# Crossing The Common Law-Civil Law Divide in International Arbitration: A Primer for the Perplexed Practitioner

by Marc J. Goldstein[1]

International arbitration captures the intellectual fascination of dispute resolution practitioners worldwide. It has spawned a vast body of scholarly and practical commentary, and an annual array of conferences and seminars so extensive that the publication of pocket calendars of arbitration community events has become a common marketing tool for law firms seeking to expand their participation in this field.

One main reason for this fascination with a particular process for resolving transnational disputes may be that the process itself is in a state of perpetual motion, moving in steps (sometimes large, sometimes halting) toward a stable, predictable method recognized and accepted in different legal cultures, and at the same time taking a somewhat different shape in each case, as arbitrators wield their virtually unlimited discretion over procedure, conferred on them by institutional and ad hoc arbitration rules. Arbitrators are engaged to resolve the particular dispute in a fair and efficient manner, respecting the equality of the parties and their right to control the procedure by agreement. But whereas the parties almost invariably disagree on what procedures should be used, arbitrators must decide to what extent they should adopt procedures that are familiar (i) to the parties from their own domestic litigation systems, (ii) to the arbitrators

[1] Partner, Hodgson Russ LLP, New York, New York. 

from their own legal cultures, (iii) to dispute resolution in courts at the seat of the arbitration, and (iv) to the regular participants in and observers of the international arbitration culture, largely through the ongoing efforts of arbitral institutions to develop shared transnational "best practices."

A prominent feature of this "protean" landscape is that in very many cases parties and arbitrators from "common law' and "civil law" countries come together, and bring with them not only their predilections from the systems in which they were raised as advocates, but their relative knowledge or ignorance of rules, customs and attitudes on the opposite side of the divide. Herein, I examine a few of the more prominent features of the common law-civil law cultural clash in international arbitration, and offer as a general hypothesis that, as international arbitration moves from an evolving stage to a more mature stage of its development, substantial convergence has occurred and, for the common law lawyer, crossing the divide is not the insuperable challenge that it once was.

**Production of Documents**

No discussion of the convergence of common law and civil law procedure in international arbitration would be complete without reference to the IBA Rules on the Taking of Evidence in International Arbitration, an effort to harmonize common law and civil law procedures into a common set of guidelines for pre-hearing and hearing procedure. It should come as no surprise to the experienced litigator that the IBA Rules have neither been adopted by any prominent arbitral institution, nor have they been regularly incorporated in arbitration clauses or submission agreements. Instead, they are

cited opportunistically by litigants to justify use of a procedure the IBA Rules endorse -- notably the compelled production of documents potentially harmful to a party's case, or to justify rejection of a procedure the IBA Rules do not explicitly endorse or reject -- most notably oral depositions *à l'Amercaine.* Similarly, arbitrators are inclined to refer to the IBA Rules opportunistically -- unless required to do more by agreement of the parties -- to ratify a particular approach to procedure that they consider well-suited to the case before them.

Quoted below is the preface for a forthcoming session concerning the IBA Rules to be presented at the forthcoming biennial Congress of the International Council on Commercial Arbitration (ICCA) in Montreal. It concisely captures both the influence of the IBA Rules in moving international arbitration toward the common law side of the divide, and the continuing quandary that is presented in international arbitrations in regard to the gathering of evidence, involuntarily, from the file drawers and computer servers of the parties:

> After the 1999 IBA Rules, there appears to be broader acceptance of document production in international arbitration. Yet there also remains vigorous disagreement about the appropriate scope and general utility of document production, with some arguing that it threatens the efficiency of the arbitral process and others that it is essential to a fair and just resolution of factual disputes. Is it possible to take a systematic approach to the question of document production, or are the issues necessarily case-specific and hence the debate incapable of resolution.[2]

[2] www.iccamontreal2006.org/English/program

The issues arise, of course, in case-specific settings in which parties are often represented by sophisticated counsel fully capable of invoking the common law or civil law point of view, depending on the tactical advantage to be gained. Consider the following scenario from a recent case: A U.S. industrial company (A) buys machinery from a manufacturer (B) in European civil law country X, transacting on B's boilerplate purchase order form, in English, which contains in very fine print: (i) a broad exclusion of liability for consequential damages, (ii) an arbitration clause providing for arbitration under the rules of the X Arbitration Centre, and (iii) a governing law clause that provides that the contract shall be interpreted and applied in accordance with the law of X. The equipment malfunctions persistently over a period of several years. U.S. firm A withholds payment of a portion of the purchase price; B invokes arbitration to recover the balance due; and A counterclaims for several years of lost profits, asserting that the exclusionary clause in the circumstances does not apply even under the law of X. Manufacturer B insists upon its good faith in exerting efforts to solve the problems encountered by U.S. Firm A; A insists that the machinery was inherently defective and that B knew it was selling a system that was not fully de-bugged and that remained, in essence, a work in progress. A requests broad disclosure of documents concerning the machinery from the files of B, and B of course resists citing procedural law of X and railing against the "fishing expedition" proposed by U.S. counsel for A.

