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International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions

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The practice of international commercial arbitration, as its name suggests, involves the resolution of disputes between parties located in different countries and, in many cases, who come from vastly different cultures. As one might expect, counsel to parties in international arbitrations and members of these arbitral tribunals alike are commonly from different countries. Invariably, such cases also bring together attorneys trained in the different legal traditions of the common law and civil law.

International arbitration has existed for centuries as a form of dispute resolution, but has increased dramatically since the passage of the 1958 New York Convention on the Recognition and Enforcement of International Arbitral Awards.[1] Until the past two decades, international arbitration was more well-known in civil law countries, with less acceptance in the United States until after the US ratification of the New York Convention in 1970. As parties and counsel from the United States and United Kingdom have increasingly participated in the international arbitral system, the system has evolved to incorporate elements of both the civil and common law traditions.

As explained below, the rules and procedures that commonly apply today in international arbitration reflect a mixture of common law and civil law norms; the system also appears to be evolving more in a common law direction that tends to favor counsel trained in the adversarial process. This essay is meant to highlight just a few examples of this trend, each of which reflects a unique intersection of these traditions.

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1 (1958), 21 UST 2517 (1970).

I. DISCOVERY

It is difficult to overstate the horror with which parties and counsel outside the United States view the prospect of American-style discovery, with parties able to serve upon one another sweeping requests for production of documents and other information relevant to the litigation, and to obtain oral deposition testimony of witnesses in advance of trial. In civil law countries, such discovery is rarely permitted, and is viewed by many as an affront to the expectations of privacy and confidentiality that private parties have in their business information. Foreign parties doing business in the United States often insist on arbitration clauses in their agreements precisely to avoid the prospect of discovery and the other risks of litigation in the United States.

It should come as no surprise, then, that the topic of discovery is frequently debated in international arbitral proceedings. Even ten years ago, discovery (or "disclosure," as it is often termed in international arbitration), was relatively uncommon in international arbitration. Today, however, a limited amount of discovery is typically available, albeit under the strict control and discretion of the arbitral tribunal. Under the rules of most international arbitral institutions, such as the International Court of Arbitration of the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), and the American Arbitration Association ("AAA"), the arbitral tribunal is given the broad power to determine whether, and to what extent, discovery will be permitted. For instance, the ICC Rules give the tribunal authority to "establish the facts of the case by all appropriate means," and "may summon any party to provide additional evidence."[2] Likewise, the LCIA and AAA Rules explicitly authorize the arbitral tribunal to order the pre-hearing production of documents.[3]

Although discovery is thus permitted to a certain extent, the scope of such discovery is generally far more limited than would otherwise be available in the United States, and more akin to the discovery process in the United Kingdom. In the UK, parties may only seek disclosure of documents that can be identified

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2 ICC International Rules of Arbitration art 20, ¶ 1, available online at <http://www.iccwbo.org/court/english/arbitration/rules.asp> (visited Mar 28, 2004).

3 See LCIA Arbitration Rules art 22.1(e), available online at <http://www.jus.uio.no/lm/lcia.arbitration.rules.1998> (visited Mar 30, 2004) (authorizing the tribunal to "order the production of any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant"). See also AAA International Arbitration Rules art 19, available online at <www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04049.html> (visited Mar 28, 2004) (empowering the tribunal to "order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate").

with particularity and which the requesting party already has reason to believe exist, thus avoiding the sorts of "fishing expeditions" commonly associated with US-style discovery. This discovery model is exemplified in the model discovery rules for international arbitration set forth in the International Bar Association's 1999 Rules on the Taking of Evidence in International Arbitration, which specifically require that any request for production of documents contain:

> (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
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> (b) a description of how the documents requested are relevant and material to the outcome of the case; and
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> (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, and of the reason why that Party assumes the documents requested to be in the possession, custody or control of the other Party.[4]

It is also important to note that the IBA Rules do not provide for any other form of discovery, such as pre-hearing depositions of witnesses, the use of written interrogatories, or requests for admissions, all of which are mainstays of the discovery process under the US Federal Rules of Civil Procedure. Such forms of discovery are rarely, if ever, permitted in international arbitral proceedings absent agreement of the parties.

