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A Civil Matter for a Common Expert: How Should Parties and Tribunals Use Experts in International Commercial Arbitration?

Ruth Fenton*

How should parties and tribunals use experts in international commercial arbitration? Are the common and civil law traditions blurred or blended, or should there be specific practices for international arbitration?

To answer these questions, it is necessary to look at the common and civil law approaches to the use of experts in international commercial arbitration. This article will look at circumstances that may require an expert and arbitration laws and rules that assist parties and arbitrators in appointing an appropriate expert. The article highlights and discusses differences and similarities between civil and common law traditions and draws a conclusion as to whether parties and tribunals should have specific practices for international arbitration.

HOW SHOULD PARTIES AND TRIBUNALS USE EXPERTS?

Parties and tribunals can use experts in a variety of ways, both in litigation and arbitration. For example, parties and tribunals can use experts to:

- Provide knowledge and expertise which the arbitrator or judge lacks,
- Report on technical or complex issues,
- Clarify information,
- Explain complex issues of law or technical ideas in layman's terms,
- Examine subject matter and conduct site visits, or
- Update the knowledge of the tribunal or judge.

The idea behind the appointment of an expert is to assist the court or tribunal to come to an accurate understanding of complex issues and, thus, ensure a fair outcome after its deliberations. This should take into account due process, natural justice, and public policy to ensure that parties cannot challenge the tribunal's ultimate award on these grounds. The use of experts should provide clarity and reduce the chance of judges' or arbitrators' misunderstanding the complex issues of the case. In some situations, experts also have other functions outside of international arbitration.

For example, expert determination is sometimes confused with arbitration. The difference is that, in expert determination, the experts themselves make the decision.¹ Expert determination also has fewer rules of evidence, and the expert's decision is not enforceable like an arbitrator's award.² The decision by the expert takes the form of a contract which is binding on the parties and enforceable in the courts.³

Parties in the construction industry commonly use adjudicators to resolve disputes while a project is ongoing.⁴ For example, Hong Kong Airport used an engineering expert to resolve interim disputes to reduce delays in the project. The decisions were binding, pending final determination by arbitration, litigation, or agreement.

Parties may also use dispute review boards or panels of experts to prevent delay in their projects. For example, in the *Channel Tunnel* case, the parties had a "panel of experts" hear their disputes and produce an interim decision.⁵ The parties could then refer these decisions to international arbitration at a later date, and the arbitral tribunal could, in theory, reverse the decisions of the experts.⁶

Experts fall under three main headings in international commercial arbitration depending on how they become involved in the process. Either

* Ms. Fenton is a Member of the Chartered Institute of Arbitrators with a diploma in international commercial arbitration; she also holds a Bachelor of Arts with Honors in business and law from Nottingham Trent University and a Veterinary Nursing Certificate from the Royal College of Veterinary Surgeons. Ms. Fenton is a trainee solicitor in Oxford, United Kingdom. Ms. Fenton previously served as a paralegal in the Litigation and Arbitration Division of Herbert Smith, LLP and in the International Arbitration Group of Clifford Chance, LLP. The author acknowledges Ben Hancock, Norah Gallagher, and Hew Dundas for their support in writing this article.

1. See JOHN KENDALL, *DISPUTE RESOLUTION: EXPERT DETERMINATION 1* (2d ed. 1992).

2. See *id.* at 2, 134.

3. See *id.* at 136-37.

4. See Alan Redfern, *Experts and Arbitrators – An International Perspective*, 4 INT'L ARB. L. REV. 105, 108 (2001).

5. *Channel Tunnel Group Ltd. v. Balfour Beatty Constr. Ltd.*, (1993) A.C. 334 (H.L.) (Eng.).

6. See Redfern, *supra* note 4, at 108.

the parties or a tribunal or a member of the tribunal may appoint an expert for their specialized knowledge or expertise.⁷

Party-appointed Experts

Party-appointed experts are normally expert witnesses who produce a report with their opinions. The tribunal may rely on the reports, and the parties may cross-examine the experts at the hearing.⁸ Article 30 of the Netherlands Arbitration Institute Rules (NAI) provides that parties are free to submit the opinion of an expert; and if agreed, the parties can call the expert to appear at the hearing to give further explanations.⁹ Interestingly, the NAI rules are one of the few sets of rules which provide for both party-appointed¹⁰ and tribunal-appointed¹¹ experts.

