MASTERARBEIT | MASTER'S THESIS

Titel | Title

The Role of Arbitrators in Bridging Common Law and Civil Law Procedural Practices in International Arbitration

verfasst von | submitted by

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angestrebter akademischer Grad | in partial fulfilment of the requirements for the degree of

Master of Laws (LLM)

Wien | Vienna, 2025

Studienkennzahl lt. Studienblatt | Degree programme code as it appears on the student record sheet:	UA 066 997
Studienrichtung lt. Studienblatt | Degree programme as it appears on the student record sheet:	Masterstudium Internationale Rechtswissenschaften
Betreut von | Supervisor:	Univ.-Prof. Mag. Dr. Christian Koller Privatdoz.

Abstract

Diese Arbeit untersucht die Rolle internationaler Schiedsrichter bei der Überbrückung prozessualer Unterschiede zwischen dem Common Law und dem Civil Law. Mit der zunehmenden Bedeutung der internationalen Schiedsgerichtsbarkeit als bevorzugtem Mechanismus zur Beilegung grenzüberschreitender Streitigkeiten treffen Parteien und Anwälte aus unterschiedlichen Rechtstraditionen aufeinander, was zu erheblichen Verfahrensdivergenzen führt. Die Arbeit analysiert zunächst zentrale Unterschiede – etwa bei Klageschriften, Beweisaufnahme, Zeugenvernehmung und Sachverständigenbeweis – und zeigt anschließend, wie sich eine hybride Schiedspraxis entwickelt hat, die Elemente beider Systeme verbindet. Durch Soft-Law-Instrumente wie die IBA- und Prag-Regeln sowie Innovationen wie den Redfern Schedule, das Kaplan Opening und Witness Conferencing gestalten Schiedsrichter Verfahren flexibel und zugleich fair. Sie fungieren dabei als „prozedurale Architekten" und kulturelle Übersetzer, die Effizienz, Fairness und Legitimität in Einklang bringen. Die Arbeit schließt mit dem Befund, dass die Legitimität der internationalen Schiedsgerichtsbarkeit von ihrer Anpassungsfähigkeit und dem Respekt vor rechtlicher Vielfalt abhängt und sich allmählich eine eigenständige transnationale Verfahrenskultur herausbildet.

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I. Executive Summary

This thesis examines the role of international arbitrators in bridging procedural differences between common law and civil law traditions. The rise of international arbitration as the leading mechanism for resolving cross-border disputes has brought together parties, counsel, and arbitrators from diverse legal backgrounds. This convergence inevitably generates procedural tensions, particularly in areas such as pleadings, oral advocacy, discovery, witness examination, and the use of expert evidence. The central research question of this thesis is how arbitrators reconcile these divergent expectations and what this process reveals about the evolving procedural culture of international arbitration.

The study begins by identifying the main procedural differences between common law and civil law traditions. Common law procedures, rooted in adversarial models, emphasise oral advocacy, broad discovery, and party-appointed experts. Civil law procedures, shaped by inquisitorial traditions, rely more heavily on written submissions, limited document production, and tribunal-appointed experts. While these differences are often overstated, they remain significant when parties from contrasting legal traditions meet in arbitration.

The analysis then turns to how arbitrators bridge these differences. Over time, a hybrid arbitral practice has developed, combining elements of both traditions into flexible procedures tailored to each dispute. This process has been supported by the rise of soft law instruments, such as the IBA Rules and the Prague Rules, which provide non-binding yet influential guidance. Procedural innovations developed by leading practitioners, including the Redfern Schedule, Kaplan Opening, and witness conferencing, further illustrate how arbitrators actively shape arbitral procedure. Ultimately, arbitrators are not passive managers but procedural architects who balance efficiency, fairness, and cultural legitimacy. The thesis also considers the broader implications of this convergence. International arbitration functions as "comparative law in action," offering a laboratory space, where legal traditions can interact and evolve. Arbitral innovations have even influenced domestic litigation reforms, while courts such as the Singapore International Commercial Court borrow procedural techniques from arbitration. At the same time, technological developments and the rise of hybrid hearings highlight the risks of over-standardisation, which could undermine arbitration's core strength: its procedural flexibility.

The concluding argument is that arbitration's legitimacy depends on its ability to preserve both adaptability and respect for cultural diversity. Arbitrators must act as cultural translators, ensuring that procedural convergence does not become homogenisation. By exercising discretion with creativity and responsibility, arbitrators do more than resolve disputes. They shape international arbitration into a distinct, transnational form of justice that integrates diverse legal traditions into a flexible and effective dispute resolution process.

II. Introduction

International (commercial)[1] arbitration – which may be best understood as a process by which parties consensually submit a (not purely domestic) dispute to a non-governmental decision-maker, who renders a binding decision finally resolving that dispute[2] – has become increasingly popular in recent decades[3] and has firmly established itself as the preferred method to resolve cross-border disputes.[4] Its realm is characterised by a great (and constantly expanding) variety of different rules and laws.[5] Consequently, the parties and arbitrators involved in an international arbitration may face a vast number of complex (procedural as well as substantive) questions as to what laws and rules to choose and how to apply them to the resolution of the underlying dispute.

This short thesis cannot and does not aspire to answer all of these questions. Notably, this paper will not deal with the following choices (including how these choices might be influenced by the arbitrators' and parties' common law or civil law backgrounds): choosing arbitration or state court litigation; choosing an arbitral seat and a lex arbitri; choosing applicable conflicts of law rules; choosing the law governing the underlying contract; choosing the law governing the

[1] Although this paper is primarily concerned with the field of international commercial arbitration, some of its observations may also be relevant in the context of investment arbitrations. [References follow the McGill Guide.]
[2] Gary B. Born, *International Arbitration: Law and Practice*, 3d ed (Kluwer Law International, 2021) at 2, 7.
[3] Gary B. Born, *International Commercial Arbitration*, 3d ed (Kluwer Law International, 2021) at 1.
[4] Claudia T. Salomon, "Introduction" in Shashank Garg, ed., *Arbitrator's Handbook* (LexisNexis, 2022) xxix at xxix; QMUL and White & Case, "2021 International Arbitration Survey: Adapting Arbitration to a Changing World" (2021) at 5, accessible via <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf>, last accessed 8 March 2025.
[5] Gary F. Bell, "Arbitration and Comparative Law" in C.L. Lim, ed., *The Cambridge Companion to International Arbitration* (CUP, 2021) 61 at 62-63; this was not always the case, see Julian D.M. Lew & Simona Valkova, "Chapter 1: Cultures and the Taking of Evidence" in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* (Kluwer Law International, 2024) 3 at 5 ("*International arbitration has not always been as universally accepted and relied on as in current times, nor was it as complex in structure and procedures. Businessmen in the same industry resolved their own disputes through the use of an independent third party, who understood the industry and environment. The principal users were merchants and traders, and the lawyers involved often had little or no understanding of the process as a neutral or independent system*.").

arbitration agreement; choosing institutional or ad hoc arbitration; choosing a set of arbitration rules; choosing the arbitrators; choosing where to contest jurisdiction; and choosing where to contest or enforce an arbitral award.[6] Rather, this paper will solely examine – within the overall legal framework determined by the aforementioned choices – the role of arbitrators in bridging common law and civil law procedural practices when conducting an international arbitration. In other words, how do international arbitrators reconcile procedural expectations shaped by divergent legal traditions, and what does this reveal about the (emerging) procedural culture of international arbitration?

To answer this highly relevant research question, this paper will present a comprehensive doctrinal and comparative legal analysis, supported by illustrative case studies. However, as international (commercial) arbitration prides itself on its high degree of confidentiality, only very few arbitral awards are published (in full). Given that I am not an experienced arbitration practitioner (yet), I naturally have only limited insight into what is actually happening in real arbitration cases.[7] Keeping this caveat in mind, the structure of my thesis will be as follows: First, this thesis will highlight the main procedural differences between common law and civil law traditions, outline how these traditions are bound to clash in international arbitration and examine what potential challenges such clashes may create (II.). Subsequently, I will look at how international arbitrators can overcome these challenges, and which tools and techniques they may apply in doing so (III.). Thereafter, this paper will examine potentially ensuing broader implications for the roles of arbitrators (IV.), before ultimately concluding that the role of international arbitrators as a procedural bridge is not merely practical but transformative, shaping the evolution of international arbitration into a hybrid, flexible and effective dispute resolution mechanism.

III. Procedural differences between common law and civil law traditions

As international arbitration is the preferred method of resolving cross-border disputes, it is not surprising that parties (and arbitrators) to arbitral proceedings often come from different

[6] For a brief overview of most of these questions see Bell, *Arbitration*, *supra* note 5 at 65-75.
[7] But even if I were a more experienced arbitration practitioner, this caveat would still apply (albeit to a lesser extent), see also Michael E. Schneider, "Chapter 25: The Uncertain Future of the Interactive Arbitrator: Proposals, Good Intentions and the Effect of Conflicting Views on the Role of the Arbitrator" in Stavros Brekoulakis, Julian D.M. Lew, et al., eds, *The Evolution and Future of International Arbitration* (Kluwer Law International, 2024) 379 at 385.

countries and legal traditions.[8] This paper will focus on the two most widespread legal traditions,[9] namely the common law tradition,[10] which is dominant in most English-speaking countries, and the civil law tradition,[11] which is dominant in continental Europe as well as the many countries around the world influenced by continental Europe, from parts of Asia (e.g., Japan, China) to most of Africa and all of Latin America.[12] However, not all national legal systems fall neatly within this distinction.[13] Some are classified as mixed systems of civil law and common law (e.g., South Africa, Cyprus, Louisiana within the US, the Philippines, Québec within Canada, Scotland within the UK); others combine civil law, common law, and customary law (e.g., Cameroon, Sri Lanka); and Israel is described as a blend of civil law, common law, Jewish law, and Muslim law.[14] As will be touched upon later, these hybrid legal systems may be able to act as microcosms for arbitration's procedural blend, thus warranting the special attention of arbitration practitioners.