The disclosure process in international arbitration thus strikes a careful balance between the common law and civil traditions—a balance that, at least in my experience, is somewhat alien to counsel trained in common law and civil law systems alike. Non-US parties, as discussed below, are often quite surprised at the prospect of having to produce confidential business documents, particularly where such disclosure would never be ordered in domestic judicial proceedings. US parties, on the other hand, complain that the discovery requirements quoted above are difficult, if not impossible, to meet. After all, they say, what good is a discovery process if you can only request documents that you already know to exist? How can you describe documents you haven't seen before? Despite such complaints, however, this process is today well-accepted and quite successful.

It is still the case, however, that US counsel in international arbitration proceedings are often viewed with a measure of suspicion at the outset, as counsel from other countries presume an intent to engage in broad fishing expeditions when, in fact, the truth is sometimes just the opposite. In many arbitrations, I find that there is little need for discovery, and that limited

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4 IBA Rule on the Taking of Evidence in International Commercial Arbitration art 3(3), available online at <http://www.ibanet.org/pdf/IBA_RULES.pdf> (visited Mar 28, 2004) (hereinafter IBA Rule Evid).

document discovery alone will suffice. I also find that counsel and parties from civil law countries, when given the opportunity to seek discovery, in some instances are anxious to broaden the scope of discovery, recognizing the tactical advantages it provides in putting together one's case. In any event, the international arbitration system has come to reflect the recognition that limited discovery does serve a valuable function in giving the parties a meaningful opportunity to present their case, and in helping arbitral tribunals to evaluate the parties' positions.

Although discovery is currently quite common in international arbitrations, it is often a new experience for parties domiciled in civil law countries where such discovery is not permitted under local law. For such parties, the discovery process carries obvious risk. Companies in the United States are often accustomed to the concept of discovery in the litigation process, and thus take precautions in their everyday business affairs, such as being careful what they put in writing, even in purely internal communications. For parties that have never been required to produce documents to litigation adversaries, however, such precautions are entirely alien, which leads inevitably to the risk that written communications may be produced which the author never dreamed would possibly make it into the hands of a litigation adversary. It is therefore vital that parties who enter into international arbitral agreements begin taking the types of precautions that US parties have long been accustomed to, taking care as to what they reduce to writing, particularly when it comes to electronic mail that today is becoming a more frequent target of discovery requests in international arbitral proceedings, just as it has been in American litigation for many years.

II. PRIVILEGES AND TRIAL PREPARATION

The intersection of the common law and civil law traditions has also brought into focus differing conceptions of the privileges that apply to communications between an attorney and a client.[5] There are no established rules to govern the nature or scope of the attorney-client privilege in international arbitration. While the rules of some arbitral institutions authorize the tribunal to order the production of all documents "not privileged," those rules never specify which documents are "privileged" in the first place. This silence is not surprising, since conceptions of the attorney-client privilege around the world differ dramatically. For instance, in the United States, the privilege is meant to foster candid communication between an attorney and a client by providing that such communications cannot be discovered or offered into evidence, including communications between in-house counsel and employees

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5 See generally Javier H. Rubinstein and Britton B. Guerrina, *The Attorney-Client Privilege in International Arbitration*, 18 J Intl Arb 587 (2001).

of organizational clients.[6] The privilege is also considered a right which only the client generally can waive. In civil law countries, however, the attorney-client privilege exists as a construct of the criminal laws and ethics rules to protect "professional secrets."[7] The obligation to protect such secrets is both a right and a duty of the lawyer and a matter of public order. As such, a client has no power to waive the confidentiality that attaches to professional secrets between the attorney and a client. It is the lawyer's exclusive province to determine what constitutes a professional secret, and what can be divulged. Unlike the common law rule, communications between in-house counsel and corporate employees are generally not considered privileged.[8]