The concept of party-appointed experts is commonly used in common law countries and is different from civil law traditions. In civil law countries, it is more common for the lawyers of the parties to ask the tribunal to appoint an independent expert; and many arbitration laws and rules expressly state this.¹² Party-appointed experts often have differing expert opinions, and the tribunal then has to decide which to give more weight to. It is thought that, if the tribunal appoints an expert, the expert may give a truer reflection of the situation without undue influence from either party.¹³

In England, under part 35 of the Civil Procedure Rules 1998, the use of experts goes one step further.¹⁴ Experts from each of the parties may meet to prepare a joint report and highlight points they agree on and issues which they do not.¹⁵ The court may also question key experts at the same time in a process similar to witness conferencing.¹⁶

7. See *infra* notes 9-37 and accompanying text.

8. See Michael E. Schneider, *Technical Experts in International Arbitration, Introductory Comments to the Materials from Arbitration Practice*, 11 SWISS ARB. ASS'N BULL. 446, 448 (1993).

9. See NETHERLANDS ARB. INST. RULES art. 30 (1998) (Party-Appointed).

10. See *id.*

11. See *id.* at art. 31 (Tribunal-Appointed).

12. See, e.g., German Arbitration Law of 1998, Jan. 1, 1998 BGBl. I at bk. 10, § 1049 (“[T]he arbitral tribunal may appoint one or more experts.”).

13. See, e.g., INT’L BAR ASS’N RULES ON TAKING OF EVIDENCE IN COMMERCIAL ARBITRATION art. 6 (1999), available at http://www.ibanet.org/images/downloads/IBA_RULES.pdf (explaining that experts under the article are required to state their independence from parties) [hereinafter IBA].

14. See Civil Procedure Rules, 1998, c. 35, § 35.0.1 (Eng.).

15. See *id.*

16. See *id.*

Before January 1, 2004, the International Arbitration Rules of Zurich Chamber of Commerce contained an opposite rule. This rule stated, “[t]he parties and persons who have been appointed as experts by the tribunal, or who have been proposed as such, may not communicate directly with each other.”¹⁷ The new uniform Swiss Rules of Arbitration,¹⁸ which are based on the UNCITRAL Arbitration Rules, provide for tribunal-appointed experts. The rule allows the tribunal, after it has consulted with the parties, to appoint one or more experts to report on issues determined by the tribunal.¹⁹ The rules are silent on the point of communication between experts.

Article 5 of the International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration expressly provides for party-appointed experts and gives a detailed summary of what should be contained within the expert’s report.²⁰ When drafting these rules, the IBA tried to compromise between the common and civil law traditions.²¹

Tribunal-appointed Experts

As mentioned above, arbitration rules and laws commonly provide for tribunal-appointed experts. For example, UNCITRAL Model Law article 26 states that, unless the parties agree otherwise, the tribunal may appoint one or more experts.²² Often, this approach is preferred in civil law countries, such as Belgium.²³

The tribunal needs to look at the laws and rules applicable to arbitration to decide who can act as their expert. In general, the tribunal can appoint any suitably qualified person to act; although in Spain, the expert must have an academic degree in certain situations.²⁴ In China, individuals or institutions can be experts, as provided for under the CIETAC rules which

17. INT’L ARBITRATION RULES OF ZURICH CHAMBER OF COMMERCE art. 41 (1989), available at <http://www.jurisint.org/doc/html/reg/en/2000/2000jiregen32.html>.

18. See SWISS RULES OF INT’L ARBITRATION art. 27 (2004) (“Tribunal-Appointed Experts”), available at http://www.swissarbitration.ch/pdf/SRIA_english.pdf.

19. See *id.*

20. See IBA, *supra* note 13, at art. 5. Article 6 relates to tribunal-appointed experts. *Id.* at art. 6. See also JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL ARBITRATION* 577-78 (2003).

21. See David W. Shenton, *Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 188, 190-91 (Julian D.M. Lew ed., 1986).

22. See UNCITRAL MODEL LAW ON INT’L COMMERCIAL ARBITRATION art. 26, Annex I, U.N. Doc. A/40/17 (1985), available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf> [hereinafter UNCITRAL].