What shall the arbitrator do? It is probable that in many cases today, there will be an accommodation of both sides, with procedure leaning toward the common law standard. U.S. counsel will be compelled to state its requests for production with all

possible particularity -- whether as to particular documents or categories of documents, and will be required to justify the disclosure with specific reference to the legal elements of the case that the party must establish. On the other hand, in the particular case described -- the civil law chairman from Country Y adhered rather strictly to the civil law customs and practices of Countries X and Y, and denied all involuntary document production except that which the Tribunal-appointed expert might require for an adequate evaluation of the defects of the machinery.

Was this a correct solution? The matter could be debated at length. Here I offer only a few observations. The arbitrator often will attempt to accommodate the reasonable expectations of the parties concerning procedure. And while it might be said that a U.S. party's reasonable expectation will inevitably be that some measure of common law procedure will prevail, the arbitrator will be justified in meeting that expectation if there has been an objective manifestation of the parties' willingness to adopt some common law procedure. Here, the U.S. party had consented to arbitration before the Country X Arbitration Centre -- as opposed to a transnational sponsoring organization like the ICC -- and also consented to a seat of arbitration and applicable law of Country X. The objective manifestations were mainly that the U.S. party had agreed that if a dispute arose, it would be treated as though it were a domestic company operating in Country X, albeit that the agreed rules were the international arbitration rules of Country X.

Debate of such issues continues, in case after case, conference after conference. It is unlikely that the world is moving toward uniform standards of transnational procedure. But it is arguable that such a movement is afoot where the parties have demonstrated an

intent to have their disputes governed by transnational standards. Had the same case been subject to an arbitration clause calling for ICC arbitration in London, under the substantive law of X, the consequences for the procedure, even before the same civil law arbitrator from Country Y, may well have been substantial.

**Presenting Witnesses**

Although the civil law arbitrator's visceral distrust of oral testimony is embedded in the lore of international arbitration, common law advocates find this feature of the arbitration process difficult to adapt to, even after repeated exposures. The common law lawyer's abiding faith in the human interpersonal persuasion is often shaken by civil law arbitrators' awards that give negligible weight even to compelling oral testimony.

Still, convergence between the common law and civil law traditions is the order of the day. Written witness statements submitted well in advance of the hearing have become the norm even in Anglo-American influenced arbitrations, but direct examination has certainly not become extinct even in arbitrations with a civil law orientation, often providing a vehicle for the witness to at least summarize his position and establish her character and credibility. Cross-examination is a fixed feature of hearing procedure in most arbitrations, on both sides of the divide. But the convergence of procedure concerning pre-hearing submission of documents relied upon by each party diminishes the significance of cross-examination in many cases.

Convergence of civil and common law procedures reflects the fact that evidence rules within a particular legal system function as an integrated unit. Consider, for example, that within common law adversarial systems, preparatory meetings between counsel and the witness are not restricted (except while cross examination is in progress) (and with the notable exception of British barristers). Restrictions on such preparation in many civil law jurisdictions (e.g. France, Switzerland (Geneva), Austria) correspond to inquisitorial civil procedures that do not depend upon effective communication between counsel and her witness, or do not expose witnesses to the traps of a clever cross examiner. But in arbitral tribunals where Anglo-American influence has made some version of cross-examination the norm, enforcement of rules restricting witness preparation would not serve the interests of the parties or the process.

Cross-examination in the American civil justice system is characterized, if not dominated, by the juxtaposition of the witness's direct testimony with prior testimony, usually at a deposition, and with the contradictory content of documents (or the absence of a corroborative document). In an arbitration setting where the critical documents and the witness statements will have been studied thoroughly by the Tribunal before the hearing begins - questions of admissibility bring essentially non-existent - the contradictions that are a cross-examiner's stock in trade will usually have been noted and considered without any questions being asked. And the contradictions offered by a pre-trial deposition simply do not exist. This has two important consequences, one being to restrain the U.S. cross-examiner from asking questions the witness has not answered in

prior testimony, and the other being the emergence of a cross-examination style calculated to impeach the witness without dependence on her prior testimony.

The presentation of most evidence in writing in advance of the hearing also means that the arbitrators' own questions will have a dramatic and often dispositive role in the case. The civil or common law orientation of the arbitrator will often be reflected in the type of information elicited by the question. Anecdotes from two recent cases in which the author was a participant will illustrate the point.

