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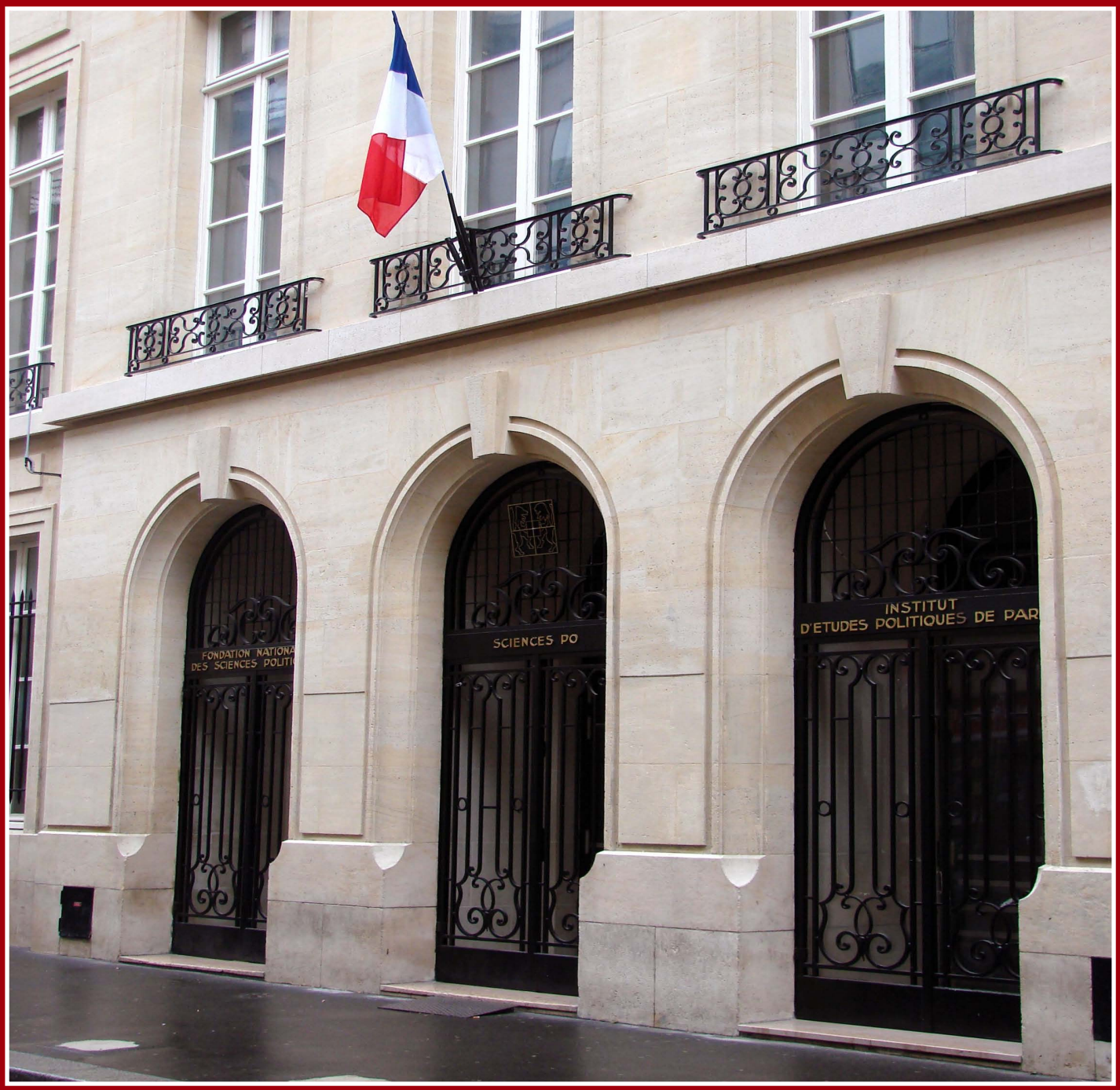

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The Globalization of International Commercial Arbitration

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According to its Dean, Professor Christophe Jamin, the newly created Sciences Po Law School aims at educating "law professionals of a very high caliber, capable of adjusting and evolving in a professional world that is constantly changing."[1]. Among the challenges facing legal professionals today is, without any doubt, the increasing globalization of law. Indeed, in most, if not all, fields of law a monolithic and merely national approach is unable to provide satisfactory answers to the issues confronting our increasingly transnational society.