23. See BELGIUM JUDICIAL CODE art. 1696 bis (3) (1998), available at <http://www.jus.uio.no/lm/belgium.code.judicature.1998/doc#18>.

24. See Claude Reymond, *Conclusions*, in *TAKING OF EVIDENCE IN INTERNATIONAL ARBITRAL PROCEEDINGS* 152 (ICC Inst. of Int’l Bus. Law & Practice, Dossier No. 440/8, 1989).

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state that “[s]uch an expert or appraiser may be either a Chinese or foreign organization or citizen.”²⁵ Interestingly, a Swiss attorney can only be an expert if a question of foreign law arises.

Article 26 of the UNCITRAL Arbitration Rules²⁶ allows the parties, by agreement, to not empower the tribunal to appoint an expert of their own.²⁷ This is interesting because the parties may, in fact, put their case at a disadvantage, and the arbitrators may take longer to come to a decision without understanding all the facts. However, if an expert is appointed, article 26(2) states that “if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him.”²⁸

It should be noted that, at the request of the parties, the tribunal does not have to appoint an expert. *Air Intergulf v. SECA* held that, where a tribunal has enough information to make a decision, its refusal to order an expert investigation does not contravene the rights of the defense.²⁹ According to Swiss law, a court can only set aside a tribunal award in very limited circumstances if the tribunal has failed to appoint an expert.³⁰

Experts as Members of the Tribunal

Where the parties or an appointing authority have so appointed, an expert may be a member of the tribunal. This is commonly seen in engineering disputes where it is advantageous to the parties to have an expert on the tribunal. The arbitrator with specialist knowledge can advise on the weight of evidence, ensure the tribunal’s award is soundly based as far as technical issues go, and possibly shorten the proceedings. In turn, the arbitrator is under a duty to impart his knowledge to the other arbitrators.³¹

25. CHINA INT’L ECON. AND TRADE ARBITRATION COMM’N (CIETAC) ARBITRATION RULES art. 39 (2000), available at http://www.cietac.org.cn/english/rules/rules_3.htm [hereinafter CIETAC].

26. See UNCITRAL, *supra* note 22, at art. 26.

27. See PIETER SANDERS, *QUO VADIS ARBITRATION? SIXTY YEARS OF ARBITRATION PRACTICE, A COMPARATIVE STUDY* 265 (1999).

28. UNCITRAL, *supra* note 22, at art. 26(2).

29. *Air Intergulf v. SECA*, Paris Ct. App. (1980) (unreported).

30. See PHILIPPE FOUCARD, FOUCARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (Emmanuel Gaillard & John Savage eds., 1999).

31. See Shenton, *supra* note 21, at 192.

Arbitrators can only use knowledge if they have given the parties an opportunity to put their case on the matter.³²

Where each party has appointed a non-legal expert, the tribunal is commonly balanced with a legal chairman. Problems may arise where each party is worried about whether they should appoint a specialist or a QC³³ and whether the tribunal will have the required knowledge or be unbalanced.

When an expert sits on the tribunal, they must act within their mandate. In *Fox v. P. G. Wellfair*, the arbitrator relied on his own knowledge and came to a conflicting conclusion from that of the respondent's expert (the only expert who produced evidence at the hearing).³⁴ The award was set aside for "serious irregularity," because the arbitrator had failed to observe rules of natural justice.³⁵ This highlights the fine line between the role of arbitrator and expert, and the effect of failure to comply with article V of the 1958 New York Convention.³⁶

Since 1996, it has been very difficult to have an award set aside for serious irregularity under section 68 of the English Arbitration Act of 1996.³⁷ In *Checkpoint Limited v. Strathclyde Pension Fund*, the applicant alleged that the arbitrator had drawn on his own knowledge without asking the parties for their comments.³⁸ The court held that the applicant could show no irregularity that would cause him to suffer "substantial injustice."³⁹ In this case, the arbitrator was expected to use his knowledge to a certain extent as provided for in the arbitration agreement.⁴⁰ On this occasion, no substantial injustice and no serious irregularity existed under section 68 of the English Arbitration Act.⁴¹

However experts are appointed, they should act with the utmost integrity and professionalism. Organizations, such as The Academy of Experts and

32. See *Fox v. P.G. Wellfair*, [1981] 2 Lloyd's Rep. 514 (Ch.) (Eng.) (in liquidation).

33. A QC is "[a] senior barrister of at least ten years' practice who has received a patent as 'one of Her Majesty's counsel learned in the law.' QCs are appointed on the recommendation of the Lord Chancellor." *Queen's Counsel (QC)*, in OXFORD DICTIONARY OF LAW 402 (Elizabeth A. Martin ed., 5th ed. 2002).

