



ISSN : 1875-4120
Issue : Vol. 8, issue 2
Published : May 2011

Terms & Conditions

Registered TDM users are authorised to download and print one copy of the articles in the TDM Website for personal, non-commercial use provided all printouts clearly include the name of the author and of TDM. The work so downloaded must not be modified. **Copies downloaded must not be further circulated.** Each individual wishing to download a copy must first register with the website.

All other use including copying, distribution, retransmission or modification of the information or materials contained herein without the express written consent of TDM is strictly prohibited. Should the user contravene these conditions TDM reserve the right to send a bill for the unauthorised use to the person or persons engaging in such unauthorised use. The bill will charge to the unauthorised user a sum which takes into account the copyright fee and administrative costs of identifying and pursuing the unauthorised user.

For more information about the Terms & Conditions visit www.transnational-dispute-management.com

© Copyright TDM 2011
TDM Cover v1.6

Transnational Dispute Management

www.transnational-dispute-management.com

The Contribution of Civil Law Systems to International Arbitration by P. Landolt

About TDM

TDM (Transnational Dispute Management): Focusing on recent developments in the area of Investment arbitration and Dispute Management, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting.

Visit www.transnational-dispute-management.com for full Terms & Conditions and subscription rates.

Open to all to read and to contribute

TDM has become the hub of a global professional and academic network. Therefore we invite all those with an interest in Investment arbitration and Dispute Management to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

If you would like to participate in this global network please contact us at info@transnational-dispute-management.com: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an TDM-focused republication), but rather concise comments from the author's professional 'workshop'.

TDM is linked to **OGEMID**, the principal internet information & discussion forum in the area of oil, gas, energy, mining, infrastructure and investment disputes founded by Professor Thomas Wälde.

The Contribution of Civil Law Systems to International Arbitration

By Phillip Landolt, Landolt & Koch, Geneva¹

To the general public, there is no difference between civil law systems and common law systems, or, if there is, it is the same difference as that between crocodiles and alligators!

In comparative law and its most useful emanation international arbitration, however, this difference between civil law and common law systems represents a *summa divisio*, a principal analytical dividing line. In many areas of the law, there is indeed sense in this dividing line, and instructive conclusions can almost unflinchingly be drawn from its employment. Yet as Claude Reymond remarked in a remarkable article some decades ago ((1989) 5 *Arbitration International*, 357-368), as regards *procedure*, analysis upon this dividing line is an unyielding harvest.

The problem is that civil law civil procedure systems are not organic growths from a Roman model, such as say civilian contract law is. They are rather the deliberate creation of legislatures and vary one from the other almost as one random walk differs from another. Common law systems, at least until the English Civil Procedural Rules reform of 1999, exhibit, by contrast, a striking and consistent family resemblance. Where the judge was the fact-finder as well as pronouncing upon the law, his job was to remain resolutely passive, above the fray. It was the parties who had the initiative not only on evidence but also on law. The extreme control of common law civil litigation reposed with the parties dictated and accounted for much of its character. The parties determined what evidence to submit, both of fact and of expert opinion, they asked the questions of witnesses, and they framed the legal issues and identified relevant legal authorities.

Procedure is very often a central focus of debate in international arbitration, quite understandably, since international arbitration is a *means* of dispute settlement, and moreover it ordinarily operates to create a procedural void, to be filled by party agreement and, in default, by the determinations of arbitrators. Just as nature abhors a void, the attention of legal commentators is naturally drawn to how best to fill voids - with rules.

Given the united front that common law procedure traditionally represented, and the centrality of procedural questions in international arbitration debate, it is therefore not surprising that much has been written about the common law contribution to international arbitration but distinctly little about the contribution of civil law systems. Yet it is plain to see that international arbitration does not present a mere transposal of common law preferences and approaches, but is rather a unique system in its fundamental characteristics, a considerable number of which civil law influences played a part in fashioning. It

¹ www.landoltandkoch.com

therefore seems fitting to attempt to identify certain of the civil law influences on international arbitration.