The first case involved American and European parties, and was venued in a civil law jurisdiction and governed by that country's substantive law. Following nominal direct examination and vigorous cross examination by U.S. counsel of the European party's main witness, the Tribunal members asked their questions. The Chairman, a German-trained lawyer, called the witness's attention to a scribbled note in German on one of the documents, and asked him if he agreed to its meaning and if he was the author of the note. The witness agreed, and the essential points of his testimony were utterly demolished. The civil lawyer's painstaking scrutiny of the documents carried the day.

The second case involved parties from Europe and China but was governed by English law and was venued in an Asian state with a British common law tradition. The chairman had been a civil commercial judge in that state. The parties had contracted to present a major international cultural event in a spectacular and historic setting in China. The Chinese party had insisted on amendments to the contract as the price of its

continued cooperation in the venture, and the European party, having accepted those onerous amendments, now claimed economic duress. The issue was whether the European party had a meaningful alternative. The chairman asked the question of the Chinese witness that counsel did not dare ask: where else could the spectacle have been presented if the Chinese party withdrew its cooperation? In the football stadium, replied the witness - hanging himself with his own rope. The common lawyer's quest for detail of the parties' thoughts and motives carried the day.

**Sources of Law**

Upon first exposure to a civil law regime as the governing law in an arbitration, the neophyte American counsel in an international arbitration quickly learns that case law and *stare decisis* are not the modus operandi of the civil lawyer. But matters are not quite so simple as to say that common law is judge-made law while civil law is the domain of professors.

Some civil law countries do have an evolved body of case law. But the decision of the highest court of a civil law country applying a particular provision of its commercial code will not necessarily impress the civil law arbitrator from another country as a more persuasive source than any one of several scholarly commentaries concerning the same provision. The existence of competing sources of authoritative interpretation is a defining feature of civil law for the common lawyer.

But there are other less-discussed but very significant elements for the common lawyer crossing the divide. One is translation. Civil law codes and commentaries need to be understood with all the nuances of meaning that their drafters intended, writing within the fabric of the legal culture of that country. The common lawyer who relies on a professional translator's translation, even one that is reviewed by bi-lingual co-counsel, may be walking into a trap. Precise translation by a lawyer who is not only bi-lingual but bi-cultural in the legal sense is vital.

Another element is practical construction. Code language in any legal system comes to life through its application. As civil law countries are apt not to have as rich a body of case law as the common lawyer would expect on her home turf, the common lawyer depends upon her civil law colleague for context, nuance, and perspective.

**Attorney-Client Privilege**

A much-discussed but possibly overstated problem in international arbitration concerns the different rules governing attorney-client communications in common law and civil law systems. In principle, issues of privilege should be particularly vexing for arbitrators asked to order disclosure by parties from civil law jurisdictions of business documents that would not be subject to disclosure in domestic litigation.

The issue is largely one of expectations. The common law advocate and her client know the attorney-client privilege as a foundational principle of the legal system

implemented, in litigation, by well defined exclusionary evidence rules. They also understand that it is the client's right to waive the privilege and introduce attorney client communications as evidence.

The civil lawyer comes from a culture where the secrecy of professional relationships is a matter of public policy enforced by criminal sanctions, and only the attorney not the client can decide that the law permits disclosure of particular information as non-secret. A potentially significant anomaly, however, is that the in-house lawyer generally does not enjoy the professional secrets privilege, exposing to disclosure in arbitration documents that are privileged by common law standards.

What does the arbitrator do, or what should she do, when confronted with a cross-cultural issue -- for example, a claim by the common law party of waiver of the attorney - client privilege by the civil law party? The prudent course, I suggest, is that privilege law will be applied according to the reasonable expectations of the parties. And reasonableness may include, for those regularly engaged in transnational commerce with important nations, a presumed understanding of certain features of the legal landscape. Thus, an American party transacting with a German counterparty should reasonably expect that the German party's relationship with its counsel will be governed by German law -- even if the seat of arbitration is in London and New York law applies.

**Settlement Facilitation by the Tribunal**

If there remains any tangible difference in practice between arbitrators from common law and civil law traditions, it is difficult to discern. The evolution of shared values and common practices over the past decade has been remarkable. For much of the modern era of international arbitration, the civil law arbitrator remained strictly focused on the advancement of the case toward a solution by a final award. It was a widely shared perspective that to facilitate settlement the arbitrator would be prone to disclose prematurely a predisposition toward one side, compromising her impartiality.