Although the common law and civil law traditions share a number of similarities – most notably, both traditions are state positivist Western legal traditions, which spread over the world via European imperialism[15] – and are arguably not as different as often presented,[16] several key differences remain.[17] Of these differences, the one that is arguably most striking relates to the

[8] This paper will use the terms "legal tradition", "legal system", and "legal culture" interchangeably, even though for some authors these terms may embody different ideas; see for example the different understandings of John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 4th ed (SUP, 2019) at 1-2 and H. Patrick Glenn, *Legal Traditions of the World: Sustainable diversity in law*, 5th ed (OUP, 2014) at 13-16 regarding "legal traditions" and "legal systems"; for a definition of the term "legal culture" see Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 3-4 as well as Tom Ginsburg, "The Culture of Arbitration" (2003) 36 Vanderbilt Journal of Transnational Law 1335 at 1336-1337. While this approach may not be entirely without its critics, it demonstrates that this paper aims to prioritize practical relevance over (mainly) theoretical distinctions.
[9] This is by no means to say that there are no other legal traditions in existence. See for a brief overview of various legal traditions Glenn, *Legal Traditions*, *supra* note 8, touching amongst others upon Chthonic, Hindu, Islamic, Confucian, and Talmudic legal traditions.
[10] Neither the common law systems nor the civil law systems are monolithic legal traditions, i.e., there are many varieties of civil and common laws; see Bell, *Arbitration*, *supra* note 5 at 67; see also Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 4-6.
[11] See for potential terminological problems regarding the term "civil law" Merryman/Pérez-Perdomo, *Civil Law*, *supra* note 8 at 6-7, 101-102.
[12] Siegfried H. Elsing & John M. Townsend, "Bridging the Common Law-Civil Law Divide in Arbitration" (2002) 18:1 Arbitration Intl 59 at 59; for a more nuanced approach see University of Ottawa, "World Map", accessible via <http://www.juriglobe.ca/eng/rep-geo/cartes/monde.php>, last accessed 4 August 2025.
[13] Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 4.
[14] *Ibid*; University of Ottawa, "Common law systems and mixed systems with a common law tradition", accessible via <https://www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php>, last accessed 11 August 2025.
[15] Merryman/Pérez-Perdomo, *Civil Law*, *supra* note 8 at 5; it should be noted that the civil law tradition managed to spread to some parts of the globe without colonialization, e.g., China, Japan, Thailand.
[16] *Ibid*, at 47, regarding their approach toward binding jurisprudence.
[17] For some general ideas on how these differences might have been caused by geographic conditions see Tim Marshall, *Prisoners of Geography* (Elliott & Thompson, 2015) at 98, 110.

role of (state-court) judges.[18] In fact, the main procedural differences discussed in this paper[19] all stem from the different functions and importance that these two legal systems historically assigned to their adjudicators.[20] While a full account of the relevant historical developments would certainly be beyond the scope of this paper, the existing (procedural) differences between civil and common law can be better understood with some historical context.[21]

Notwithstanding that the different status of judges in the civil law tradition may be traced back as far as Roman times,[22] their role as mere appliers of the law was decisively shaped by the revolutions of the 19th century, most notably the French Revolution (1789-1799). These revolutions, which aimed to overcome the distant and autocratic hierarchies, also targeted the judges, who were regarded as guardians of the (undesired) status quo.[23] By establishing a system of strict separation of powers the function of adjudicators was drastically restricted, since this made sure that they would merely be able to apply and enforce the laws created by the general public.[24] Unlike in the common law world, laws within the civil law tradition were subsequently drafted in the form of exhaustive codifications, e.g., the Code Civil/Napoléon of 1804, which were intended to conclusively abolish the need for judicial law-making.[25] Judges were supposed to be mere "*operators of a machine designed and built by legislators*".[26] As a result, civil law judges – unlike their common law counterparts – are to this day not able to create (formally) binding case law.[27] Such continental European distrust towards adjudicators may also explain why the institution of constitutional review, i.e., the judicial review of laws as to their conformity with the constitution, only managed to take root in the civil law world

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[18] See for a brief overview Merryman/Pérez-Perdomo, *Civil Law*, *supra* note 8 at 34-38; Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 7-8; Rosalie Jukier, "The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec's new Code of Civil Procedure" (2015) 93 Can Bar Rev 211 at 215.

[19] Substantive legal differences, such as the contract law requirement of consideration, will not be discussed. Nor will the differences between civil law and common law trained arbitrators with regard to their approach towards the applicable substantive law, see in this regard for example George A. Bermann, "Chapter 19: Applicable Law and the Civil and Common Law Divide" in Nayla Comair-Obeid & Stavros Brekoulakis, eds., *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer Law International, 2023) 233.

[20] Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 7.

[21] Similarly, Pierre A. Karrer, "The Civil Law and Common Law Divide: An International Arbitrator tells it like he sees it" in ICDR, *Handbook on International Arbitration & ADR*, 3d ed (Juris Legal Information, 2017) 65 at 67.

[22] Merryman/Pérez-Perdomo, *Civil Law*, *supra* note 8 at 35.

[23] Glenn, *Legal Traditions*, *supra* note 8 at 252.

[24] Merryman/Pérez-Perdomo, *Civil Law*, *supra* note 8 at 36.

[25] *Ibid*, at 30-31.

[26] *Ibid*, at 36.

[27] However, in practice their role may not be so narrow after all. Especially judges of higher courts will typically establish de facto case law, since lower court judges will – for pragmatic reasons – be reluctant to deviate from the decisions of higher courts.

after the Second World War,[28] and (albeit more indirectly) why civil law judges lack inherent equitable powers.[29] Common law judges are more powerful than their civil law counterparts. They have not been on the receiving end of a revolution targeting them as they were not perceived as part of the undesired establishment,[30] they traditionally enjoyed a higher degree of trust and independence,[31] and their appointment is more prestigious (i.e., they are "*culture heroes*")[32] and thus more desirable, which arguably results in a higher intellectual quality of decision-makers. They are "law-seekers" as opposed to mere "law-appliers", meaning they apply the law not because they are legally forced to do so but because they choose to commit to an ethic of independently administering justice (within the existing legal boundaries).[33] Moreover, and most importantly, they are – unlike civil law judges[34] – capable of creating formally binding law via the concept of stare decisis (i.e., binding precedent).[35] Thus, their adjudicative work can (at least in theory) be seen as more creative and impactful than the routine and mechanical work of their civil law counterparts.

In addition to their different roles in shaping legal rules, civil law and common law judges also differ regarding their roles in conducting legal (civil) proceedings. While the adversarial system of the common law relies heavily on party autonomy, meaning the parties to the dispute are responsible for presenting evidence and legal arguments to the impartial (and more passive) judge,[36] the inquisitorial approach of the civil law envisages judges to take a more investigative

[28] Merryman/Pérez-Perdomo, *Civil Law*, *supra* note 8 at 140; contrastingly, the US Supreme Court first formally embraced the doctrine of judicial review as early as in the 1803 case of *Marbury v. Madison* (U.S. (1 Cr.) 137 (1803)).
[29] Merryman/Pérez-Perdomo, *Civil Law*, *supra* note 8 at 52, noting that the civil law is nevertheless more equitable than the common law in some areas.
[30] Glenn, *Legal Traditions*, *supra* note 8 at 252; rather, judges were perceived as protectors of property and contractual rights against arbitrary actions of the crown, see Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "The Economic Consequences of Legal Origins" (2008) 46:2 J Economic Literature 285 at 288 citing Paul G. Mahoney, "The Common Law and Economic Growth: Hayek Might Be Right" (2001) 30:2 J Leg Studies 503 at 504.
[31] Glenn, *Legal Traditions*, *supra* note 8 at 256-257.
[32] Merryman/Pérez-Perdomo, *Civil Law*, *supra* note 8 at 34-35.
[33] Glenn, *Legal Traditions*, *supra* note 8 at 257.
[34] But see *supra* note 27.
[35] It should however be noted that the concept of stare decisis, i.e., the binding authority formally attached to each decision, only emerged in the 19th century (around the same time as codifications started to emerge in continental Europe) and did thus not exist throughout most of the common law's history; Glenn, *Legal Traditions*, *supra* note 8 at 250, 258-259.
[36] Up until the elimination of the formalistic writ system in the 19th century, most cases were heard by juries, which also helps to explain this rather passive approach; *ibid*, at 254-255; see also Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 9; consequently, unless there are strong public policy reasons for doing so, a common law judge will not reach a decision outside the boundaries of the parties' submissions, Derek Wood, "Chapter 14: Common Law Advocacy in International Arbitrations: Fit for Purpose?" in Nayla Comair-Obeid & Stavros Brekoulakis, eds., *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer Law International, 2023) 171 at 172.

role, actively gathering and assessing evidence to determine the underlying truth.[37] Although it may seem counterintuitive that the (legally) less powerful civil law judge enjoys arguably greater fact-finding powers than his common law counterpart, this "inconsistency" can be best understood when looking at the overarching aims of the two legal systems. While the common law was traditionally focused on resolving disputes that arose between commercial parties in a swift and pragmatic manner (often on a case-by-case basis),[38] the civil law endeavoured to find a "correct" and inherently just solution to the underlying disagreement.[39] This required a more proactive approach by its adjudicators, both as regards to fact-finding as well as to the determination of the relevant legal provisions ("iura novit curia"[40]). As a side-effect, oral advocacy – the art of presenting a party's case in law and in fact – seems to be worth considerably less in civil law jurisdictions than in common law systems.[41] The main procedural differences between the common law and the civil law tradition stem from these fundamentally different roles and functions of their adjudicators. Since most of these differences relate to the taking of evidence, i.e. the process of establishing the facts of a case, this paper will broadly divide the differences covered into two main categories: evidentiary and non-evidentiary issues.[42]

A. Non-evidentiary procedural differences

As regards to the non-evidentiary issues, some are already identifiable as early as at the very beginning of a dispute, namely when considering the statement of claim.[43] While the common

[37] Urs Martin Laeuchli, "Civil and Common Law: Contrast and Synthesis in International Arbitration" in ICDR, *Handbook on International Arbitration Practice*, 2nd ed (Juris Legal Information, 2017) 37 at 38; as regards to the (potentially) different conceptions of truth in these traditions, see Jukier, *The Impact of Legal Traditions*, *supra* note 18 at 216.

[38] René David & John E. C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 3d ed (Stevens & Sons 1985) at 318.

[39] See also Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International, 2012) at 108; see for a somewhat different perspective Markus Wirth, "Ihr Zeuge, Herr Rechtsanwalt! – Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden" (2003) 1:1 SchiedsVZ 9 at 10.

[40] Latin for "the court knows the (relevant) law (even if the parties did not plead it) and may have an obligation to apply it"; Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 8-9; Bell, *Arbitration*, *supra* note 5 at 74; Giuditta Cordero-Moss, "Chapter 6: Iura Novit Curia" in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* (Kluwer Law International, 2024) 111 at 111.

[41] In fact, "*one of the dominant features of the common law system, throughout its long history, is the emphasis on oral advocacy*", Wood, *Common Law Advocacy*, *supra* note 36 at 172.

[42] For an overview of procedural differences between civil and common law and examples of varying categorisations: Elsing/Townsend, *Common Law-Civil Law Divide, supra* note 12; Karrer, *Civil Law and Common Law Divide*, *supra* note 21; Laeuchli, *Civil and Common Law*, *supra* note 37.

[43] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 59.

law favours so-called "notice pleadings", i.e., short and concise statements of claim, which often do not contain more than a brief outline of facts and a theory of the claim, with the details to be further developed during a subsequent discovery stage, the civil law prefers the statement of claim to include a comprehensive account of the facts and the law upon which the claim is based as well as the submission of all referenced documents.[44] Such written memorial-style pleadings of civilian lawyers[45] will often include so-called "offers of evidence", thereby signalling the adjudicators which factual events they intend to prove with what pieces of evidence.[46] More generally, it should be noted that civil law and common law lawyers traditionally have an entirely different understanding of the concept of "pleading": While to the civil lawyer a "pleading" means the (often lengthy) presentation of legal arguments during the hearing, for common law lawyers a "pleading" is nothing more than the brief initial statement of claim and defence exchanged at the beginning of the case.[47] The two traditions also have a very different understanding of what constitutes a "trial".[48] The historical role of the jury, whose members could not be assembled, dismissed and reconvened at will, meant that the common law trial evolved into a single, continuous event with a clearly defined pre-trial phase.[49] In contrast, continental procedures blur the line between the pre-trial phase and the trial itself, which usually takes place in a series of brief, segmented sessions.[50] These hearings, which often last only 15-30 minutes, primarily serve to compile a unified case file from which the court can then reach its decision.[51]

Another non-evidentiary difference relates to the role of oral advocacy and how legal arguments are presented. As already briefly mentioned, due to the more active role of adjudicators who are responsible to identify the factual truth and find a just solution to each case, the art of oral advocacy is worth considerably less in the civil law tradition.[52] Unlike in the common law,