This enterprise may also serve the salutary purpose of accentuating how international arbitration as it is found operating today is a true hybrid of influences both from the relatively homogenous common law world and the more heterogeneous civil law world, and has also been influenced by sources peculiar to arbitration. In view of the fact that, as I will say later in this article, international arbitration in its chief fundamentals is a civil law construct, this may act as a corrective to a view too often propounded, that in international arbitration the common law acts as an aggressive foreign predator swimming up from the depths, and into the gentle inland streams to devour the more docile indigenous fish, and generally disturb a reposeful ecosystem.

While it is true that arbitration is in English law an institution of considerable antiquity, it should be recalled that English arbitration until quite recently lacked certain essential characteristics of modern arbitration as we know it. English arbitration existed and operated by and large until the 1996 Act as a devolution of dispute settlement upon individuals close to trade and industry. The same realism that led English law to develop the jury system (fortified too by a wholesome Anglo-Saxon suspicion of state authority) led also to a readiness to oust judges from the practical factually-sensitive determinations in favour of industry insiders.

What leading systems of continental arbitration developed long before Anglo-Saxon arbitration was a readiness to substitute the determination of arbitrators for that of judges with an astonishingly high degree of breadth and finality. The common law by contrast contains a deep-seated, constitutional reluctance to accept the ouster of the courts. This is expressed in such solemnizing language as the “inherent jurisdiction of the court” and reached a crescendo just before that other incoming tide, the transposition of the *European Convention on Human Rights* into English domestic law (Scotland took the plunge a year earlier). See for example, *R v. Lord Chancellor, ex parte Witham*, [1998] Q.B. 575. It is therefore not unjustified to see modern international arbitration, in its fundamental characteristics, as a creature of civil law systems, which Anglo-Saxon systems sincerely flattered by imitation. Far before the major common law jurisdictions, the arbitration law of major civil law jurisdictions, such as France, Germany, and Switzerland had positioned the twin sentinels protecting international arbitration agreements, namely the separability of the arbitration agreement and Kompetenz-Kompetenz, the latter of course as variations upon a theme. Moreover, these leading civilian jurisdictions also precociously accepted that arbitration awards could not be set aside on the merits and not for mistake of law. English law, of course for other legitimate if not fully compelling reasons, under section 69 generally still allows review for serious mistake of English law, and US Federal law still seems irresolute about disavowing manifest disregard of the law as a basis to vacate an FAA award.

While we can quite cheerfully father the fundamental principles of international arbitration upon civil law systems, because of the centrality of procedure in

discussions of arbitration, we must now grasp this nettle. In doing so, we might proceed by *touches successives*. First, let us endeavor to identify those elements most clearly ascribable to civil law influences since, despite their heterogeneity in procedural matters, there is consensus in these limited matters among civil law systems, and this consensus is poised against how the common law goes about such things. We shall then move toward procedural elements which while not a matter of consensus among civil law systems, certainly feature in some leading civil law systems and stand contrary to the common law.

The highly restrained powers in arbitration for parties to obtain evidence from the other side is an expression of virtually universal civil law principles. In international arbitration the common law practice of taking pretrial depositions of witnesses almost never obtains. Moreover, as seen in the IBA Rules on taking evidence, both in their 1999 edition and in their 2010 edition, a party's ability to obtain disclosure of documents from its adversary is tightly circumscribed, as it is in those civil law systems which go so far as to admit the principle of compelling a party to disclose documents, such as Germany. Under the IBA Rules in all their avatars, one must show not only that the documents sought are relevant to an issue, but that they are material to the outcome of the arbitration.