34. See *Fox*, [1981] 2 Lloyd's Rep. 514.

35. KENDALL, *supra* note 1, at 205.

36. See NEW YORK CONVENTION ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS art. V (1958), available at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

37. See Arbitration Act, 1996, c.23, § 68 (Eng.).

38. See *Checkpoint Ltd. v. Strathclyde Pension Fund*, [2003] E.W.C.A. Civ. 84 (C.A. 2003) (Eng.).

39. See *id.* at 58.

40. See *id.* at 17, 31.

41. See *id.* at 60; Arbitration Act, 1996, c.23, § 68 (Eng.).

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Expert Witness Institute, have gone so far as to have a code of practice for their members to follow.⁴²

HOW DO PARTIES AND TRIBUNALS USE EXPERTS IN INTERNATIONAL COMMERCIAL ARBITRATION?

Some helpful international case law exists that provides a useful guide on how parties and tribunals can and should use experts in international arbitration.

The court in *Corfu Channel (U.K. v. Alb.)*, for example, discussed the function of the independent expert.⁴³ According to the court, the arbitral tribunal should rely on the expert to try to obtain “technical information that might guide it in the search for the truth.”⁴⁴

Judge Cresswell, in the *Ikarian Reefer* case, set out the duties and responsibilities that an expert witness owed to the court.⁴⁵ It is thought that these apply equally to arbitrations.⁴⁶ The expert is primarily obligated to provide independent expert evidence and not to the party employing him. This is seen as a general principle of international arbitration, although no written authorities acknowledge it.

The decision in *Sutcliffe v. Thackrah* made experts “liable in contract and tort for professional negligence.”⁴⁷ It must therefore be clear whether an expert is acting as an “expert” or an “arbitrator,” because arbitrators enjoy a certain amount of immunity in some countries, like the United Kingdom, under section 29 of the English Arbitration Act of 1996,⁴⁸ and the United States.

Experts do not bind arbitrators. For example, in *Starrett Housing Corp. v. Iran*, the court held,

42. See *Code of Practice for Experts*, The Academy of Experts, <http://www.academy-experts.org/cprac.htm> (last visited Nov. 11, 2005); *The Code of Practice for Experts*, Expert Witness Institute, <http://www.ewi.org.uk/practice.asp> (last visited Nov. 11, 2005).

43. See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 20 (Apr. 9).

44. Schneider, *supra* note 8, at 449.

45. See *Nat'l Justice Compania Naviera S.A. v. Prudential Assurance Co. (The Ikarian Reefer)*, [1995] 1 Lloyd's Rep. 455 (Q.B) (Eng.).

46. See RONALD BERNSTEIN ET AL., *BERNSTEIN'S HANDBOOK OF ARBITRATION AND DISPUTE RESOLUTION PRACTICE* 331 (4th ed. 2003).

47. *Sutcliffe v. Thackrah*, (1974) App. Cass. 727 (H.L. 1974) (appeal taken from Eng.).

48. See Arbitration Act, 1996, c.23, § 29 (Eng.).

no matter how well qualified an expert may be, however, it is fundamental that an arbitral tribunal cannot delegate to him the duty of deciding the case. Rather, the expert's report is simply one element to be considered and weighed by the tribunal along with all the other circumstances of the case.⁴⁹

In *Brandeis Brokers Limited v. Black*, the court upheld an award that an applicant challenged on the grounds of serious irregularity under section 68 of the English Arbitration Act 1996.⁵⁰ The applicant claimed that the expert was not qualified and that the arbitrator relied too much on the expert's evidence.⁵¹ The court held that a claimant would need to establish that the arbitrator had delegated their decision making power to the expert.⁵² Justice Toulson went on to quote Justice Tuckey in the case of *Egmatra AG v. Marco Trading Corporation*.⁵³ Justice Tuckey had quoted from the DAC (Development Assistant Committee) Report at paragraph 280 to say that section 68 is "only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration [and] justice calls out for it to be corrected."⁵⁴