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[44] *Ibid*, at 59-60; see for a discussion of the respective advantages of both approaches Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 16; on whether the civil law approach could raise issues of access to justice see Laeuchli, *Civil and Common Law*, *supra* note 37 at 39.
[45] *Ibid*.
[46] See for example sec 226 (1) Austrian Code of Civil Procedure (ZPO).
[47] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 64; Laeuchli, *Civil and Common Law*, *supra* note 37 at 39; sometimes the common law pleading style is also known as "London style", Reza Mohtashami, "Chapter 6: Some Observations on the Civil Law: Common Law Dichotomy – The Approach to Procedural and Legal Issues" in Nayla Comair-Obeid & Stavros Brekoulakis, eds., *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer Law International, 2023) 75 at 76.
[48] Jukier, *The Impact of Legal Traditions*, *supra* note 18 at 217.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.
[52] Moreover, written submissions are often perceived to be more efficient in supporting/influencing the judges' decision, see for example Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 68-69.

where counsel has to zealously present its client's position, counsel's role in the civil law world is more to assist the judge in finding the truth and making a just decision.[53] To do so, civilian lawyers will rely heavily on statutory legal provisions and scholarly commentary (often by law professors).[54] Contrastingly, due to the more powerful role of common law judges in law-making, common law counsel will likely prefer to present the court with more case law and judicial interpretations.[55] There might also exist differences as regards to how lawyers present their arguments at the hearing: While civilian lawyers like to present a detailed outline of their arguments (including citations to the relevant authorities; so-called "pleading points") at the hearing, which they will follow meticulously in their oral arguments, common law lawyers tend to focus their oral presentations only on their key points and on questions from the court, often in a different order than in their previously submitted briefs.[56]

Moreover, there are also differences regarding the potential recovery of procedural costs.[57] While the civil law world and some common law systems (notably the UK) usually award the court fees and costs of legal representation (or a fixed rate thereof) to the prevailing party (often according to the extent of its win),[58] other common law systems (mainly the US) generally require each party to bear its own legal fees, which can only be recovered from the other party under exceptional circumstances.[59] Lastly, there is also a diverging practice between these two legal systems as regards to dissenting opinions, i.e., the opinion of one or more judges which disagrees with the reasoning stated in the majority or plurality opinion (and often the outcome of the case).[60] While dissenting opinions are extremely common in common law courts, they are very rare in civil law courts.[61]

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[53] Laeuchli, *Civil and Common Law*, *supra* note 37 at 48.
[54] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 64.
[55] *Ibid*.
[56] *Ibid*.
[57] It is generally accepted that determinations as to costs and fees are matters of procedure, see Waincymer, *Evidence*, *supra* note 39 at 1194.
[58] See for example secs 41, 43 Austrian Code of Civil Procedure (ZPO); there are some notable exceptions to this rule, for example, Indonesia (a civil law jurisdiction) does generally not allow for the recovery of representation costs.
[59] Laeuchli, *Civil and Common Law*, *supra* note 37 at 43; Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 77.
[60] See for this definition the official educational resources created by the Administrative Office of the U.S. Courts accessible via <https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix/grove-city-college-v-bell-glossary#:~:text=A%20dissenting%20opinion%20is%20an,result%20reached%20in%20a%20case>, last accessed 12 March 2025.
[61] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 78.

B. Procedural differences related to the taking of evidence

Documentary evidence

The majority of procedural differences[62] between the civil law and common law traditions relates to the taking of evidence.[63] In fact, there is arguably no bigger (procedural) contrast between these two legal systems than their different approaches to fact-finding,[64] which can be traced back to the contrasting roles of judges in the conduct of legal (civil) proceedings in adversarial and inquisitorial systems.[65] This is highlighted for example by these systems' diverging attitude towards pre-trial discovery, where parties can compel the other side to produce relevant documents (or other physical evidence).[66] The common law approach emphasises gathering supporting evidence after filing a claim, leading to expectations of broad discovery (especially in the US).[67] The underlying idea is appealing as forcing both parties to open their books should ultimately reveal the 'truth' and provide a solid foundation for the tribunal's decision on the merits.[68] Such approach contrasts markedly with the civil law tradition, where discovery is far more limited, i.e., parties may only request specific documents if they are directly relevant or if there is a legal entitlement to obtain them.[69] This approach intends to avoid burdensome "fishing expeditions" as well as situations where parties would be forced to incriminate themselves.[70]

Civil law and common law lawyers also differ in how they present documents at hearings. Civil law practitioners usually provide organised, self-authenticating documents before the hearing

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[62] It should be noted that there are various (and often subtle) differences relating to evidence where a conclusive categorisation as either procedural or substantive may be very difficult, such as burden and standard of proof, see Waincymer, *Evidence*, *supra* note 39 at 764-767.
[63] Piero Bernardini, "The Role of the International Arbitrator" (2004) 20:2 Arbitration Intl 113 at 114-115, who observes that in the evidentiary context inquisitorial and adversarial approaches confront each other most often.
[64] See for example regarding the contrasting attitudes towards witness testimony, Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 62.
[65] Waincymer, *Evidence*, *supra* note 39 at 746.
[66] Laeuchli, *Civil and Common Law*, *supra* note 37 at 39.
[67] *Ibid*; Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 69; Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 60.
[68] Jörg Risse, "Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings" (2013) 29:3 Arbitration Intl 453 at 460, who warns that reality is somewhat less attractive ("*To begin with, nobody can guarantee or control that a party really complies in full with an order to produce documents. While it apparently lies in the genes of Anglo-American parties that non-compliance is an absolute no-go, some parties might interpret a production order more 'generously'.*").
[69] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 60; Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 69; see for example secs 303-307 Austrian Code of Civil Procedure (ZPO).
[70] Laeuchli, *Civil and Common Law*, *supra* note 37 at 39; Wirth, *Ihr Zeuge, Herr Rechtsanwalt!*, *supra* note 39 at 12; more generally, there might also be some libertarian concerns in the civil law tradition as to whether a party, through disclosure, should be required to assist its opponent in developing its case, Waincymer, *Evidence*, *supra* note 39 at 745.

and highlight key points without witness introduction.[71] Common law lawyers on the other hand, while also submitting documents in advance, rely on live witness testimony to authenticate and explain them, which might lead to considerable additional costs.[72]

Witness evidence

In fact, common law and civil law systems take starkly different approaches to witness testimony in general.[73] In the civil law, judges review case dossiers in advance, and witness testimony is often given in writing as a narrative or in response to judge-led questioning, with lawyers playing a minimal role.[74] In contrast, common law relies on live (and time-consuming[75]) direct and cross-examinations led by lawyers, a practice that (usually) does not appeal to civil law practitioners.[76] The two traditions also differ in the evidentiary weight given to witness testimony: The common law highly values live (particularly sworn) testimony, while the civil law prioritises documentary evidence and is sceptical of witness statements, especially from persons affiliated with or employed by a party.[77] In fact, because of their interest in the case's outcome, representatives of the parties are – unlike in common law jurisdictions – not typically heard as witnesses in the civil law world.[78] Rather, their testimony will usually be treated as (mere) argument of the parties, as they are (naturally) still permitted to present their case.[79] Civil law and common law systems also diverge as to the degree to which counsel may interview and prepare witnesses for their (oral and written) testimony, with some civilian systems viewing such conduct as unethical,[80] while in some common law countries lawyers might even be sued for negligence for failing to prep their witnesses.[81]

[71] Laeuchli, *Civil and Common Law*, *supra* note 37 at 39, at 40; Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 61.
[72] *Ibid*; Laeuchli, *Civil and Common Law*, *supra* note 37 at 40.
[73] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 62; see also Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 19-20, who also note that (Muslim) Shariah law seems to combine elements of both civil law and common law regarding witness testimony.
[74] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 62.
[75] There is a (historical) reason why hearings in common law jurisdictions tend to last considerably longer than in civil law jurisdictions, see Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 68.
[76] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 62; Laeuchli, *Civil and Common Law*, *supra* note 37 at 40-41; however, this does not mean that witness statements are frequently used in common law courts or that there is no form of cross-examination (equivalent) in the civil law, see Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 70-71; for an overview of the advantages and disadvantages of oral evidence, see Waincymer, *Evidence*, *supra* note 39 at 885.
[77] *Ibid*; Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 62.
[78] Laeuchli, *Civil and Common Law*, *supra* note 37 at 42.
[79] Waincymer, *Evidence*, *supra* note 39 at 896.
[80] *Ibid*, at 906.
[81] Wirth, *Ihr Zeuge, Herr Rechtsanwalt!*, *supra* note 39 at 13.

Expert evidence

Another striking difference pertains to the use of expert evidence. In the adversarial model of the common law, where experts are simply a specialised form of witnesses (i.e., "expert witnesses"), each party hires (and pays) its own expert and the court eventually decides which expert it finds more persuasive.[82] In contrast, civil law jurisdictions tend to rely on tribunal-/court-appointed experts who are not seen as witnesses but conduct independent investigations, consult with party-appointed experts (if helpful or necessary), and report their findings to the judges, who will often base their decisions upon them.[83] Moreover, civil law judges will rarely appoint legal experts (except regarding the contents of foreign law) as they are supposed to know the relevant (domestic) law themselves ("iura novit curia"). Lastly, there are also differences regarding the admissibility of evidence. In the common law, the historical use of jury trials (involving legally untrained jurors) has led to many exclusionary rules of evidence, such as the inadmissibility of illegally obtained evidence or hearsay[84], where the concern was that the evidence's prejudicial power outweighed its probative value.[85] Civil law systems, which were traditionally dominated by professional judges, rarely stipulate strict exclusionary rules of evidence; rather, all evidence is weighed in terms of its credibility and utility. Likewise, civilian legal systems have no equivalent of the common law parol evidence rule, which aims to prevent oral evidence from being used to alter the meaning of (unambiguous) written agreements.[86]

Given their numerous and often stark procedural differences, it is easy to see how these two legal traditions are bound to clash in international arbitration, which often involves parties (and arbitrators) from different legal backgrounds. This can create a number of potential challenges for arbitral tribunals, such as managing the parties' differing expectations (e.g. between

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[82] Laeuchli, *Civil and Common Law*, *supra* note 37 at 42; Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 72; Waincymer, *Evidence*, *supra* note 39 at 886; Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 63.

[83] *Ibid*; Laeuchli, *Civil and Common Law*, *supra* note 37 at 42; Waincymer, *Evidence*, *supra* note 39 at 886; in doing so, some civil law judges tend to delegate considerable decision-making authority to their tribunal-appointed experts, which – while pragmatic on the face of it – is certainly problematic from a due process perspective.

[84] Hearsay evidence concerns information that is being testified to by a witness where no direct experience of such information was actually obtained, Siegfried H. Elsing, "The Influence of the English Language: A Gradual Acceptance of Anglo-American Legal Culture in International Arbitration" in Stefan M. Kröll, et al., eds., *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011) 85 at 91.

[85] Waincymer, *Evidence*, *supra* note 39 at 748, 793; Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 74.

[86] Waincymer, *Evidence*, *supra* note 39 at 747; for a legal categorisation of the parol evidence rule as a hybrid between substantive and procedural law, see Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at 559.

extensive discovery requests from common lawyers and narrower civilian evidentiary requirements), navigating fundamentally different attitudes towards oral hearings and cross-examination, and more generally to understand underlying cultural sensitivities and backgrounds.[87] For example, even within the same legal tradition, communication styles can differ due to regional, linguistic, cultural, and other background factors.[88] Words, expressions, gestures, and tone may carry different meanings, making these nuances important in (oral) advocacy.[89] However, arbitrators should also keep a wary eye on themselves since their nationality, legal background, culture, and experience may subtly influence their own decision-making.[90] Throughout, tribunals must strive to maintain a balance between finding the truth, procedural fairness and efficiency, in order to ultimately ensure the enforceability of their award.[91] The following section will examine how international arbitrators can overcome these challenges as well as the tools and techniques they can use to do so.

