# Introduction

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International arbitration brings together parties, counsel and arbitrators from diverse legal backgrounds. These various legal influences make international arbitration a 'live' experience of comparative law. Indeed, over the years, arbitration has combined features from distinct legal traditions and has, as a result, forged a forum of truly international 'best practice'.

This blend of legal traditions is particularly evident in the context of procedural aspects of arbitration. To a lesser extent, but no less importantly, substantive issues are also increasingly shaped by a broad comparative law approach. In both cases, the influence of the two major (western) legal systems – the civil law and common law systems – have been of particular importance.

The gap between the civil law and common law traditions is particularly wide as regards procedure. Generally speaking, common law proceedings are 'adversarial', meaning that both parties can exert control over the pace and scope of the proceedings. The judges' role is to sit and decide. By contrast, civil law countries use a so-called 'inquisitorial' system, where judges play a more active role and are responsible for the conduct of the proceedings, intervening ex officio if required. This is, of course, a broad generalisation, procedural traditions vary significantly from country to country and within each legal system. Nevertheless, some specific examples detailed below illustrate the differences between the systems and how international arbitration practice has combined the best of both worlds.

To begin, one may ask how a blend of different procedural approaches has become possible in international arbitration. Indeed, most modern arbitration laws and institutional rules allow the parties – and, in the absence of the parties' agreement, the tribunal – wide discretion in determining the rules governing arbitral proceedings. In doing so, the parties or the arbitrators tend to follow their 'legal instinct' and rely on familiar practices used in their own legal system. As a consequence, different features from various legal backgrounds usually coexist in an arbitral proceeding. This can result in misunderstandings, particularly where one side is not familiar with the legal traditions of the other. Experienced arbitration practitioners, however, will use the freedom to determine arbitral procedure, and the coexistence of various legal traditions, to tailor procedural rules to the international arbitration context as well as the specific case at hand.

Civil law and common law systems do not, for instance, attach the same importance to written submissions and oral arguments in a commercial dispute. In a common law country, oral arguments are the centrepiece of the proceedings, and therefore oral hearings may often last many weeks, for example as in the UK. By contrast, in systems influenced by civil law, written submissions are of the utmost importance, while oral hearings are sometimes reduced to a mere formality.

International arbitration practice has taken elements from both traditions. On the one hand, arbitral proceedings usually involve the exchange of substantial written submissions (in important disputes, possibly several rounds of pre-hearing and post-hearing submissions) which lay out in an exhaustive fashion the parties' factual and legal arguments. On the other hand, the hearing forms a significant part of an arbitral proceeding, not only as described below for the examination of witnesses, but also for the presentation of an oral opening or closing statement.

Another example of the blend of different procedural traditions in international arbitration concerns the use of document disclosure and pre-trial discovery. These are important features in common law proceedings, where the claimant often files a rather skeletal statement of claim. It then relies on discovery to obtain vast amounts of documents from the other side. The scope of documents the parties may seek, or are obliged to produce, varies significantly among common law countries. In any form, these disclosure or discovery practices are highly surprising from a civil law perspective, where each party is responsible for providing the documents supporting its case. In certain civil law countries, the claimant is even obliged to file the entire factual evidence with the statement of claim, additional documents being allowed only under exceptional circumstances. The possibility of obtaining documents from the other side is generally very limited, and only concerns cases where such documents can be precisely identified.

In international arbitration, the use of document disclosure and pre-trial discovery is commonly accepted these days, but to an extent that is significantly limited compared to, for example, US practice. The IBA Rules on the Taking of Evidence in International Commercial Arbitration have set forth a middle ground that is widely accepted and applied today. Under these rules, requests for documents must be reasonably specific, relevant to the case, and proven to be within the control of the other party, thus excluding so-called 'fishing expeditions' for broad categories of documents.

The use of witness evidence is a further example of how procedural aspects from both civil and common law systems have shaped today's features of international arbitration. In civil law countries, the use of fact witnesses is rather limited. In most cases, if witnesses are to be examined at all at the hearing, the examination is conducted mainly by the judge and to a much lesser extent by the parties' representatives. Party-affiliated witnesses are given less (if any) weight, and contact between the parties and their witnesses is often governed by strict rules. The parties generally do not provide expert witnesses; rather, the court will appoint an independent expert. By contrast, both fact and expert witnesses play a material role in common law countries. Testimony from a fact witness is sometimes considered even more important than documentary evidence. At the hearing, both parties have ample opportunity to put questions to the witnesses, usually called direct, cross and re-direct examination. Party-affiliated witnesses are common practice, as are preparatory contacts between the parties' counsel and their witnesses. Each side may appoint not only fact witnesses, but also their own experts.

Again, international arbitration practice combines, in an effective manner, elements from both traditions. Fact witnesses, including party-affiliated witnesses, are usually heard in an international arbitration. It is also accepted in international arbitration that counsel may assist the witnesses in preparation for their examination. At the

hearing, counsel from both sides usually examine the witnesses but the scope of such examination is narrowed by a previously submitted written witness statement. Furthermore, cross-examination tends to be less aggressive than in US courts, and it is not unusual for the arbitral tribunal to intervene to ask questions directly to the witness. As regards experts witnesses, both party-appointed and tribunal-appointed experts may be used in international arbitration: the above mentioned IBA Rules on the Taking of Evidence in International Commercial Arbitration specifically recognise both methods.

Finally, civil law and common law elements may be combined in international arbitration also with respect to substantive issues. This is particularly true where the parties have not chosen the law applicable to the substance. In these cases, the arbitral tribunal may be inclined to apply general principles which are broadly accepted in comparative law, these being known as lex mercatoria or 'transnationalised' law. In addition, even where the parties have agreed on the applicable substantive law, a comparative law approach may prove useful to give the arbitral tribunal intellectual comfort, particularly where the chosen law is less developed on the issues at stake.

In sum, today's features of international commercial arbitration are the result of a well-balanced 'mix and match' from different legal traditions, in particular from the two major legal systems, the civil and the common law. As a result, international arbitration practitioners are usually chosen, among other things, for their ability to look beyond their own jurisdictional borders to a wider legal horizon. Legal teams at law firms specialising in international arbitration therefore increasingly comprise lawyers from various legal backgrounds, working side by side and combining their legal skills and experiences to serve the best interests of their clients.