The common law litigator turned arbitrator, particularly the American of the species, came to the arbitration world from a courthouse tradition of judges "facilitating" settlement by, at least, pointing each side to the vulnerabilities of its case, and, not infrequently, acting as an intermediary in a bargaining process. The common law judge, whose impartiality does not prevent her from taking and expressing a view of the merits at any time, could "knock heads" without hesitation or fear of criticism.

In recent years there has been substantial convergence. On the civil law side, arbitration lawyers particularly from the German-Austrian-Swiss legal culture have cultivated the notion that the arbitrator's "preliminary" expression of views of the merits, while avowedly remaining open to persuasion by the evidence and arguments still to be presented, when done with the consent of the parties and their stipulation that the arbitrator's impartiality shall not be challenged on this account, may be a useful tool to achieve an agreed solution. On the Anglo-American side, the culmination of a multi-year effort to codify contemporary ethical standards for Arbitrators -- the new 2004 AAA

Code of Ethics for Arbitrators, a joint project of the AAA and the American Bar Association -- has usefully clarified the arbitrator's permitted, indeed encouraged, position as a settlement facilitator, permitting her to proceed with consent of the parties, so long as no pressure to settle is brought to bear upon either side.[3]

## CONCLUSION

While a truly transnational code of procedure for international arbitration has not developed, there has been substantial convergence in many areas, with a trend toward adoption of modified common law procedures. Perhaps as significant, the dissemination of knowledge concerning common law and civil law procedure among arbitration practitioners of the opposite cultural persuasion has created a wider arsenal of tactical weapons for counsel and better informed basis for the common law lawyer to assist her client at all stages of a dispute, from the drafting of the arbitration clause to the enforcement of the Award.

[3] Canon IV, Section (F) of the new AAA Code provides: "Although it is not improper for an arbitrator to suggest to the parties that they discuss the possibility of settlement or the use of mediation or other dispute resolution processes, an arbitrator should not exert pressure on any party to settle or to utilize other dispute resolution processes. An arbitrator should not be present or otherwise participate in settlement discussions or act as mediator unless requested to do so be all parties."

## Selected Bibilography


*IBA Rules on the Taking of Evidence in International Commercial Arbitration*, www.ibanet.org/images/downloads/IBA%20rules

*ABA/AAA Code of Ethics for Arbitrators 2004*, www.adr.org/codeofethics

C. Mark Baker and Anibal M. Sater, *Under-Privileged in the E.U.*, Corporate Counsel April 2005

Klaus Peter Berger, *Integration of Mediation Elements into Arbitration*, Arbitration International Vol. 19, No. 3 at 387 (2003)

Charles N. Brower, *The Anatomy of Fact-Finding Before International Tribunals: An Analysis and A Proposal Concerning the Evaluation of Evidence*, from Fact-Finding Before International Tribunals, 11th Sokol Colloquium (Transnational Publishers, R. Lillich ed.)

Jack J. Coe, *Pre-Hearing Techniques to Promote Speed and Cost-Effectiveness -- Some Thoughts Concerning Arbitral Process Design*, Mealey's International Arbitration Report Vol. 17 No. 4 at 1 (April 2002).

Siegfried H. Elsing and John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, Arbitration International Vol. 18, No. 1 at 59 ((2002).

Rosabel E. Goodman-Everard, *Cultural Diversity in International Arbitration - A Challenge for Decision-Makers and Decision-Making*, Arbitration International, Vol. 7 No. 2 at 155.

Grant Hanessian, *Discovery in International Arbitration*, GP/Solo Magazine, September 2005 (ABA General Practice, Solo & Small Firm Division)

Richard M. Mosk and Tom Ginsburg, *Evidentiary Privileges in International Arbitration*, International and Comparative Law Quarterly Vol. 50, Part 2 at 345 (April 2001).

Ewell E. Murphy, Jr., *Confronting the Confrontation of the World's Two Great Arbitration Systems*, International Arbitration News, ABA Section of International Law and Practice (Summer 2003).

Eliot E. Polebaum, *Discovery in Complex International Arbitration*, www.acca.com/chapters/program/acce/discoveryeng.pdf, March 10, 2005

Hilmar Raeschke-Kessler, *The Arbitrator as Settlement Facilitator*, Arbitration International Vol. 21, No. 4 at 523 (2005).

Javier H. Rubinstein and Britton B. Guerrina, *The Attorney-Client Privilege and International Arbitration*, Journal of International Arbitration Vol. 18 No. 6 at 587 (2001).

Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, Chicago Journal of International Law Vol. 5 No. 1 at 304 (2004)

George M. Von Mehren and Claudia F. Salomon, *Submitting Evidence in an International Arbitration: The Common Lawyer's Guide*, Journal of International Arbitration Vol. 20 No. 3 at 285 (2003).