C. Overview of procedural differences

The following table provides a comparative overview of the key procedural differences between the common law and civil law traditions discussed in this paper:

Procedural Aspect	**Common Law**	**Civil Law**
Pleadings	Notice pleadings, concise initial filings	Memorial style, detailed legal arguments
Evidence production	Broad discovery, fishing expeditions common	Limited, targeted document requests only
Witness testimony	Oral direct + cross-examination led by counsel	Written statements, judge-led questioning
Expert evidence	Party-appointed expert witnesses	Tribunal-appointed independent experts
Costs	"Loser pays" in UK; each bears own costs in US	Prevailing party usually recovers costs

[87] Nayla Comair-Obeid & Stavros Brekoulakis, "Introduction" in Nayla Comair-Obeid & Stavros Brekoulakis, eds., *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer Law International, 2023) 1 at 2.

[88] Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 17-18.

[89] *Ibid*.

[90] Thus, most arbitration rules require sole arbitrators to be of a different nationality to the parties involved, with institutions considering factors such as residence and other relationships to avoid bias (e.g., Art 13.5 ICC Rules 2021, Art 6.1 LCIA Rules 2020, Art 11 DIS Rules 2018), *ibid*, at 14.

[91] For a short discussion on whether arbitrators are under an obligation to render an enforceable award see Diego P. Fernández Arroyo, "Chapter 6: Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy?" in Franco Ferrari, ed, *Limits to Party Autonomy in International Commercial Arbitration* (JurisNet, 2016) 199 at 208-209.

IV. Bridging procedural differences in international arbitration

There are various reasons why international arbitration has firmly established itself as the leading procedural mechanism to resolve cross-border disputes.[92] Besides other obvious advantages, such as the (almost global) enforceability of awards via the New York Convention (NYC),[93] neutrality and extensive confidentiality,[94] international arbitration's greatest strength is arguably its procedural flexibility,[95] which puts it in a unique position to bridge the above described procedural differences between legal traditions.[96] Over time, numerous rules, tools, and techniques were developed to help international arbitrators conduct their proceedings in a fair and efficient manner. In many procedural aspects, hybrid approaches emerged through combining elements of both legal traditions, which nowadays form part of a wide array of arbitration laws, (institutional) rules, and/or other soft law instruments (i.e., non-binding best practices, such as the International Bar Association('s) Rules on the Taking of Evidence in International Arbitration (IBA Rules);[97] the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules);[98] the IBA Guidelines on Party Representation in International Arbitration;[99] IBA Guidelines on Conflicts of Interest in International Arbitration;[100] the UNCITRAL Notes on Organizing Arbitral Proceedings;[101] or the Chartered Institute of Arbitrators (CIArb) Protocol for the Use of Party-appointed and Tribunal-appointed

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[92] Salomon, *Introduction*, *supra* note 4 at xxix.
[93] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, in force 7 June 1959, 330 UNTS 4739.
[94] Salomon, *Introduction*, *supra* note 4 at xxix.
[95] Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 6.
[96] Outside the international arbitration context procedural law has proved to be especially difficult to harmonize, Joshua Karton, "International Arbitration as Comparative Law in Action" (2020) 2:7 J Dispute Resolution 293 at 324.
[97] IBA Rules on the Taking of Evidence in International Arbitration, 2020, accessible via <https://www.ibanet.org/resources>, last accessed 13 March 2025.
[98] Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), 2018, accessible via <https://www.praguerules.com/prague_rules/>, last accessed 13 March 2025.
[99] IBA Guidelines on Party Representation in International Arbitration, 2013, accessible via <https://www.ibanet.org/resources>, last accessed 13 March 2025.
[100] IBA Guidelines on Conflicts of Interest in International Arbitration, 2024, accessible via <https://www.ibanet.org/resources>, last accessed 13 March 2025.
[101] UNCITRAL Notes on Organizing Arbitral Proceedings, 2016, accessible via <https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings>, last accessed 13 March 2025.

Experts (CIArb Protocol)[102]).[103] Although these best practice standards are of a private nature and thus not formally binding, in practice they often enjoy norm-like effects since they appear like (state-made) statutory law (which may also be problematic).[104] Such rules are uniquely apt to shape arbitral proceedings for several reasons: First, because they are based on a consensus of (often renowned) practitioners from different jurisdictions, they may have the best potential for merging different procedural cultures.[105] Second, best practice standards provide greater predictability and legal certainty in the conduct of arbitral proceedings by establishing a high level of core principles shared by (often) international consensus.[106] Third, they make the work of arbitrators (and counsel) easier by saving them from "reinventing the wheel" when deciding procedural issues.[107] And lastly, they serve as a form of self-regulation, thus potentially preventing intrusive (and ill-informed) external regulations.[108] Often intended to provide international arbitrators (and parties) with a possible blueprint of how to conduct (every step of) arbitral proceedings,[109] these (soft) norms have led to a proliferation of rules that arbitrators can draw on.[110]

On the exemplary basis of the procedural (evidentiary and non-evidentiary) differences identified above (see sec III.), this section aims to demonstrate how international arbitration has attempted to strike a balance between common law and civil law approaches. However, as each arbitration is unique, it is up to the individual arbitrators to ultimately achieve this balance.

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[102] CIArb Protocol for the Use of Party-appointed and Tribunal-appointed Experts, accessible via <https://www.ciarb.org/resources/professional-practice-guidelines/international-arbitration/>, last accessed 13 March 2025.

[103] Laeuchli, *Civil and Common Law*, *supra* note 37 at 45-46; only rarely do some norms show their common law or civil law origins – a notable exception are the ICC Terms of Reference (Art 23 ICC Rules 2021), which obviously have a civil law background, Bell, *Arbitration*, *supra* note 5 at 62-63.

[104] Klaus Peter Berger, "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?" (2019) 36:3 J Intl Arbitration 295 at 304-306.

[105] *Ibid*, at 304; see however Karton, *International Arbitration as Comparative Law*, *supra* note 96 at 314, who criticizes such drafting committees for their lack of diversity ("*They are composed entirely of business lawyers, mostly white men from developed countries*.").

[106] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 304-305.

[107] *Ibid*, at 305.

[108] *Ibid*.

[109] Andrea Carlevaris, "Chapter 18: The Civil Law/Common Law Divide in International Arbitration: Requiem or New Dawn?" in Nayla Comair-Obeid & Stavros Brekoulakis, eds., *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer Law International, 2023) 215 at 219, who (besides the perceived need for guidance) identifies the desire to update standards in light of developments within the international arbitration community, as well as the need to adapt to technological evolution, as reasons for triggering soft law initiatives.

[110] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 301-302; Bell, *Arbitration*, *supra* note 5 at 62-63; this has led to a 'democratization' of the field of international arbitration by making known standard practices, Stavros Brekoulakis, "Chapter 1: Introduction: The Evolution and Future of International Arbitration" in Stavros Brekoulakis, Julian D.M. Lew, et al., eds, *The Evolution and Future of International Arbitration* (Kluwer Law International, 2024) 1 at 7.

Thus, most arbitration laws and rules provide the arbitrators with broad discretion as regards to how to conduct the proceedings.[111] Such wide procedural discretion is usually only curtailed by mandatory (mainly due process related) provisions, e.g., Art 18 UNCITRAL Model Law, or the (contrary) agreement of the parties.[112] Thus, at the end of the day, each arbitration is (clearly) only as good as the arbitrator(s) involved.[113]

A. Non-evidentiary procedural differences

Regarding existing non-evidentiary differences, it is accepted in international arbitration that parties should provide a detailed narrative when filing a statement of claim – more than a notice pleading but less than a civil law filing – and attach key operative documents, such as the contract and amendments, without excessive supporting materials.[114] This hybrid approach intends to merge the memorial style's detailed early case presentation with the pleading style's more incremental, targeted development, facilitating efficient issue identification while preserving flexibility to adjust claims throughout the proceedings.[115] A useful test of adequacy is whether the statement and documents enable an arbitrator to draft the Terms of Reference of an arbitration conducted under the ICC Rules without additional information.[116] Similarly, international arbitration practice seems to accommodate both common law and civil law approaches toward presenting legal arguments, i.e., arbitrators accept written arguments in various formats and allow different styles of oral advocacy.[117] Lawyers typically present code provisions, commentary, and case law as persuasive, with their weight depending on the applicable substantive law.[118]

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[111] Salomon, *Introduction*, *supra* note 4 at xxix; see for example Art 19 (2) UNCITRAL Model Law (UNCITRAL Model Arbitration Law, UN Document A/40/17, Annex 1) or Rule 32.2 SIAC Rules 2025.

[112] See for example Art 19 (2) first sentence UNCITRAL Model Law: "*Failing such agreement* [by the parties], *the arbitral tribunal may, subject to the provisions of this Law* [i.e., Art 18], *conduct the arbitration in such manner as it considers appropriate.*"

[113] Salomon, *Introduction*, *supra* note 4 at xxix; Berger, *Common Law vs. Civil Law*, *supra* note 104 at 310; see also Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 65, who notes that it all depends on the people involved.

[114] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 60; see also Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 68-69.

[115] Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 16.

[116] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 60.

[117] *Ibid*, at 64, noting that when arguing before European arbitrators, it is still advisable to provide an outline of the arguments with citations, as this assists arbitrators and (at least) reduces their need to take notes.

[118] *Ibid*.

Since civil law and common law take starkly different stances regarding the potential recovery of procedural costs (see sec III.A.), it is not surprising that most arbitration rules and laws leave the allocation of costs to the discretion of arbitral tribunals,[119] the majority of which seem to favour to allow the recovery of (some) costs by the winning party.[120] Similarly, most arbitration norms do not take a definitive position as to whether the civil law principle of iura novit curia (in this context also known as "iura novit arbiter") should apply or whether it should be up to the parties to plead the relevant law. Some laws and rules will – for the avoidance of doubt – explicitly allow arbitral tribunals to adopt an inquisitorial approach.[121] However, such a reference by itself does not imply that arbitration in general should be presumed to embody a common law adversarial style – there is (and should be) no default procedure (neither adversarial nor inquisitorial) in international arbitration.[122] Rather, the preferred approach will (in every single case) depend on the legal backgrounds of the arbitrators and the parties involved, and the necessity to balance correct legal application with due process rights.[123] In any event, even a tribunal consisting solely of civilian-trained lawyers would strive to provide the parties with an opportunity to comment on the law the tribunal is considering to apply in order to avoid undesirable (and potentially contestable) surprise decisions.[124]

B. Procedural differences related to the taking of evidence

[119] See for example Rule 58.1 SIAC Rules 2025 or sec 609 Austrian Code of Civil Procedure (ZPO); Waincymer, *Evidence*, *supra* note 39 at 1196; the mandatory sec 60 of the English Arbitration Act 1996 (not amended in 2025) remains a noteworthy exception; as always, it is crucial to keep cultural backgrounds in mind, e.g., in some contracts in the Middle East, parties may agree at the outset that each party shall bear its own costs of arbitration, irrespective of the outcome of the arbitration, see Yvonne Foo, "Chapter 40: International Arbitration: Training in Procedural Aspects That Differ in Civil and Common Law Approaches" ?" in Nayla Comair-Obeid & Stavros Brekoulakis, eds., *The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide* (Kluwer Law International, 2023) 503 at 510.
[120] Amit George and Rishabh Dheer, "Allocation of Cost and Award of Interest by the Arbitral Tribunal" in Shashank Garg, ed., *Arbitrator's Handbook* (LexisNexis, 2022) 413 at 416; Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration*, supra note 86 at 654-655.
[121] See for example sec 12 (3) Singapore International Arbitration Act 1994 (SIAA): "*Unless the parties to an arbitration agreement have* [] *agreed to the contrary, an arbitral tribunal has power to adopt, if the arbitral tribunal thinks fit, inquisitorial processes*."; see also Art 35 (3) CIETAC Rules 2024: "*Unless otherwise agreed by the parties, the arbitral tribunal may adopt an inquisitorial or adversarial approach in hearing the case having regard to the circumstances of the case*."
[122] But see for example the decision of the Singapore High Court in *JVL Agro Industries Ltd v. Agritrade International Pte Ltd* ([2016] SGHC 126, [2016] 4 SLR 768), where the court based on sec 12 (3) SIAA rejected the application of the civil law principle iura novit curia (albeit without naming it) and stated that arbitration (at least in Singapore) should be presumed to have adopted an adversarial system; for a critical assessment of this case see Bell, *Arbitration*, *supra* note 5 at 74; see also Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 6, 10, noting that "*in international arbitration, there is no uniform procedure*".
[123] See for a brief summary of positions, Waincymer, *Evidence*, *supra* note 39 at 1076.
[124] Bell, *Arbitration*, *supra* note 5 at 74; see also Art 7.2 Prague Rules (titled "*Iura Novit Curia*"): "*However, the arbitral tribunal may apply legal provisions not pleaded by the parties if it finds it necessary, including, but not limited to, public policy rules. In such cases, the arbitral tribunal shall seek the parties' views on the legal provisions it intends to apply*."