International arbitration is often referred to as the area of globalization "par excellence". Indeed, it is the preferred means of dispute resolution for multinational companies[2]. It brings together parties, counsel and arbitrators from diverse and varied legal backgrounds, and these various legal influences make international arbitration a "live" example of the globalization of law.

The blend of legal traditions is particularly spectacular concerning the procedural aspects of arbitration. Over the past years and decades, arbitration has combined features from distinct legal traditions and has, as a result, forged a global "best practice" for arbitral proceedings. This was possible, and indeed necessary, because international arbitration – as opposed to international litigation before national courts – has an inherent and truly a-national character. International arbitral tribunals have no forum, i.e., no anchor in a specific legal system.[3] Accordingly, no predetermined set of procedural rules necessarily applies to the proceedings before them.

Rather, 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 the arbitral proceedings. In determining the procedural rules, the parties or the arbitrators tend to follow their "legal instinct" and rely on familiar practices used in their own legal culture. As a consequence, different features from various legal backgrounds usually co-exist in an arbitral proceeding.[4] Experienced arbitration practitioners use this freedom to determine arbitral procedure, and the co-existence of various legal traditions, to tailor global procedural rules that are best suited to the international arbitration context as well as the specific case at hand.

Common Law and Civil Law Practices

Even though the statistics of international arbitration institutions, such as the International Chamber of Commerce (ICC) in Paris, show a trend towards a diversification in the origin of the players in international arbitration, including, more frequently, parties from Asia and Africa,[5] it is still fair to say that two main legal traditions, usually described as civil law and common law, have predominantly influenced the globalization of the arbitral process.

Generally speaking, those traditions use very different procedural approaches. Common law proceedings are usually described as "adversarial", meaning that both parties (i.e., adversaries) can exert control over the pace and scope of the proceedings, whereas the judges' role is to "sit and decide".[6] By contrast, civil law countries follow 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.[7] This description is, of course, a very broad generalization, and procedural traditions vary significantly from country to country and within each system.

In the following, we will provide some examples to illustrate the differences between both systems and how international arbitration practice has combined "the best of both worlds" in shaping a globalized procedure.

Written Submissions and Oral Argument

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, for example in England, oral arguments are the centerpiece of the proceedings, leading to hearings that may often last many weeks.[8] By contrast, in systems influenced by civil law, such as in Germany, written submissions are of the utmost importance, with oral hearings sometimes reduced to a mere formality.[9]

Globalized 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 filings) 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 and/or closing statement.

Document Disclosure and Pre-Trial Discovery

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 and then relies on discovery to obtain vast amounts of documents from the other side.[10] The scope of documents the parties may seek, or are obliged to produce, varies significantly among common law countries.[11]

In any form, these disclosure or discovery practices are highly surprising (or even shocking) from a civil law perspective, where each party is responsible for providing the documents supporting its case.[12]

In certain civil law countries, the claimant is even obliged to file all of its factual evidence with its statement of claim, additional documents being allowed only under exceptional circumstances.[13] The possibility of obtaining documents from the other side is generally very limited, and only concerns cases where such documents can be precisely identified.[14]

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 instance, U.S. practice. The IBA Rules on the Taking of Evidence in International Commercial Arbitration have set forth a middle-ground which is widely accepted and applied today.[15] 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.[16]

The Use of Witnesses and Experts

The use of witnesses and experts is a further example of how procedural aspects from both civil and common law systems have shaped today's globalized features of international arbitration. In civil law countries, the use of factual 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.[17] Party-affiliated witnesses are given less (if any) weight, and contact between the parties and their witnesses is often governed by strict rules.[18] The parties generally do not provide expert witnesses; rather, it is for the court to appoint an independent expert.[19]

By contrast, both factual and expert witnesses play a material role in common law countries. For instance in England, testimony from a factual 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.[20] Each side may appoint not only factual witnesses, but also their own experts.[21]

Again, international arbitration practice combines, in an effective manner, elements from both traditions. Factual witnesses, including party-affiliated witnesses, are usually heard in an international arbitration.[22] It is also accepted in international arbitration that counsel may assist the witnesses in preparation for their examination.[23] 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.[24]

Conclusion

Today's globalization of international commercial arbitration is the result of a well-balanced "mix-and-match" processing involving many different legal traditions. 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 plane. Teams at law firms specializing in international arbitration are therefore increasingly comprised of lawyers from various legal backgrounds, working side by side, and combining their legal skills and experiences. The global approach of Sciences Po's Law School is an excellent preparation for the challenges of such a globalized legal environment.

