can base it on the actual relevance for the case, so that no time and money consuming pre-trial discovery phase is needed and unnecessary investigation is minimised. Especially an American style discovery (which should be the exception in international arbitration) means considerable costs for both sides for preparing the requested documents for the other side and evaluate the documents received. So the advantages of the civil law approach in this respect seems to be that the Tribunal and the Respondent know already after the first exchange of submissions, what the case is all about and this approach also enables the Tribunal to immediately draft a list of issues. In addition, this will also help to streamline proceedings, minimise unproductive investigations and could discourage incentives for excessive research.

Witnesses[11]

Another important difference between common law and civil law procedure is the attitude toward the testimony of witnesses.[12] In the common law tradition the preparation of witness statements and the concept of cross-examination of witnesses are very important. Lawyers will usually spend a lot of time on preparing the witnesses for their testimony, ensuring that the testimony is favourable for their case and to prevent attacks on the witnesses' credibility during cross-examination.

In civil law procedures/arbitrations it is the judge/tribunal who decides which witnesses are to be heard and the bench/tribunal will be primarily in charge of their interrogation. The parties' counsel are usually not supposed to talk to the witnesses before the trial and witness preparation is regarded as uncomfortably close to manipulation of evidence. An overly smooth and polished witness statement would be considered not credible and of little value to the court/tribunal. Still the parties get the chance to either propose questions for the witness or ask themselves after the judge is done, if they think the judge's interrogation failed to address important points or inconsistencies in the testimony.

Common law and civil law don't only differ with regard how the testimony of a witness is presented, but also with regard to the weight such testimony is given. While common law seems to rely more on oral testimony, civil law seems to prefer evidence that is based on documents, ie civil law gives far less weight to the oral testimony than the common law.[13]

Since international arbitration is mostly following the common law tradition, in international arbitration witness preparation seems generally accepted.[14]

The difficulty with the common law approach to witnesses is summarised by Langbein[15] as follows:

> [The witness] often detects what the lawyer hopes to prove at the trial. If the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed.
>
> Cross-examination is too often ineffective to undo the consequences of skillful coaching. Further, because cross-examination allows so much latitude for bullying and other truth-defeating stratagems, it is frequently the source of fresh distortion when brought to bear against truthful testimony.[16]

By restricting the adversaries' role in fact-gathering and having the tribunal examine the witnesses rather than the parties, lawyers would be prevented from having pre-trial contact with non-party witnesses, thereby precluding the coaching of witnesses that in many cases may reduce their reliability. The result would be not only witness statements that carry more weight, but also reduced costs, as the parties' lawyers would require less (billable) hours to prepare their respective witnesses.

Expert Evidence

For difficult questions of scientific or technical nature, courts/tribunals will have to rely on expert opinions. While in civil law jurisdictions the expert is selected by the court/tribunal on the basis of his or her credentials and with due regard to the interests of both parties, common law courts/tribunals always leave it to the parties to provide them with expert opinions as part of the evidence.

These experts are selected and paid by the parties for supporting their case, thus almost necessarily biased and less reliable, on the other hand the other party may cross-examine the expert to point out weaknesses of his or her opinion. The court/tribunal then has to decide, which of the expert opinions offered by the parties it finds more credible.

This leads to a situation in which both parties have to hire experts, while the court/tribunal may in the end have problems to believe either side. In the end the expert who can "sell" or explain his opinion better may be given more weight, regardless of the actual scientific accuracy of his or her statement.

Langbein[17] is very critical of the common law approach to expert witnesses:

> The idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes.
>
> Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune. Opposing counsel undertakes a similar exercise, hiring and schooling another expert to parrot the contrary position. The result is our familiar battle of opposing experts.

The essential insight of civil law procedure is that credible expertise must be neutral expertise. And therefore the responsibility for selecting and informing experts is placed upon the Courts/tribunal, although with important protections for party interests. Since the Court/tribunal chooses the expert, it can rely on his or her neutrality, while

the parties still can examine the expert. As long as neither party manages to show that there are serious doubts concerning the quality of the expert opinion, the Court can follow the expert opinion. This saves at least the costs for another expert and makes it in most cases more likely that the outcome of the case is based more on a correct analysis of the factual situation rather than the rhetorical skills of an expert.