This view is also reflected in international arbitration rules. For example, in the China International Economic and Trade Arbitration Commission Arbitration Rules (CIETAC), article 41 states, "[t]he evidence submitted by the parties will be examined and evaluated by the arbitration tribunal. The arbitration tribunal shall decide whether to adopt the expert's report and the appraiser's report."⁵⁵

Parties and tribunals in international arbitration may use experts in many ways, such as preparing valuations in commodities, reporting on effects of defects, calculating money lost by a business, conducting forensic accounting, and answering technical points in engineering or construction project disputes.

An emerging practice in international arbitration is using experts in investment arbitration. It is usual for each party to have an accountant prepare the report on damage or loss that it will submit to the tribunal.⁵⁶

49. *Starrett Housing Corp. v. Iran*, 4 Iran-U.S. Cl. Trib. Rep. 122, 197 (1983).

50. *See Brandeis Brokers Ltd. v. Black*, [2001] 2 Lloyd's Rep 359, 359, 372 (Q.B.) (Eng.); Arbitration Act, 1996, c.23, § 68(1) (Eng.) ("A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.").

51. *See Brandeis Brokers Ltd.*, [2001] 2 Lloyd's Rep 359, 359.

52. *See id.* at 360.

53. *See id.* at 370-71.

54. *Id.*; *Egmatra AG v. Marco Trading Corp.*, [1999] 1 Lloyd's Rep 862, 865 (Q.B.) (Eng.).

55. CIETAC, *supra* note 25, at art. 41.

56. *See* INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES (ICSID), ARBITRATION R. 28(2) (2005), available at <http://www.worldbank.org/icsid/basicdoc/partF-chap03.htm#r19>.

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ICSID Conciliation Rule 28 allows parties to request that the commission (tribunal) hear a witness or expert at any stage of the proceedings, although the tribunal will fix a time limit on these hearings.⁵⁷ Parties, as a rule, examine experts under the control of the president (chairman). ICSID Conciliation Rule 28 allows for written depositions by agreement of the parties if the expert is unable to attend a hearing before the commission.⁵⁸

Article 21.1 of the London Court of International Arbitration (LCIA) Rules provides that, unless the parties agree otherwise, the tribunal may appoint experts, and the experts may conduct site inspections.⁵⁹ This is very relevant in construction disputes where, for example, a sub-contractor's defective work has caused damage or loss. In the Netherlands Arbitration Rules, article 32 expressly states the tribunal may order site inspections, and the tribunal must give the parties the opportunity to attend.⁶⁰

Arbitrators may also need an expert "to explain technical and scientific issues which arbitrators may not understand without assistance."⁶¹ This also applies to complex questions of law. The arbitral tribunal may not be familiar with the applicable law, especially if the members are not lawyers. For example, eminent professors of law may be engaged as experts to give legal opinions.

Where an expert has advised the tribunal, the parties should be made aware, so they can make comments.⁶² However, this may be limited. In the matter of *Luzon Hydro Corp. v. Transfield Philippines Inc.*, the applicant claimed a breach of natural justice, because the tribunal allowed the expert to spend a considerable amount of time reviewing documents and the relevance of evidence.⁶³ The Singapore High Courts came to the conclusion that "unless there was strong and unambiguous evidence of irregularity in the way in which the arbitration was conducted, the integrity of the arbitral tribunal should not be questioned."⁶⁴

57. See INT'L CENTRE FOR SETTLEMENT OF INV. DISPUTES (ICSID), CONCILIATION R. 28 (2005), available at <http://www.worldbank.org/icsid/basicdoc/partE-chap04.htm#r28>.

58. See *id.*

59. See London Court of Int'l Arbitration (LCIA), Arbitration Rules art. 21.1 (1998).

60. See Neth. Arbitration Inst (NAI) Arbitration Rules art. 32 (1998).

61. D. MARK CATO & IAN MENZIES, ARBITRATION PRACTICES AND PROCEDURE – INTERLOCUTORY AND HEARING PROBLEMS 251 (1992).

62. See W. MICHAEL REISMAN ET. AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF BUSINESS DISPUTES (1997).

63. See *Luzon Hydro Corp. v. Transfield Philippines Inc.*, [2004] 4 Sing. L.R. 705.

64. *Id.* at 712.