In terms of how international arbitration handles the diverging civil and common law approaches towards (the taking of) evidence, it should be noted that most arbitration laws and rules grant arbitral tribunals broad discretion regarding evidentiary issues (including in relation to the admissibility, relevance, materiality, and weight of any evidence).[125] However, the above mentioned IBA Rules have established themselves as influential and widely-used guidelines.[126] Developed by a committee of leading practitioners (mainly arbitrators) from both common law and civil law traditions, these rules, which were first adopted in 1999 (and continuously refined over time), have shaped the conduct of (mostly large) international arbitrations worldwide.[127] By codifying the best practices of their drafters, i.e., they contain what their drafters usually wrote in their (procedural) orders for directions, the rules aim to strike a delicate balance between civil and common law approaches.[128] While in some areas they (simply) compromise between civil and common law practices, there are other areas where they contain procedures that markedly differ from what is done in both civil and common law jurisdictions.[129] Despite their success, the IBA Rules have in recent years been (rightly) criticised for leaning too much towards the traditional (and costly) common law approach,[130] which has led to the development of the more civil law inspired Prague Rules in 2018.[131] As such the Prague Rules encourage arbitral tribunals to take a more active role in managing the proceedings,[132] as well as to facilitate the amicable settlement of the dispute at any stage of the arbitration, which might strike arbitrators from a common law background as slightly odd.[133] Although it is very

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[125] See for example Art 19 (2) UNCITRAL Model Law:" [T]*he arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence*."; or Art 34.1 FAI Arbitration Rules 2024 and Art 27.4 UNCITRAL Arbitration Rules 2021. A prominent example of a tribunal exercising its broad discretionary powers under the UNCITRAL Arbitration Rules is the investment arbitration case of *Methanex v. United States*, in which illegally obtained documents were rejected (*Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), Part II, Chapter I at paras. 53-60.
[126] For many, Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 66.
[127] *Ibid*; Bell, *Arbitration*, *supra* note 5 at 72; Berger, *Common Law vs. Civil Law*, *supra* note 104 at 302-303.
[128] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 66.
[129] See *ibid*, who was one of the initial drafters of the IBA Rules and notes that it was not particularly difficult to draft them.
[130] Whether or not this criticism is warranted remains somewhat controversial. A leading arbitration practitioner and renowned academic with a background in civil law recently assured me that the IBA Rules are both drafted and applied in a balanced manner. For some further less critical remarks see Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 21-22.
[131] Bell, *Arbitration*, *supra* note 5 at 72-73.
[132] See for example Art 2 Prague Rules.
[133] Artt 9.1. and 9.2. Prague Rules; Berger, *Common Law vs. Civil Law*, *supra* note 104 at 308-309; Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 77-78; see also Carlevaris, *The Civil Law/Common Law Divide in International Arbitration*, *supra* note 109 at 222; however, (at least) in theory, the IBA Rules are flexible enough to allow for everything which the Prague Rules envisage, see Berger, *Common Law vs. Civil Law*, *supra* note 104 at 310.

questionable whether the new rules – which claim to be more (time and cost) efficient than the IBA Rules – may (one day) be viewed as similarly influential,[134] they are at least a successful reminder that there are also other ways to conduct arbitral proceedings than those suggested by the IBA Rules.[135] To put it in the words of one of the members of the Working Group drafting the Prague Rules: "[T]*he Prague Rules provide an additional option, thereby making arbitration more attractive for its users. Nothing more, nothing less*."[136]

It must not be forgotten, however, that both Prague and IBA Rules are merely non-binding soft-law instruments, and as such cannot be more effective than the arbitrators interpreting and applying them.[137] There are three main ways how these best practices might influence an arbitral proceeding: First, when the parties (explicitly) agree to apply them.[138] In this scenario, such guidelines become a contractually binding part of the parties' agreement, forcing the arbitrators to follow them (within the boundaries of mandatory due process requirements and subject to specific procedures expressly selected by the parties).[139] Second, where the parties have not agreed to apply them but also have not reached an (explicit) agreement to the contrary. Here, such rules – although not binding – may serve as a source of guidance and inspiration on how the arbitrators should use their procedural discretion.[140]And third, where the parties have explicitly agreed not to apply the rules to the resolution of their dispute. Even in this scenario, although prohibited from applying specific rules of these guidelines, a tribunal's procedural discretion may still be informed by the underlying (persuasive) reasoning and ideas of such instruments. This approach does not disregard the parties' wishes but rather reflects the tribunal's discretion to consider useful principles from various sources.

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[134] Incidentally, the drafters of the Prague Rules are probably not as well-known as those creating the IBA Rules.
[135] Bell, *Arbitration*, *supra* note 5, at 73, 75; Karton, *International Arbitration as Comparative Law*, *supra* note 96 at 310, who goes on to note that "[t]*he dearth of procedural law is a feature of international commercial arbitration, not a bug*".
[136] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 313; see also Lew/Valkova, *Cultures and the Taking of Evidence*, *supra* note 5 at 14, noting that "*The IBA Rules and the Prague Rules should not be seen as competitors. They complement each other by providing the parties and the tribunal with the opportunity to select the rules best suitable for the particular dispute*."
[137] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 310; Carlevaris, *The Civil Law/Common Law Divide in International Arbitration*, *supra* note 109 at 223 ("*The efficiency in the conduct of the proceedings the Prague Rules are meant to achieve ultimately depends on how arbitral tribunals apply them in concreto. For example, it has been observed that the application of Article 4 of the Prague Rules on document production will not necessarily lead to results very different from those of the application of Article 3 of the IBA Rules: the crucial test for a document production request is ultimately that of the 'relevance and materiality' of the requested documents, which is common to both sets of rules.*").
[138] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 302.
[139] Waincymer, *Evidence*, *supra* note 39 at 757.
[140] *Ibid*; Berger, *Common Law vs. Civil Law*, *supra* note 104 at 302.

Documentary evidence

Given the various ways in which soft law instruments may influence arbitral proceedings, it is not surprising that both IBA Rules and Prague Rules (although to a different degree) have shaped international arbitration procedure as such (and vice versa). One aspect where this is evident is the (pre-trial) discovery of documents. Here a compromise between the liberal common law and the stricter civil law position is reflected in Art 3 of the IBA Rules,[141] which allows parties to request the other side to produce narrowly defined documents that are reasonably believed to exist and to be in the possession of the other party, together with an explanation of how the documents requested are relevant to the case and material to its outcome.[142] After the requested party has formulated its objections (in line with Artt 9.2 and 9.3 IBA Rules), the tribunal will decide to either grant or deny such a request,[143] which leaves it ultimately to the arbitrators to decide the extent of discovery.[144] This procedure is usually conducted in writing only and often by using a so-called “Redfern-Schedule”, i.e., a spreadsheet with rows and columns for each specific document. Considering that many parties choose arbitration (amongst others) to avoid the broad and costly discovery of common law systems,[145] the Prague Rules have opted to openly discourage the production of documents, including electronic forms of discovery.[146] Maybe as a trade-off for allowing (limited) discovery, not even the IBA Rules provide for common law style depositions and interrogatories, which are both uncommon in international arbitration.[147]

Regarding the use of documentary evidence, arbitral practice has been converging toward parties submitting evidence in advance without formal introduction or authentication.[148] The IBA Rules outline objections based on relevance, privilege, confidentiality, or fairness, shifting the burden to the opposing party to justify exclusion rather than requiring the submitting party to prove admissibility.[149] This approach balances procedural flexibility with fairness while

[141] Although Art 3 IBA Rules deals with discovery, it is not titled as such. In fact, the term “discovery” seems to have been purposefully avoided throughout the entire IBA Rules.
[142] Art 3.3 IBA Rules; Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 61.
[143] Artt 3.5-3.7 IBA Rules.
[144] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 69; Comair-Obeid/Brekoulakis, *Introduction*, *supra* note 87 at 9.
[145] Laeuchli, *Civil and Common Law*, *supra* note 37 at 40.
[146] Art 4.2. Prague Rules: “*Generally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery*.”; even if allowed, the Prague Rules (Art 4.5.) limit document production to “specific documents” rather than encompassing “categories of documents” like Art 3 IBA Rules, see Berger, *Common Law vs. Civil Law*, *supra* note 104 at 308.
[147] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 61.
[148] *Ibid*.
[149] *Ibid*; Artt 9.2 and 9.3 IBA Rules.

avoiding rigid common law evidentiary norms, such as exclusionary rules.[150] The Prague Rules arguably take an even more civil law friendly approach by not (explicitly) providing for any opportunity to object to the admission of documents; rather – just like in domestic civilian courts – all evidence should be admitted and then weighed in terms of its perceived credibility and utility.[151]

Witness evidence

The approaches towards witness testimony have also converged in international arbitration.[152] While the parties (generally) have the right to choose their own witnesses (and the order of presenting them), in exceptional circumstances, the tribunal may decide to require a particular witness who has not been proposed.[153] Direct witness testimony is typically submitted in writing before hearings, thereby reducing surprises and shortening arbitral hearings.[154] This also helps the other party (and the tribunal) to determine whether there is a need to cross-examine (and prepare questions) or whether it is possible to agree on certain facts, which narrows the issues to be ultimately resolved by the tribunal.[155] While live direct testimony (i.e., examination in chief) is usually brief (15-30 minutes), tribunals regularly allow it to prevent a witness's first impression from being shaped by hostile questioning.[156] Cross-examination (though not always labelled as such) is effectively permitted, with parties often questioning witnesses before the tribunal does.[157] This approach, which is also firmly enshrined in the IBA Rules, ensures fairness and allows tribunals to intervene at any time if key points remain unaddressed.[158] Contrastingly, if a party were not allowed to (sufficiently) cross-examine a

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[150] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 61-62; see also Berger, *Common Law vs. Civil Law*, *supra* note 104 at 297, who notes that international arbitration is often chosen to not be trapped "*in the straitjacket of mandatory rules of domestic procedural law*"; see also Karrer, *Civil Law and Common Law Divide, supra* note 21 at 74.

[151] See Art 4 Prague Rules.

[152] Laeuchli, *Civil and Common Law*, *supra* note 37 at 47.

[153] Waincymer, *Evidence*, *supra* note 39 at 888, 917-918.

[154] Laeuchli, *Civil and Common Law*, *supra* note 37 at 47; Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 72; Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 62; warning about the potential dangers of written witness statements Wirth, *Ihr Zeuge, Herr Rechtsanwalt!*, *supra* note 39 at 13-14.

[155] Waincymer, *Evidence*, *supra* note 39 at 898.