Conclusion

One of the main goals of parties that choose to have their disputes resolved by arbitration rather than state Courts is to obtain a faster decision than in the courts and in an optimal case, without having to spend more money on the proceedings than in Court.

Even though it is rather unlikely that the often fundamentally different common law and civil law procedural approaches will ever fuse into a single set of rules. But the flexibility of international arbitration should make it possible to apply the principles in practice that guarantee the best results. This is a unique opportunity for tribunals and the parties to be open to the advantages offered by procedural models of other legal systems.[18]

As the author attempted to show above, a number of civil law principles could make international arbitration proceedings less time consuming and far less costly, by assigning the tribunal more of a managerial role, limiting the use of discovery and allowing greater reliance on written presentation of proof. Introducing some of these instruments into the common law dominated international arbitration proceedings is possible under most institutional and other international rules, including the IBA Rules, and could ensure that international arbitration will continue to remain an attractive way of dispute resolution.

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Notes

1 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration; <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

2 Queen Mary Survey, p 2.

3 Javier Rubinstein: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective, p 303: "The system also appears to be evolving more in a common law direction that tends to favour counsel trained in the adversarial process."

4 See Elsing/Townsend, "Bridging the Common Law Civil Law divide in Arbitration", Arbitration International, Vol 18, No 1, p 1.

5 See Elsing/Townsend, "Bridging the Common Law Civil Law divide in Arbitration", Arbitration International, Vol 18, No 1, p 2.

6 See "Hazard: Discovery and the Role of the Judge in Civil Law Jurisdictions" (1998), Yale Law School Legal Scholarship Repository, Paper 2362.

7 According to Elsing/Townsend, "discovery" is a term, "which to most civil lawyers, resonates with all the positive associations of bubonic pleague", in "Bridging the Common Law Civil Law divide in Arbitration", Arbitration International, Vol 18, No 1, p 3.

8 This does of course not completely exclude a party to obtain documents from the other party in civil proceedings, eg Sec 142 German Code of Civil Procedure.

9 The IBA Rules (Art 3(3)) balance the need for evidence against the inconvenience and expense involved with expansive discovery. Ie, document requests under the IBA Rules call for the disclosure of "all documents in the possession, custody or control of the other party" that are "relevant to the case" and "material to its outcome".

10 McHwrath/Alvarez, *Common Law and Civil Law Approaches to Procedure: Party and Arbitrator Perspectives*, Chapter 2, § 2.03.

11 See in more detail regarding the differences between the common law and the civil law approach to witnesses, John H Langbein, "The German advantage in Civil procedure" (1985), Yale Law School, *Faculty Scholarship Series*, p 833.

12 Some authors see that as the presentation of witnesses and evidence in general as the most fundamental difference between common law and civil law, eg Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective", 5 Chicago Journal of International Law 305 (2004).

13 Elsing/Townsend, "Bridging the Common Law Civil Law divide in Arbitration, in: Arbitration International, Vol 18, No 1, p 4.

14 In this respect, the IBA Rules provide as follows: "Each witness who has submitted a Witness Statement shall appear for testimony at an evidentiary Hearing … (IBA Rule 4.7).

15 John H Langbein: "The German advantage in Civil procedure" (1985), Yale Law School, *Faculty Scholarship Series*, p 823; 853; with further references: Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (1949); Frankel, "The Search for Truth: An Umpireal View", 123 U PA L REV 1031 (1975); Brazil, "The Adversary Character of Civil Discovery: A Critique and Proposals for Change", 31 VAND L REV 1295, 1298–1303 (1978).

16 As expected, Langbein was heavily criticised for such "heretic" views and wrote a brilliant rebuttal: "Trashing the German Advantage" in Yale Law School Legal Scholarship Repository (1998), *Faculty Scholarship Series*, Paper 538.

17 John H Langbein, "The German advantage in Civil procedure" (1985), Yale Law School, *Faculty Scholarship Series*, p 853.

18 Rubinstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions Perspective", 5 Chicago Journal of International Law 310 (2004).