The American Arbitration Association Rules (AAA) rule 22(3)⁶⁵ not only allows the parties to comment on reports of the expert but also gives the parties the opportunity to question the expert at the hearing (rule 22(4)).⁶⁶ Rule 20(4) of the ICC rules also provides for this.⁶⁷ This is a fairer process, and it gives the arbitrator a better chance to understand all of the facts. The World Intellectual Property Organization (WIPO) has also taken a similar position in articles 55(b)⁶⁸ and 55(c)⁶⁹ of its rules. In the Stockholm Chamber of Commerce (SCC) Arbitration Rules, article 27(2) allows the parties to put questions to the tribunal-appointed expert.⁷⁰

However, CIETAC article 40 is slightly more limited in its approach.⁷¹ The expert may be required to attend the hearing; but no express provision states that the tribunal or parties can question the experts, although they can give explanations of their reports.⁷²

Federal arbitration law and state arbitration statutes in the United States are all silent on the subject of expert opinions, and tribunals do not commonly appoint experts.⁷³ This follows the common law approach.⁷⁴ Swiss federal law is also silent on this point.⁷⁵

ARE COMMON LAW AND CIVIL LAW TRADITIONS BLURRED OR BLENDED?

Some countries expressly state whether they follow civil or common law traditions. For example, Brazilian law states in article 21(2),⁷⁶ “[t]he

65. See AM. ARBITRATION ASS'N., INT'L DISPUTE RESOLUTION RULES art. 22(3) (2005).

66. See *id.* at art. 22(4).

67. INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 20(4) (1998), available at http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf.

68. WIPO Arbitration Rules, art. 55(b) (2002).

69. *Id.* at art. 55(c) (“At the request of a party, the parties shall be given the opportunity to question the expert at a hearing. At this hearing, the parties may present expert witnesses to testify on the points at issue.”).

70. See RULES OF ARBITRATION, INSTITUTE OF STOCKHOLM CHAMBER OF COMMERCE (1999), art. 27(2), available at http://www.sccinstitute.com/_upload/shared_files/regler/web_A4_vanliga_2004_eng.pdf (“At the request of a party, the parties shall be given the opportunity to put questions to any such expert.”).

71. See CIETAC, *supra* note 25, at art. 40.

72. See *id.* Although Article 40 does provide the parties “an opportunity to comment on the report,” the expert is not questioned. *Id.*

73. See SANDERS, *supra* note 27, at 267.

74. See *id.* at 226; see also Federal Arbitration Act of 1925, 9 U.S.C. §§ 1-14 (1990), available at http://www.chamber.se/arbitration/shared_files/laws/arbitract_us_part1.html.

75. See SWITZERLAND'S FED. CODE ON PRIVATE INT'L LAW (CPIL) art. 27 (Umbricht Attorneys, Zurich, Switzerland 2004), <http://www.umbricht.ch/pdf/SwissPIL.pdf>.

76. Brazil Law, LAW NO 9.307, art. 21(2) (1996) available at <http://www.jus.uio.no/lm/brazil.arbitration.law.no.9.307.1996/21>.

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principles of adversarial proceedings . . . shall always be respected"; and Austrian Law article 587(1)⁷⁷ makes reference to an inquisitorial approach. The table below summarizes a few common and civil law traditions.

Common law	Civil law
The procedure is adversarial.	The procedure is inquisitorial.
The tribunal does little investigation.	The tribunal has wide powers of investigation.
Lawyers examine the witnesses.	The arbitrator examines witnesses; parties only suggest questions. ⁷⁸
Lawyers prefer to ask the tribunal to hear technical issues from experts of each party. Court-ordered experts are less common. ⁷⁹	Lawyers ask the tribunal to appoint independent experts.
The expert presents his legal opinion orally with questioning.	Legal opinion is normally in writing.
The parties have strictly equal access to the same documents from the start. The tribunal hears the case after the parties have produced their documents.	The tribunal opens the case before the parties make a substantial exchange of documents.
Discovery process occurs without court interference.	Parties submit documents to the tribunal in proof of their claim.
Parties may appoint an expert.	The court balances what special or technical knowledge it needs to settle the dispute. Under Swiss law, the tribunal must have an "objective need" for special knowledge to appoint an expert. ⁸⁰
Experts have narrow mandates.	Experts have wide mandates. ⁸¹

77. Art. 587 (1) ch. 4 ZPO (Austrian Arbitration Law 1983), available at <http://www.jus.uio.no/Im/Austria.code.of.civil.procedure.fourth.chapter.as.modified.1983/587>.