The second example of an unalloyed and verifiable civil law procedural feature in international arbitration is the nascent if not burgeoning obligation "to arbitrate in good faith". It is true that common law systems disclose institutions such as treating counsel as "officers of the court" which restrain the otherwise rampant adversarialism of their procedures. But this functions in practice as nothing more than an injunction on truly obstreperous, active disruption of proceedings. The 2010 edition of the IBA Rules for the first time employs as one of its two overarching principles in paragraph three of the preamble that "each Party shall act in good faith", and then, *in cauda venenum*, backs this up with costs penalties. Good faith requirements, as civilian lawyers know and common law lawyers fear, are pregnant with consequence, and will certainly entail a fulsome measure of cooperation.

The evidential importance of contemporaneous documentary evidence as opposed to witness evidence is a frequently-cited feature of international arbitration. Common law systems place much more weight on the whole on witness testimony than do civil law systems, where a witness' erratic comportment during testimony is routinely put down not to untruthfulness but to the mere discomfort of testifying. The Working Party's commentary to the 1999 version of the IBA Rules fittingly observed that documents "are often the most reliable form of evidence for parties in international arbitration" and duly cites a distinguished German authority for the proposition. It might be though that this feature of arbitration is not or not entirely due to civil law influence. The international context of commercial facts is ripe ground for varying perceptions of the fleeting spoken word and conduct, and witness testimony, invariably subject to cross-examination under the IBA Rules and elsewhere, is much more costly to attend to.

Now on to the most prominent characteristic of arbitration which is traditionally banished from the common law, and was indeed deprecated there with the vehemence of Dicey as quintessentially civilian, doubtless because of associations with the procedure in England before the Doctors' Commons, dealing with divorce, probate and admiralty ("wives, wills, and wrecks"). The reference is to the inquisitional powers of the judge or arbitrator, which is to say, their powers to take initiatives to obtain evidence and ascertain the law. As pointed out by Professor Reymond in the celebrated article referred to above, civil law civil procedural systems repose such powers of initiative with judges in various degrees, and some very little so. Moreover, the civil procedure reform in England in 1999 introduced a paradigm-shift, turning the studiously inactive judge into a managerial judge. But by 1999, the openness in arbitration to the activist role of arbitrators had already coalesced and taken hold. Indeed, it might be said that requirements on the arbitrator to "determine the facts by all appropriate means", as one finds in the ICC Rules, and the arbitrator's duty to decide the case, express even a *preference* for the initiative of arbitrators. Even the 1996 *Arbitration Act* in England now throws up its hands and accepts that it is for the arbitrator to determine whether and to what extent he should seize the day (subsection 34(2)(g)).

The IBA Rules fall into line, contemplating, as they do, not only the unassailably settled principles that it is the arbitrator who controls the hearing, and the arbitrator may commission experts, but also that the arbitrator may even call witnesses of fact, and obtain evidence otherwise of his own initiative.

As for the ascertainment of the law, certain leading civil law systems such as France, Germany, and Switzerland ordain that this is the judge's duty (*iura novit curia*), and she of course "may not bring a finding of *non-liquet*", to borrow a phrase from the ICSID Convention, but also may not presume, say, that Scottish law where apparently obscure operates as English law. The common law treats the law as fact, to be proven by the parties. Increasingly in arbitration, the arbitrator is treated as being under a duty to ascertain the law and in this the parties are merely his auxiliaries.

While this aligns with the civil law vision, doubtless certain forces indigenous to arbitration are also at work here. Some are salutary, such as the realization that the arbitrator often expressly selected by the parties in view of a particular dispute with certain distinct qualities enjoys greater confidence of the parties in his subjective person. Others are less so, such as market forces impelling arbitrators to distinguish themselves by an innovative or otherwise distinctive application of the law.

By way of conclusion, the triumph of civilian systems in international arbitration is the now universal acceptance of the anxious recognition of arbitration clauses, and the finality of arbitration awards, the very hallmarks of modern arbitration. More than that, above the din of common law features such as voluble cross-examination once discerns the modulating influence of civil law systems. Indeed its own distinctive accents, such as the duty to arbitrate in good faith, here and there may be heard rising to the fore.