[156] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 62; see also Art 8.4(a) IBA Rules.

[157] Laeuchli, *Civil and Common Law*, *supra* note 37 at 47; Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 62-63.

[158] *Ibid*; Artt 8.4(b) and 8.4(g) IBA Rules; see however the more critical view of this common law trained advocate: "*In the interests of saving hearing time, and eliminating the element of surprise, witnesses of fact are now committed to statements drafted for them, sometimes at length, by the lawyers, and then filed with the tribunal in advance of the hearing. At the hearing, the hapless witness confirms the 'truth' of a statement which he or she would never have written, at least in those terms, and is then exposed to cross-examination by opposing counsel. In my experience, some witnesses resent this entire process. They have their own story to tell but the legal process gets in their way*.", Wood, *Common Law Advocacy*, *supra* note 36 at 174.

witness, it might be questionable whether that party has been denied a full opportunity to present its case.[159] However, this does usually not hold true for more extreme styles of cross-examination, which aim to confuse a witness or challenge his/her veracity and expertise.[160] The IBA Rules have also adopted the common law approach of allowing a party or a party's officer, employee, or other representative to testify as a witness.[161] Moreover, they stipulate that it shall not be improper for a party to interview its (potential) witnesses and to discuss their prospective testimony with them.[162]

While the IBA Rules thus seem to take a more common law oriented approach toward witness testimony,[163] the Prague Rules – in line with the civil law approach – put arbitral tribunals clearly in charge of witness examination.[164] Amongst others, the rules empower the tribunal to decide that witnesses nominated by a party should not be called for examination at the hearing[165] and even encourage documents-only arbitration without any hearing to promote cost-efficiency.[166] Nevertheless, most international arbitrations will usually (also) involve oral evidence, since it is often crucial to understand the background, nature, and interpretation of key documents, as well as to resolve disputed factual issues.[167] Arbitrators (especially those with a civil law background) should therefore remain alert to the potential pitfalls of oral evidence, such as higher costs, potential bias toward eloquent (and more educated) witnesses, and varying resilience to cross-examination tactics when hearing oral testimony.[168] Moreover, when deciding to hear witnesses in a language that is different from the language of the arbitration, prudent arbitrators should oversee interpreter selection, ensuring competence and, ideally, independence.[169] In any case, however, it is preferable for all parties and the tribunal to have someone on their team who understands the foreign language to ensure accurate translation.[170]

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159 Waincymer, *Evidence*, *supra* note 39 at 916.
160 *Ibid*, at 917; see also Elsing, *The Influence of the English Language*, *supra* note 84 at 89, who refers to cross-examination in international arbitration as "cross examination light".
161 Art 4.2 IBA Rules.
162 Art 4.3 IBA Rules.
163 Note however Laeuchli, *Civil and Common Law*, *supra* note 37 at 47, who states that "[t]*he IBA Rules come down heavily on the civil side, giving the tribunal full control of the process surrounding witnesses*."
164 Art 5.9. Prague Rules; Bell, *Arbitration*, *supra* note 5 at 73.
165 Art 5.6. Prague Rules.
166 Art 8.1. Prague Rules; Berger, *Common Law vs. Civil Law*, *supra* note 104 at 308.
167 Waincymer, *Evidence*, *supra* note 39 at 885.
168 *Ibid*.
169 *Ibid*, at 921.
170 *Ibid*.

Expert evidence

As regards to the other category of oral testimony, expert evidence, the vast majority of arbitration laws and rules allow for the use of both party-appointed and tribunal-appointed experts.[171] Even where arbitration norms only expressly mention tribunal-appointed experts, the parties' general right to submit evidence naturally allows them to also submit testimony of party-appointed experts.[172] This approach is reflected by both the IBA Rules as well as the Prague Rules,[173] although the latter arguably emphasise the use of tribunal-appointed experts instead of experts retained by the parties.[174] In arbitral practice, however, this perceived balance between party-appointed and tribunal-selected experts does not exist. Rather, the use of party-appointed experts (through written reports and/or oral testimony) is the norm while tribunals only opt to appoint their own expert in exceptional cases, e.g., when faced with irreconcilable opinions of party-appointed experts or when the parties have agreed to it.[175]

There are various reasons for this: First, the procedure to retain tribunal-appointed experts is cumbersome, lengthy, and costly – especially when compared to the straightforward use of experts appointed by the parties.[176] There may also be problems in ensuring that tribunal-appointed experts get access to the relevant information from the parties, which might require additional assistance from the tribunal and thus prolong the proceedings even more.[177] Second, parties may be wary of tribunal-appointed experts due to concerns about losing control over the case, as the expert's views may be unpredictable and potentially contradict the parties' own (and their experts') understanding of the case.[178] This worry is exacerbated by the fact that – unlike fact witnesses – experts often do not simply provide evidence in the strict sense but also opinions and reasoning about other evidence before the tribunal, which can make them very

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[171] See for example sec 601 Austrian Code of Civil Procedure (ZPO), sec 37 English Arbitration Act 1996 (although here the tribunal's power to appoint an expert is subjected to the parties' agreement), Rules 40 and 41 SIAC Rules 2025, or Art 25 ICC Rules 2021.

[172] See for example the interplay between Art 23 and Art 26 UNCITRAL Model Law; Waincymer, *Evidence*, *supra* note 39 at 935-936.

[173] Artt 5 and 6 IBA Rules; Art 6 Prague Rules.

[174] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 308.

[175] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 73; Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 63; Florian Haugeneder, "Party-Appointed and Tribunal-Appointed Experts in International Arbitration" in Christian Klausegger, et al., eds., *Austrian Yearbook on International Arbitration 2020* (Manz, 2020) 177 at 177, 180-181.

[176] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 73.

[177] Waincymer, *Evidence*, *supra* note 39 at 935.

[178] Haugeneder, *Party-Appointed and Tribunal-Appointed Experts*, *supra* note 175 at 186.

influential.[179] Once appointed, it is much more difficult for a dissatisfied party to replace a tribunal-appointed expert (i.e., there needs to be a demonstrable lack of qualifications or independence) than an expert retained by such a party.[180] Third, the added benefit of having a tribunal-appointed expert, i.e., his/her impartiality and independence, is perceived to be only minimal, as arbitrators often have enough expertise of their own to understand the difficult issues of a case with the help of (sharp) lawyers and (good) party-appointed experts (even if some are biased).[181] In fact, most party-appointed experts are now acting less and less like hired guns, as this is beneficial both to their professional reputation and to their credibility.[182] Accordingly, the testimony given by party-appointed experts, which can be effectively tested by cross-examination[183] and questioning of the tribunal, does not have per se less weight than the evidence given by tribunal-appointed experts.[184] And fourth, parties to an international arbitration are so used to retaining their own expert(s) and integrating them in their case teams as early as possible that (unlike in civil law systems) tribunal-appointed experts are not seen as an alternative to party-appointed experts, but as a mere (costly and time-consuming[185]) addition.[186] Even on the rare occasions when tribunals appoint experts, parties are usually given the opportunity to question them and present their own experts to challenge their findings.[187]

Whatever approach to expert evidence the parties prefer, arbitrators should keep in mind the procedural background against which it was developed: While the use of party-appointed experts might be unfair if the parties do not get an opportunity to test the opposing party's expert through cross-examination, a tribunal might risk the impression to unduly delegate its decision-making authority if it fails to (sufficiently) engage with a tribunal-appointed expert and his/her

[179] Waincymer, *Evidence*, *supra* note 39 at 931, 934; Wood, *Common Law Advocacy*, *supra* note 36 at 175 ("*it is difficult if not impossible to eradicate the suspicion that, however much counsel may shake his or her evidence, the court-or tribunal-appointed expert will decide the case, if not actually write the judgment or award*").

[180] Haugeneder, *Party-Appointed and Tribunal-Appointed Experts*, *supra* note 175 at 186.

[181] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 73.

[182] See also Art 5.2(c) IBA Rules, which requires the expert to submit a statement of his or her independence from the parties; and Art 4.1 CIArb Protocol: "*An expert's opinion shall be impartial and objective*."; see also Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 72, who does not believe that all party-appointed experts are just hired guns.

[183] Wood, *Common Law Advocacy*, *supra* note 36 at 175 ("*This method also has, in my experience, a salutary effect on the experts too. They will know that their evidence is likely to be rigorously tested in cross-examination by a well-informed opposing counsel and that it will not be accepted by the tribunal unless it is as watertight as it can be. They will, or should, take a great deal more care in the preparation of their report. Issues can be reduced and shortened, and points of controversy clearly identified*.").

[184] Haugeneder, *Party-Appointed and Tribunal-Appointed Experts*, *supra* note 175 at 179-180, 183.

[185] *Ibid* at 180, noting that the selection of a tribunal-appointed expert often prolongs the proceedings by more than one year.

[186] *Ibid* at 178-179; similar Waincymer, *Evidence*, *supra* note 39 at 933-934.

[187] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 63-64; see for example Art 25.3 ICC Rules 2021: "*At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert*."; see also Art 6.6 IBA Rules, explicitly mentioning questions posed by party-appointed experts.

conclusions.[188] Criticisms of expert use tend to stem from arbitrators' failure to engage and develop case-specific practical approaches to expert evidence rather than more systemic flaws.[189] But even when there is agreement as to whether to rely on party-appointed and/or tribunal-appointed experts, there might also be disagreement as to who to appoint as an expert: When lawyers and arbitrators from a civil law background decide to appoint a legal expert – although they might be generally more reluctant to do so than their common law counterparts – they are likely to retain law professors, whereas common law lawyers usually appoint legal practitioners (i.e., barristers) or former judges.[190]

Burden and standard of proof

Evidence lies at the heart of international arbitration because the resolution of disputes ultimately depends on the factual record presented by the parties and how the tribunal assesses it.[191] A key part of this process is the burden of proof, which determines who is responsible for establishing the facts underlying their claims and defences.[192] Although the principle is rather simple, the burden of proof interacts with presumptions, adverse inferences and evidentiary production duties in ways that can have a decisive influence on outcomes.