78. See FOUCHARD, *supra* note 30, at 690.

79. See T. Bernard, *Administration of Evidence in Countries of Civil Law*, in EVIDENCE IN INTERNATIONAL ARBITRATION PROCEEDINGS 21, 26 (1994).

80. See Lambert Matray, *Main Features of the Production of Evidence in Certain Roman Procedural Laws*, in TAKING OF EVIDENCE IN INTERNATIONAL ARBITRAL PROCEEDINGS 143, 150 (1990).

81. See Schneider, *supra* note 8, at 449-51.

Traditionally, civil lawyers have had problems understanding how an expert that one party pays can be impartial.⁸² When two experts exist, the issue becomes how a tribunal decides which expert is correct. This is why tribunal-appointed experts are more common in civil law countries.

Evidence suggests that the common and civil law traditions in international arbitration are converging. Indeed the IBA Rules for the Taking of Evidence⁸³ have tried to close the gap between the two systems.

The concept of “witness conferencing” was first put forward by Wolfgang Peter.⁸⁴ Article 8.2 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration 1999⁸⁵ allows for such a process where the tribunal examines experts and witnesses at the same time with one set of questions. Questioning can be precise and effective. It can also quickly ascertain relevant points of contention.

Although this approach would not be suitable for all types of arbitration, it can save time and lead to early settlement, if the arbitrators have in-depth knowledge of the file. This process also reduces the lengthy submissions and bundles that reflect a civil law approach. Counsel from common law jurisdictions may be less in favor of the process, because they have less control over the conduct of their witnesses. Witness would also be well-advised to draft their own statements instead of having counsel draft them.⁸⁶

The opinion of The Institute of International Business Law and Practice is that the traditions are blurred, for the following reasons:

- Case law favoring stricter rules on production of evidence,
- An increased number of experts in civil law countries, and
- Discovery limitations in common law countries.⁸⁷

Civil lawyers are more aware of compulsory disclosure, but they use it in a more limited way. In the written stage of international arbitration, civil law holds strong influence; but at the oral stage, tribunals and parties favor the more adversarial common law approach.

Article 20(3) of the International Chamber of Commerce Rules of Arbitration makes no reference to tribunal-appointed experts; however, it does make reference to party-appointed experts.⁸⁸ This shows a narrowing

82. Redfern, *supra* note 4, at 108.

83. See IBA, *supra* note 13.

84. See Wolfgang Peter, *Witness Conferencing*, 18 *ARB. INT’L* 47 (2002).

85. See IBA, *supra* note 13, at art. 8.2.

86. See Peter, *supra* note 84, at 51.

87. See Reymond, *supra* note 24.

88. See INT’L CHAMBER OF COMMERCE, RULES OF ARBITRATION art. 20(3) (1998), available at http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf.

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of the gap between common and civil law practices, if not a shift towards the common law approach.

Tribunals can use both common and civil law systems, because the parties or arbitrators can choose rules which are best suited to their case. When drafting arbitration agreements, the parties should be aware that lawyers and arbitrators tend to follow their own country's practices in regard to procedure. These practices may be something very different from the parties' jurisdictions of origin. The chairman of the tribunal will decide the procedure. In principle, the tribunal will have due regard to the applicable law and the parties' wishes and expectations.

SHOULD THERE BE SPECIFIC PRACTICES FOR INTERNATIONAL ARBITRATION?