Notes

1. http://master.sciences-po.fr/droit/en/node/28
2. Queen Mary, School of International Arbitration, "International Arbitration: Corporate Attitudes and Practices 2008", p. 2.
3. Emmanuel Gaillard and John Savage, eds., *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), p. 50; Philippe Fouchard, "L'autonomie de l'arbitage commerial international," *Revue de l'Arbitrage*, (1965), p.99.
4. Gary B. Born, *International Commercial Arbitration*, (Kluwer Law International, 2009), pp. 1748-1765.
5. *See* ICC 2008 Statistical Report, *ICC International Court of Arbitration Bulletin* 20(1) (2009).
6. Christian Borris, "Common Law and civil law: fundamental differences and their impact on arbitration," *JCI Arbitration* 60 (2) (1994), p. 78.
7. Christian Borris, "Common Law and civil law: fundamental differences and their impact on arbitration," *JCI Arbitration* 60 (2) (1994), p. 79; *See also* L. Pair, "Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Despite Harmonization?" *ILSA Journal of International and Comparative Law* 9(57) (2002), p.62.
8. Julian D.M. Lew and Laurence Shore, "International Commercial Arbitration: Harmonizing Cultural Differences," in *AAA Handbook on International Arbitration and ADR*, ed. Thomas E. Carbonneau and Jeanette A. Jaeggi (JurisNet, LLC, 2006), p. 38 ; *See also* Lord Mackay of Clashfern, *Volume 11 Civil Procedure*, Halsbury's Laws of England fifth edition, (LexisNexis, 2009), para. 768.
9. Christian Borris, "Common Law and civil law: fundamental differences and their impact on arbitration," *JCI Arbitration* 60 (2) (1994), p. 80; *See also* Antwerp Luc Demeyere, "An essay on differing approaches to procedures under common law and civil law," *SchiedsVZ* (2008), p. 282.
10. Siegfried H. Elsing and John M. Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration," *Arbitration International*, 18(1) (2002), p. 59; *See also* Gabrielle Kaufamnn-Kohler, "Discovery in international arbitration: How much is too much?" *SchiedsVZ* (2004), p.14.
11. Lucy Reed and Jonathan Sutcliffe, "The 'Americanization' of International Arbitration?" *Mealey's International Arbitration Report* 16(4) (2001), p 39.

12. Christian Borris, "Common Law and civil law: fundamental differences and their impact on arbitration," *JCI Arbitration* 60 (2) (1994), p. 82.
13. Siegfried H. Elsing and John M. Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration," *Arbitration International*, 18(1) (2002), p. 59.
14. Emmanuel Gaillard and John Savage, eds., *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International, 1999),.p. 690: "Continental systems are familiar with the principle of compulsory disclosure of documents, but they implement it in a far more limited way".
15. *See* IBA Rules of Evidence, Article 3.
16. *See* IBA Rules of Evidence, Article 3.3.
17. Gabrielle Kaufmann-Kohler, "Globalization of Arbitral Procedure," *Vanderbilt Journal of Transnational Law*, 36 (2003), p. 1329.
18. Siegfried H. Elsing and John M. Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration," *Arbitration International*, 18(1) (2002), p. 60.
19. Christian Borris, "Common Law and civil law: fundamental differences and their impact on arbitration," *JCI Arbitration* 60 (2) (1994), p. 82.
20. Lucy Reed and Jonathan Sutcliffe, "The 'Americanization' of International Arbitration?" *Mealey's International Arbitration Report* 16(4) (2001), p. 42.
21. Lord Mackay of Clashfern, *Volume 11 Civil Procedure*, Halsbury's Laws of England fifth edition, (LexisNexis, 2009), para. 844: "...the court's permission is not generally required to instruct an expert..."; Christian Borris, "Common Law and civil law: fundamental differences and their impact on arbitration," *JCI Arbitration* 60 (2) (1994), p. 82.
22. *See* IBA Rules of Evidence, Article 4.2.
23. *See* IBA Rules of Evidence, Article 4.3; See also Peter R. Griffin, "Recent Trends in the Conduct of International Arbitration- Discovery Procedures and Witness Hearings," *Journal of International Arbitration* 17(2) (2000), pp. 26-27.
24. *See* also ICC Rules, Article 20(3).