There is thus a great deal of uncertainty over what sorts of communications between an attorney and a client are immune from discovery in international arbitrations—uncertainty further compounded by the absence of any established choice-of-law rules to determine which law will govern the existence and scope of the privilege, and the extent to which the privilege can be waived. This uncertainty has a significant impact on the process of trial preparation and the presentation of evidence—a process that itself also highlights another clear divide between the common law and civil law traditions.

It is generally accepted in common law jurisdictions that counsel can interview and "prepare" their witnesses for the giving of testimony during discovery and at trial, thus discussing the witness's testimony and the issues likely to arise during their examination. In civil law countries, however, such preparation of witnesses is often forbidden, and is regarded as nothing less than witness tampering. In international arbitral proceedings, however, it is generally permitted for counsel to speak with witnesses about the content of their testimony, whether in preparing a witness's pre-hearing written testimony or in preparing for the witness's oral testimony at the arbitral hearing. The obvious concern arises, however, as to whether such communications between counsel and witness would be subject to disclosure. While it is doubtful that many arbitral tribunals would be willing to permit such questioning, the absence of any established framework to govern the nature and scope of the attorney-client privilege should give the practitioner a measure of pause at the prospect that such communications could come to light.

III. THE PRESENTATION OF EVIDENCE

Perhaps the most fundamental difference between the common law and civil law modes of dispute resolution lies in the manner in which evidence is

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6 See generally *Upjohn Co v United States*, 449 US 383 (1981).

7 Rubinstein and Guerrina, 18 J Intl Arb at 591–99 (cited in note 5).

8 Id at 592.

presented to the finder of fact. In the common law tradition, testimony is presented to the finder of fact principally through live oral testimony of witnesses, rather than in written form. While written declarations are permissible in certain pre-trial settings, such declarations cannot generally be offered at trial in lieu of oral testimony, for they are considered inadmissible hearsay.[9] The questioning of witnesses is also conducted by counsel for the parties, with each party having the right to have their counsel cross-examine witnesses directly in the presence of the finder of fact.

In the civil law tradition, by contrast, evidence and testimony generally is presented to the finder of fact principally in written form. While live testimony may be taken, the questioning of witnesses is conducted not by counsel, but rather by the court, which retains the sole authority to determine which questions will be put to the witness. Direct, adversarial cross-examination of witnesses by counsel is not permitted.

The current standard practice in international arbitral proceedings, once again, seeks to strike a balance between the common law and civil law traditions, albeit one in which the balance tips decidedly in favor of the common law model. Witness testimony is generally presented in the first instance through written witness statements, although the content of such witness statements depends heavily on the requirements imposed by the particular arbitral tribunal in each case. In some instances, the arbitral tribunal will require that the written witness statements serve as a complete substitute for the witness's direct testimony at trial, with oral examination at trial commencing with cross-examination conducted by opposing counsel. In other instances, the arbitral tribunal will require that the written witness statement provide only a general overview of the witness's testimony, with the witness able to supplement their testimony with direct examination by counsel at the hearing. In any event, the heavy use of written evidence in international arbitration reflects the distinct influence of the civil law tradition.

However, it is also generally well-established in international arbitration that any witness presented by a party must be made available to testify live before the arbitral tribunal, with the opportunity for the opposing party to cross-examine the witness. This procedure again is outlined in the IBA Rules, which provide that:

> The Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses, and then by the presentation by Claimant of rebuttal witnesses, if any. Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional

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9 See FRE 801.