At its core, there is broad commonality between legal families and within public international law: a party seeking to rely on a particular fact bears the burden of establishing it.[193] This is reflected in the Latin maxim *ei qui affirmat non ei qui negat incumbit probatio* (the burden rests upon he who affirms, not he who denies) as well as *actori incumbit probatio* (the claimant carries the burden of proof).[194] Conversely, *actore non probante reus absolvitur* clarifies that if a claimant cannot prove its case, the respondent is absolved, while *reus excipiendo fit actor* highlights that a respondent raising a defence or counterclaim assumes a burden of its own.[195] These principles underpin modern arbitral practice, where claimants must prove their claims

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[188] Haugeneder, *Party-Appointed and Tribunal-Appointed Experts*, *supra* note 175 at 198.
[189] *Ibid*.
[190] Waincymer, *Evidence*, *supra* note 39 at 952.
[191] Richard Garnett, "Chapter 4: Demystifying the Burden of Proof in International Arbitration" in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* (Kluwer Law International, 2024) 67 at 67.
[192] *Ibid*.
[193] *Ibid*, at 68-69; Waincymer, *Evidence*, *supra* note 39 at 762-763; Rekha Rangachari and Kabir Duggal, "Addressing Evidence in International Arbitration: A Snapshot of General Principles and Best Practices" in Shashank Garg, ed., *Arbitrator's Handbook* (LexisNexis, 2022) 183 at 186; see also *The Rompetrol Group NV v. Romania* (Award) ICSID Case No. ARB/06/3 (6 May 2013) para. 178.
[194] Waincymer, *Evidence*, *supra* note 39 at 763; similarly, Garnett, *Burden of Proof*, *supra* note 191 at 68, citing the principle of *onus probandi incumbit actori* (he or she who asserts must prove).
[195] Waincymer, *Evidence*, *supra* note 39 at 763.

while respondents generally bear the burden in respect of affirmative defences, exceptions, counterclaims, and set-offs.[196]

This allocation of proof has been consistently confirmed by arbitral tribunals. In *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* and *Metal-Tech Ltd v. Republic of Uzbekistan*, for example, each party was required to substantiate the facts of their case.[197] Moreover, the principle is codified in straightforward terms in arbitral instruments such as the 2021 UNCITRAL Arbitration Rules (Art 27.1): "*Each party shall have the burden of proving the facts relied on to support its claim or defence*." Similar provisions appear in the rules of HKIAC (Art 22.1), CIETAC (Art 41.1) and other institutions. However, these restatements of the general rule do not override specific allocations of proof found in substantive law.[198] For example, doctrines such as mitigation, foreseeability and force majeure often determine which party must prove specific elements, and contract terms may also shift the evidentiary framework.[199]

The question of whether the burden of proof is procedural or substantive has long been debated.[200] Civil law systems tend to characterise it as substantive, falling under the *lex causae*, whereas common law has often viewed it as procedural.[201] Contemporary arbitral practice largely favours the substantive view, given the direct effect of burden of proof allocation on outcomes.[202] This approach improves foreseeability and prevents the distortion of substantive rights by separating them from evidentiary requirements. Similarly, Gary Born suggests that tribunals should allocate the burden of proof in light of applicable substantive law and arbitral procedure, while remaining free to create context-specific rules where necessary.[203] The classification of the burden of proof as substantive or procedural also matters for judicial review.[204] If deemed substantive, it falls outside review unless an express ground permits appeal

[196] *Ibid*, at 765-766; see also Ina C. Popova & Lisa Wang Lachowicz, "Chapter 5: Standard of Proof in International Commercial Arbitration" in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* (Kluwer Law International, 2024) 87 at 88.
[197] *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt* (Award) ICSID Case No. ARB/05/15 (1 June 2009) paras 315, 318; *Metal-Tech Ltd v. Republic of Uzbekistan* (Award) ICSID Case No. ARB/10/3 (4 October 2013) para. 237.
[198] Waincymer, *Evidence*, *supra* note 39 at 764.
[199] *Ibid*.
[200] *Ibid*; Garnett, *Burden of Proof*, *supra* note 191 at 75-77.
[201] *Ibid*; Waincymer, *Evidence*, *supra* note 39 at 764-765; Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration*, supra note 86 at 560.
[202] Garnett, *Burden of Proof*, *supra* note 191, at 77-78.
[203] Born, *International Commercial Arbitration*, *supra* note 3 at 1858.
[204] Garnett, *Burden of Proof*, *supra* note 191 at 80.

for legal error.[205] If considered procedural, review is more likely, though annulment or refusal of enforcement based on misallocation is rare.[206] Only a manifestly erroneous approach could rise to the level of a due process violation, and even then, courts generally show considerable deference to arbitral discretion.[207]

Finally, the limits of burden of proof analysis are worth noting. Tribunals are (naturally) not absolved of their duty to engage with the applicable law and evidence simply because a party has failed to prove their case. Even if international arbitration does not apply the strict rules of proof-distribution seen in domestic courts, arbitrators often have to weigh incomplete records and make reasoned judgements.[208] Moreover, burdens of proof can be unhelpful in situations involving claims and counterclaims over the same factual issue, such as in construction disputes where both sides contest payment obligations.[209] In such cases, tribunals are likely evaluate the totality of the evidence rather than relying on rigid technical allocations.[210]

The standard of proof in international (commercial) arbitration has long been the subject of debate, particularly with regard to distinguishing it from the burden of proof.[211] While the burden of proof identifies which party is responsible for establishing a fact, the standard of proof determines the level of conviction required by the adjudicator to conclude that this burden has been met.[212] Common law traditions tend to regard this as a procedural matter, articulating the test (for civil matters) as the balance of probabilities or preponderance of evidence, meaning that a proposition is more likely than not.[213] By contrast, civil law traditions tend to view it as a substantive matter and frame the standard in terms of the adjudicator's inner conviction.[214] The inner conviction standard, rooted in the decision-maker's subjective perspective, requires that a claim convince the tribunal to the point of silencing but not eliminating doubt, making it less a formal standard than a personal, intimate process of judgment.[215] However, the practical effect is arguably rather similar, as both traditions ultimately require a preponderance of evidence (albeit to a different degree).[216] Even those commentators who suggest that certain

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[205] *Ibid*.
[206] *Ibid*.
[207] *Ibid*.
[208] Waincymer, *Evidence*, *supra* note 39 at 762-763.
[209] *Ibid*, at 766.
[210] *Ibid*.
[211] Popova/Lachowicz, *Standard of Proof*, *supra* note 196 at 87-89.
[212] Waincymer, *Evidence*, *supra* note 39 at 766.
[213] *Ibid*; Popova/Lachowicz, *Standard of Proof*, *supra* note 196 at 89-90.
[214] *Ibid*, at 90; Waincymer, *Evidence*, *supra* note 39 at 766.
[215] Popova/Lachowicz, *Standard of Proof*, *supra* note 196 at 90-91.
[216] Rangachari/Duggal, *Addressing Evidence*, *supra* note 193 at 186; Waincymer, *Evidence*, *supra* note 39 at 766.

civil law systems adopt a higher standard tend to conclude that, in practice, the outcome rarely diverges from the common law approach.[217] Regardless of terminology, neither a civil law or common law system will permit a party to succeed if the opposing case is favoured by the evidence, and if the evidence is evenly balanced, the party bearing the burden will necessarily fail.[218] Therefore, the distinction between inner conviction and balance of probabilities may be more rhetorical than substantive. In line with this observation, international arbitral practice broadly aligns with the balance of probabilities standard.[219]

Institutional rules and national arbitration statutes rarely set out detailed standards of proof, giving tribunals wide discretion,[220] thus fuelling uncertainty, particularly as to whether such standards are procedural or substantive. There has been relatively little recent analysis of the rule of decision regarding the standard of proof in cases where procedural rules are silent, but three approaches can be identified: (i) an autonomous standard derived from arbitral practice; (ii) the domestic rules of evidence of the substantive law governing the dispute (lex causae); or (iii) the domestic rules of evidence of the law governing the arbitration (lex arbitri).[221] Naturally, the choice between (ii) and (iii) often turns on whether the standard of proof is characterised as substantive or procedural.[222] Proponents of the substantive view emphasise that the burden and standard of proof affect the enforceability and value of claims and, by analogy to the European Rome I Regulation,[223] should follow the governing substantive law, thereby aligning with party expectations and preserving the finality of the award under the NYC.[224] By contrast, the procedural camp points to the traditional treatment of evidentiary issues as procedural and to party autonomy in shaping evidentiary standards.[225] In arbitral practice, the classification of the standard of proof as substantive or procedural remains unresolved.[226] Tribunals seem to rarely invoke the law of the seat, instead drawing on either substantive law

[217] *Ibid*; see for a contrasting view as regards to Austrian civil procedure Walter Rechberger, "Vor § 266 ZPO" in Hans W. Fasching and Andreas Konecny, eds, *Zivilprozessgesetze*, vol III/1 (Manz, 2017) paras 11, 13-16: Here the regular standard of proof is that of a high degree of probability (hohe Wahrscheinlichkeit), with a mere preponderance of probability (überwiegende Wahrscheinlichkeit) accepted only in narrowly defined exceptional cases.
[218] Waincymer, *Evidence*, *supra* note 39 at 767.
[219] *Ibid*, noting that some questions remain as to whether some civilian adjudicators tend to apply a higher threshold in practice; Rangachari/Duggal, *Addressing Evidence*, *supra* note 193 at 186.
[220] Waincymer, *Evidence*, *supra* note 39 at 767; Lew/Mistelis/Kröll, *Comparative International Commercial Arbitration*, supra note 86 at 561.
[221] Popova/Lachowicz, *Standard of Proof*, *supra* note 196 at 92.
[222] *Ibid*.
[223] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177, Art 18.1.
[224] Popova/Lachowicz, *Standard of Proof*, *supra* note 196 at 92-93.
[225] *Ibid*, at 93.
[226] *Ibid*, at 94.

or an autonomous balance of probabilities standard.[227] Interestingly, tribunals adjust the standard to context; for example, interim measures tend to rest on a prima facie case while illegality claims were historically reliant on clear and convincing evidence (though recent practice prefers a uniform balance of probabilities with more cogent evidence for serious allegations).[228]

Adjudication in international arbitration is ultimately probabilistic and discretionary, guided by common sense and professional expertise rather than rigid rules, with evidence assessed holistically.[229] Specialised contexts confirm this flexibility, for instance more relaxed standards in Nazi-era restitution, reliance on newspapers in commercial disputes, heightened caution in pharmaceutical cases, and variable approaches to damages, where estimation is tolerated but rough approximations without sufficient proof remain controversial.[230] Overall, the standard of proof seems to be less a fixed threshold than a calibration of persuasiveness to the seriousness of the allegation, the availability of evidence, and the need for an enforceable award. Despite divergent traditions and terminology, practice converges on a balance of probabilities, applied with flexibility to preserve fairness, efficiency, and credibility.

Reconciling procedural differences

When wanting to reconcile procedural differences between legal traditions, arbitrators – as part of their wide procedural discretion – may also look beyond already established arbitral norms and codified best practices to establish their individual tools and techniques. There are several renowned arbitration practitioners who have produced such successful innovations.[231] Notable examples include the already mentioned "Redfern Schedule", which was conceived by Alan Redfern and is nowadays used in most document productions;[232] the "Kaplan Opening", a suggestion by Neil Kaplan to set a (pre-)hearing well before the main hearing, at which the parties' representatives will (already) open their respective cases before the tribunal;[233] the "Case Review Conference" (CRC), proposed by Constantine Partasides, which is held after the first written submissions and involves a tribunal-led discussion to clarify key issues and

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[227] *Ibid*.
[228] *Ibid*, at 95-103; see also Rangachari/Duggal, *Addressing Evidence*, *supra* note 193 at 186-187.
[229] See also Waincymer, *Evidence, supra* note 39 at 771.
[230] *Ibid*, at 770-771.
[231] See Berger, *Common Law vs. Civil Law*, *supra* note 104 at 301.
[232] Sam Luttrell & Peter Harris, "Reinventing the Redfern" (2016) 33:4 J Intl Arbitration 353 at 354.
[233] Neil Kaplan, "If It Ain't Broke, Don't Change It" (2014) 80:2 Intl J Arbitration, Mediation & Dispute Management 172.

evidence, define the scope of further submissions, and establish a more tailored procedure for the remainder of the arbitration;[234] the "Reed Retreat", Lucy Reed's idea to schedule time in procedural timetables for tribunals to meet in person to study the file;[235] David Rivkin's "Town Elder" model, where the arbitrator takes an active role throughout the dispute by guiding the parties, identifying necessary evidence, promoting a phased process, focusing on key issues, offering preliminary views, and even proposing solutions;[236] the "Collaborative Arbitrator" as suggested by Katherine Kessedjan, who conducts the arbitration in an (similar to the "Town Elder") interactive manner as part of a more collaborative process;[237] or the "Sachs Protocol", a proposal by Klaus Sachs to create expert teams in order to combine the advantages of party-appointed and tribunal-appointed experts.[238]

Naturally, numerous additional approaches or techniques exist which cannot be attributed to a particular individual, most of which relate to the taking of evidence and aim to make international arbitration more time and cost efficient. Some of these case management techniques are quite simple, such as alternating (fact) witnesses instead of hearing for days the testimony from one party only, which often risks time overruns.[239] Another straightforward strategy is to introduce page limits for written submissions[240] and to limit the overall number of minutes each party may use to question witnesses or for the presentation of oral arguments by (for example) using a chess clock.[241] Further ideas include introducing the common law concept of "Calderbank Offers" to international arbitration (i.e., arbitral tribunals should

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[234] Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* note 7 at 382.