Pros and cons exist for specific practices for international arbitration. In 1983, the International Bar Association drafted the Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration, which it revised in 1999.⁸⁹ The IBA hoped to pre-determine procedure in considerable detail and achieve harmonization between common law and civil law traditions.⁹⁰

Reasons against specific practices for international arbitration may be highlighted as follows:

- The time and cost of drafting specific practices may not be viable.⁹¹
- Every dispute is different. Disputes will involve different subject matter and evidence, and they may require site visits or specialist investigation to which a specific practice does not apply.⁹²
- Processes that become too rigid may cause lawyers to start attacking the practices, causing increased costs and delay to cases. In the alternative, flexible practices will allow party autonomy to prevail.⁹³

89. See David W. Rivkin, *Foreword to IBA*, *supra* note 13.

90. See Gino Lorcher, *Improving Procedures for Oral and Written Witness Testimony*, in *PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION* 145, 147 (Albert Jan Van Den Berg ed., 1996).

91. See Arthur L. Marriott, *Pros and Cons of More Detailed Arbitration Laws and Rules*, in *PLANNING EFFICIENT ARBITRATION PROCEEDINGS*, *supra* note 90, at 65, 70-71.

92. See Schneider, *supra* note 8, at 446.

93. See Marriott, *supra* note 91, at 70-71.

- Arbitration is based on party autonomy, subject to mandatory rules. Parties can draft their arbitration agreements to reflect both common law and civil law approaches, thus taking the good points from each system to best suit their case.⁹⁴
- If the parties want a rigid system, they should go to court, where they will find inflexible rules on procedure, rather than arbitration.⁹⁵
- Parties and tribunals have not used previous attempts to harmonize international practices, such as the IBA Rules on the Taking of Evidence in International Arbitration.⁹⁶

In contrast, reasons for specific practices include the following:

- Consistency may save time as lawyers become more familiar with procedures and are able to better advise their clients.⁹⁷
- Experts may become experts at being experts. They may become more familiar with procedure and better able to perfect their submissions.⁹⁸

CONCLUSION

Experts have a wide-ranging, important role not only in arbitration but also in other ADR processes such as expert determination.⁹⁹ In international arbitration, experts may sit on the tribunal, and either the tribunal or the parties may appoint them.¹⁰⁰ Arbitration rules and laws are generally flexible, and party autonomy is paramount in international arbitration.¹⁰¹ Experts can become involved in all areas, although a few laws limit what an expert can do. As arbitration and litigation evolves, organizations, such as the Academy of Experts, are producing codes of conduct for their members.¹⁰² This provides credibility and encourages professionalism.

94. See *id.* at 69; see also John Fellas et al., *Selected Materials in International Litigations and Arbitration*, in INTERNATIONAL BUSINESS LITIGATION & ARBITRATION 2003, 1243 (PLI Litig. & Admin. Practice, Course Handbook Series No. 704, 2003).

95. See Marriott, *supra* note 91, at 69.

96. See Fellas, *supra* note 94, at 1243.

97. See Marriott, *supra* note 91, at 65-66.

98. See *id.*

99. See *supra* notes 1-5 and accompanying text.

100. See *supra* notes 7-29 and accompanying text.

101. See *supra* notes 11-14.

102. See *supra* note 42 and accompanying text.

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Case law has shown increasing importance in the use of independent experts.¹⁰³

Common and civil law approaches to the use of experts in international commercial arbitration vary from country to country.¹⁰⁴ For example, the use of experts in the United States is widely different from that of France. This article highlights the differences and similarities between the civil and common law traditions to support the conclusion that the systems are blurred rather than blended.¹⁰⁵

Distinct differences remain between the two systems. Due to the nature of international arbitration, some parties currently have the advantage of being able to use both common and civil law traditions to best suit their needs and expectations. The drafters of arbitration rules and laws have recognized and implemented this, thus upholding the principle of party autonomy.¹⁰⁶

For the reasons concluded above, any strict introduction of specific practices for international arbitration may have a detrimental effect. Time and money spent drafting such rigid practices will not be of benefit due to the nature of international arbitration. The International Bar Association has already put in place useful guidelines, which, in themselves, have shown a narrowing of the common and civil law divide.¹⁰⁷ So, in fact, a civil matter for a common expert could be a common matter for a civil expert.

103. *See supra* notes 43-64 and accompanying text.

104. *See supra* notes 59-79 and accompanying text.

105. *See id.*

106. *See supra* note 89-94 and accompanying text.

107. *See id.*