> questions on the matters raised in the other Parties' questioning. . . . The Arbitral Tribunal may ask questions to a witness at any time.[10]

The presentation of live witness testimony, and particularly the concept of adversarial cross-examination of opposing witnesses, clearly is drawn from the common law approach, and is often one of the greatest sources of consternation for civil law-trained counsel. This concern is understandable since such cross-examination is rarely, if ever, permitted in their domestic courts. Effective cross-examination requires extensive training and practice—neither of which civil law lawyers are likely to receive in their traditional legal training or in their everyday domestic litigation practice. As such, common law attorneys from the United States and the United Kingdom are generally at a competitive advantage because of their everyday familiarity with adversarial cross-examination in their domestic courts.

Cross-examination in international arbitration, however, raises unique challenges even for the common law-trained attorney. Such counsel are accustomed to relying in domestic litigation on the use of oral depositions to understand the testimony that a witness would give at trial before the trial itself takes place. Armed with such testimony, counsel have a measure of confidence in knowing what a witness will say when asked particular questions at trial. If the witness testifies in a manner inconsistent with their pre-trial testimony, the witness can be impeached on the basis of such inconsistent statements. As mentioned above, however, oral depositions are rarely, if ever, permitted in international arbitration. Moreover, the level of detail that one sees in written witness statements varies significantly, sometimes being nothing more than a general description of the subjects that the witness will address at the arbitral hearing. Since document discovery is generally quite limited, it is also possible that there will not be many documentary exhibits to control the cross-examination. These, however, are the essential tools that American counsel typically rely upon to conduct and control their cross-examinations. In any event, it is apparent that skill and care are required for counsel conducting the sorts of "blind" cross-examinations that commonly occur in international arbitration, where counsel often have little assurance of knowing what a witness will say during the course of an examination.

Disputes also occasionally arise as to whether counsel should be given the opportunity to present oral arguments to the arbitral tribunal, whether in the form of opening statements at the outset of an arbitral hearing, or through closing arguments after the evidence has been presented. These too are creatures of the common law world, and relatively unknown in civil law litigation. As indicated above, the common law tradition relies more heavily on the use of oral presentation of evidence and argument to the finder of fact. And once again,

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10 IBA Rule Evid art 8(2) (cited in note 4).

that tradition has largely prevailed, for such use of oral argument is common in international arbitration.

IV. THE NEW FRONTIER

The challenge of international arbitration, and litigating at the crossroads of the common law and civil law traditions, ultimately lies in the opportunity it affords to counsel in each and every case to fashion procedural rules that best suit the particular proceeding and will serve the client's interest. Unlike the rules of domestic litigation that are immutable and well-understood, the procedures that govern international arbitration depend entirely on the choices of the counsel who represent the parties and those who serve on the arbitral tribunal. Accordingly, no two arbitrations will ever be conducted in exactly the same way—nor should they be, for the best rules and procedures are those that properly reflect the needs of the parties based on the particular facts and circumstances of the dispute at hand.

The frameworks that generally govern international arbitrations, whether they be ad hoc arbitrations governed by the Rules of Arbitration of the United Nations Commission on International Trade Law ("UNCITRAL"), or by the rules of institutions such as the ICC, LCIA or AAA, consistently promote this flexibility in arbitration first by acknowledging the ultimate power of the parties to control the arbitral process through the terms of the arbitration agreements that give rise to the arbitral process in the first place, and then by giving arbitral tribunals great latitude (within the parameters of the arbitration agreement) to decide how the arbitration should be conducted, subject also to broadly stated requirements of fairness.

These opportunities demand that counsel, regardless of where they have been trained, be open to the advantages offered by the procedural models of other legal systems. In my case, as counsel trained in the United States, it has required that I be open to the benefits of civil law procedures, including, among other things, greater reliance on written presentation of proof, and more limited use of discovery. It is possible, although unlikely, that someday there will exist a set of universal procedural rules to govern international arbitrations, much like the rules of civil procedure that govern domestic litigation. In the meantime, though, the field of international arbitration will remain a new frontier, continually evolving at the crossroads of the common law and civil law traditions.