

**Assumptions regarding
Common Law versus Civil Law in the Practice
of International Commercial Arbitration***

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At the beginning permit the personal remark that it was a particular pleasure to open this first joint conference of these two arbitration institutions in which I presently hold office, as the Chairman of the DIS and as the Patron of the CI Arb. Both institutions differ considerably in the scope of their work and in their membership. But they have in common the purpose of promoting commercial arbitration and providing meetings and educational opportunities for the exchange of information on the law and practice of arbitration at the domestic and international level.

It would therefore seem as an appropriate effort that both institutions joined in Frankfurt to deal with a **topic** which is of continuing interest to both and very relevant for the practice of arbitration: To what extent is there a Divide or a Convergence between the approaches to arbitration by Common Law jurisdictions versus Civil Law jurisdictions?

Since, after my oral introduction in Frankfurt and hereafter in this volume of the SchiedsVZ, eminent colleagues are addressing specific aspects of this very topic in more detail carving out the basics and differences of the two systems with regard to the main stages of the arbitral procedure, I can be very short here. Hereafter I submit some very short suggested assumptions which were intended to stimulate the discussion at the Frankfurt conference and, having heard that discussion, seem still topical in view of that discussion.

First, for domestic arbitration, I suggest that divide still is rather relevant in practice. Parties and tribunals will mostly tend to apply their traditional procedure in such domestic arbitrations, though in recent years I find that the

procedure used by the domestic courts will not be applied as such, but is varied to some extent in order to achieve what the parties or the tribunal consider a more efficient evidence procedure for the particular arbitration at hand.

A particular feature of the German tradition should be mentioned in this context, namely what we have all learned as **Relationstechnik**. This can indeed be a method avoiding unnecessary work and unnecessary examination of evidence and thus limiting and speeding up the procedure. It seems still to be very helpful and applied in domestic German arbitrations. However, as soon as non-German parties, counsel or arbitrators are involved, it seems more difficult to maintain. These often feel that this method puts them at a disadvantage and provides for a pre-judgement of the issues at too early a stage when not all aspects of the case are clear.

Second, in international arbitration cases I see more and more that parties and their counsel as well as the tribunal agree and apply a mixture of the evidence procedures of the Common Law and of the Civil Law traditions. I would thus submit that the differences between the arbitral procedures in the Common Law and the Civil Law traditions are less relevant in today's international arbitration practice.

Third, a major contribution of the Civil Law would seem to me the wide use of the **written procedure**. This is in particular so, because in view of the difficulty to have many and long hearings at dates convenient to all concerned, one must rely more on the written procedure. This results in requesting an exchange of full written pleadings, often in at least two rounds, in preparation of the oral hearing.

Fourth, in this context, a major feature not coming from the Civil Law would seem to be the wide use of **written statements of witnesses and of experts**, that have to be submitted well before the hearing in order to be able to limit the time needed for their examination at the oral hearing.

Fifth, however, if one does use written statements of witnesses and experts, which are mostly drafted with the help of counsel of the parties, one does need the indispensable possibility to test and verify the written witness and expert statements by the Common Law method of **oral cross and re-direct examination, supplemented by questioning by the arbitral tribunal**.

Sixth, at least regarding **legal experts** whose opinions have been submitted before the hearing, the method of **expert conferencing** is used more and more frequently.

Seventh, the busy schedules of all participants in modern international arbitrations require an agreement on **limited periods for the oral hearing** at a very early stage of the procedure. In this context, without any missionary feeling, I notice that the **chess clock method** I first introduced at the Iran-United States Claims Tribunal at The Hague, is now common practice in most

international commercial arbitration hearings as the preferred method to give equal time periods for the parties and still give the widest possible party autonomy to decide on which issues the parties wish to use their time at the hearing.

Finally eight, in view of the fast growing number of international **investment arbitrations**, it should be noted that on one hand these procedures follow mostly what is common practice in commercial arbitration, but on the other hand specific requirements and features have to be respected in view of the involvement of state parties as respondents and of the application of certain treaties of public International law such as the ICSID Convention, the Energy Charter Treaty, NAFTA or CAFTA.