[235] Lucy F. Reed, "The 2013 Hong Kong International Arbitration Centre Kaplan Lecture – Arbitral Decision-Making: Art, Science or Sport?" (2013) 30:2 J Intl Arbitration 85.

[236] David W. Rivkin, "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited" (2008) 24:3 Arbitration Intl 375; see also Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* note 7 at 390, who compares Rivkin's "Town Elder" model to the Roman concept of "pater familias".

[237] *Ibid*, at 382.

[238] Klaus M. Sachs & Nils Schmidt-Ahrendts, "Protocol on Expert Teaming: A New Approach to Expert Evidence" in Albert Jan van den Berg, ed., *ICCA Congress Series No. 15 (Rio 2010): Arbitration Advocacy in Changing Times* (ICCA & Kluwer Law International, 2011) 135.

[239] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 73.

[240] Risse, *Ten Drastic Proposals for Saving Time and Costs*, *supra* note 68 at 456, suggesting that each party's submissions, in their entirety, must not exceed a limit of a total of 100 pages. He also points out that both in front of the European Court of Justice and the US Supreme Court, the submissions of the parties involved are similarly limited.

[241] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 73-74; however, a nuanced approach is warranted as demonstrated by the case of *Brunswick Bowling & Billiards Corp v. Shanghai Zhonglu Industrial Co Ltd* (*Brunswick Bowling & Billiards Corp v. Shanghai Zhonglu Industrial Co Ltd* [2009] HKCFI 94, [2011] 1 HKLRD 707), where the Hong Kong Court of First Instance held that even where parties have agreed to use a "chess clock" method for witness examination, an arbitral tribunal may need to allocate additional time to a party if, due to translation requirements, it would otherwise be unable to properly present its case, Stefan M. Kröll, "Chapter 2: The Normative Framework on the Taking of Evidence" in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* (Kluwer Law International, 2024) 23 at 37-38.

consider settlement offers made by one party when ultimately deciding on the allocation of costs);[242] abandoning the (often cumbersome) preparation of written witness statements;[243] not allowing for document production at all;[244] issuing directives as to the material issues of the case (i.e., after the written submissions, the tribunal identifies the issues that are potentially decisive based on the parties' assertions, excludes irrelevant ones, informs the parties, and limits evidence at the hearing to the relevant issues);[245] inviting comprehensive opening statements followed by a thorough discussion on the merits of the case, which may help orient arbitrators who have not fully absorbed the written submissions, clarify misunderstandings, and reveal the tribunal's key interests;[246] allowing the parties to assist in writing the arbitral award by instructing them to summarise their key positions (which can then be copied as a summary of the parties' submissions into the final award);[247] (partial) allocation of costs according to the efficiency shown by counsel in handling the proceedings;[248] or financially incentivising tribunals to render awards more quickly.[249] Other case management techniques might be more sophisticated and thus more challenging to master, such as hearing concurrent (fact or expert) witness testimony.[250] One such method is known as "witness conferencing", which involves the simultaneous questioning of several witnesses, mainly by the tribunal.[251] It is most effective when the arbitrators (and counsel) are well prepared and the tribunal (pro-)actively takes charge of the questioning.[252] Another (similar) method is known as "hot tubbing" and refers to a process where experts in a specific field or issue are sworn in together, questioned simultaneously, and may even engage in discussions or pose questions to each other.[253] Naturally, there is a variety of variations to each of these techniques, depending on the facts of the specific case and the arbitrators, parties, and (expert) witnesses involved.[254] A more comprehensive approach to case management can be seen in the Gangnam Arbitration Model,

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[242] Risse, *Ten Drastic Proposals for Saving Time and Costs*, *supra* note 68 at 457-458.
[243] *Ibid*, at 458-459.
[244] *Ibid*, at 459-461.
[245] *Ibid*, at 461.
[246] *Ibid*, at 461-462.
[247] *Ibid*, at 462, elaborating that this technique speeds up drafting the final award by relieving arbitrators from summarizing parties' positions and reduces the risk of challenges for allegedly overlooking arguments and violating the right to be heard.
[248] *Ibid*, at 462-464.
[249] *Ibid*, at 464, ranging from a 20% premium to a 20% penalty based on the arbitrators' fees.
[250] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 74.
[251] *Ibid*; Wirth, *Ihr Zeuge, Herr Rechtsanwalt!*, *supra* note 39 at 15.
[252] *Ibid*; Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 74.
[253] Gregory Kochansky, "Hot Tubbing and Expert Conferences – Using Concurrent Expert Evidence to Streamline Construction Arbitration" (2019) 74:3 Dispute Resolution J 81 at 81, who notes that the term "hot tubbing" stems from the need for experts to share close quarters while providing concurrent evidence.
[254] *Ibid*, at 83.

which combines several of these strategies into a coherent framework.[255] It emphasizes early involvement of legal experts, tribunal-driven case management, and intermediate non-evidentiary hearings that allow for open dialogue, all aimed at clarifying core issues, streamlining proceedings, and fostering constructive communication between parties.[256]

By developing such proactive and case-specific approaches, arbitrators play an important role in shaping the evolution of international arbitration into a hybrid, distinct, and effective dispute resolution mechanism. Therefore, arbitrators should have the courage and open-mindedness to continuously refine and develop arbitral processes within the general legal framework of international arbitration,[257] which consists of the parties' agreement, mandatory norms, arbitral statutes and rules, and the tribunal's procedural discretion.[258] This requires arbitrators to be well prepared, actively engage with the specifics of each case and have a good understanding of the procedural options available to them by virtue of the vast amount of arbitral statutes, rules, and soft law instruments.[259] Only then will arbitrators be able to decide which procedural approach will allow them to conduct their proceedings in the most fair and efficient manner possible.

There will be no need to reinvent the wheel: Many of the above-mentioned ideas have already resonated with existing arbitral bodies and institutions, thus leaving a mark in existing arbitration rules and guidelines.[260] A prominent example are the LCIA Rules, which explicitly empower the arbitrators to "*take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute*".[261] Similarly, the IBA Rules urge (at least in theory) the arbitral tribunal to "*identify to the parties, as soon as it considers it to be appropriate, any issues that (a) the arbitral tribunal may regard as relevant to the case and material for its outcome and/or (b) for which a preliminary determination may be appropriate*".[262] Moreover, the ICC Rules envisage the tribunal to draw up the Terms of

[255] See for an overview Kevin Kim and Ashutosh Ray, "Procedural Innovations for Efficiency in International Arbitration" in Shashank Garg, ed., *Arbitrator's Handbook* (LexisNexis, 2022) 445.
[256] *Ibid*, at 445-451.
[257] But see also Laeuchli, *Civil and Common Law*, *supra* note 37 at 45, who notes that arbitrators should keep in mind that arbitration is a contractual process and that the parties are paying (with their time and money) for such experiments.
[258] See Waincymer, *Evidence*, *supra* note 39 at 886; for a more detailed overview of this normative interplay see Kröll, *The Normative Framework on the Taking of Evidence*, *supra* note 241.
[259] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 312-313, noting that "*it is never the rules or best practice standards applicable to the proceedings that stand in the way of proactivity, but the reality of the 'hands-off arbitrator'*".
[260] Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* note 7 at 384-385.
[261] Art 22.1(iii) LCIA Rules 2020 (interestingly, the provision is termed "Additional Powers").
[262] Art 2.3 IBA Rules.

Reference including a summary of the parties' claims, which forces the tribunal to engage with the case early, ensuring it understands the parties' positions and allowing parties to correct any misunderstandings.[263] Some commentators have proposed to turn such draft meetings into a preliminary hearing, where parties present their case and receive the tribunal's recommendations;[264] but even without such a hearing, the process would enable early discussion on structuring proceedings, focusing on key issues, and identifying necessary evidence, fostering a more interactive arbitration.[265] Unfortunately, the reality of an arbitration conducted under the ICC Rules is usually quite different. Rather than actively engaging with the case to gain an understanding of it, arbitral tribunals tend to confine themselves to organizational matters and delegate the task of preparing a summary of their respective claims to the parties.[266]

Crucially, sometimes the most successful approaches to effective case management will not only require arbitrators to know when to apply a certain procedure but also when to refrain from applying a certain procedure. A prominent example would be document production as envisaged by the IBA Rules.[267] While the (extensive) production of documents may seem sensible in large and complex cases, it can lead to unreasonable costs and inefficient proceedings in smaller arbitrations (even if it were to yield meaningful results).[268] No doubt, a decision not to allow for (extensive) document production (by going against codified best practices), requires courage and the ability to aptly differentiate between upholding due process and avoiding due process paranoia.[269] While it is true that the decision to allow or not allow

[263] Art 23 ICC Rules 2021; Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* note 7 at 384-385.
[264] Risse, *Ten Drastic Proposals for Saving Time and Costs*, *supra* note 68 at 457.
[265] Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* note 7 at 384-385.
[266] *Ibid*, at 386, who also criticizes that even the guidelines which the ICC provides to arbitrators and parties treat the preparation of the summary by the arbitral tribunal as optional (see ICC, Controlling Time and Costs in Arbitration, (March 2018) at 9 para 19: "*The arbitral tribunal should consider whether it is appropriate for it to draft the summary of claims and/or the relief sought itself, or whether it would assist if each party were to provide a draft summary for inclusion in the Terms of Reference in accordance with Article 23(1), subparagraph (c), of the Rules.*").
[267] Art 3 IBA Rules; see also Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* note 7 at 385, who observes that nowadays a standard arbitral procedure seems to include a phase of two to four months for document production whether or not a request for such production has been made or at least announced.
[268] Bell, *Arbitration*, *supra* note 5 at 73, noting that in almost 15 years of arbitration practice as an arbitrator, he "*cannot remember a single case in which a document so produced made much of a difference – there certainly never was any smoking gun*"; he therefore asks (and answers in the negative) whether document production is really necessary in almost every case; due to such costly procedural inflexibility small arbitrations have become difficult to afford, see Risse, *Ten Drastic Proposals for Saving Time and Costs*, *supra* note 68 at 453, 460.
[269] See for an overview of due process paranoia, Klaus Peter Berger & J. Ole Jensen, "Due process paranoia and the procedural judgment rule: a safe harbor for procedural management decisions by international arbitrators" (2017) 14:54 Revista Brasileira de Arbitragem 73; see also Berger, *Common Law vs. Civil Law*, *supra* note 104 at 306, who notes that soft law rules are often "*observed by parties, their counsel and the arbitrators not because they are mandatory law, but because these texts exist*".

certain procedures may create grounds for annulment or non-enforcement of arbitral awards,[270] arbitrators should keep in mind that soft law instruments, like the IBA Rules, do not constitute a default arbitral procedure but (usually) merely another available option to manage an arbitration.[271] It is also crucial to know how not to combine certain procedural elements. In many cases, inefficiency arises when features from different legal traditions are simply added together rather than integrated effectively.[272] For example, civil law-style lengthy written submissions and extensive document production are sometimes followed by broad common law-style disclosure requests and prolonged oral hearings with numerous witness cross-examinations.[273] This overlap often leads to longer proceedings, higher costs, and a failure to achieve a genuine synthesis of the two approaches.[274]

Rather, keeping an open mind and staying flexible is key.[275] When making difficult procedural decisions, it will also help to be transparent: Letting the parties know as early as possible what they can expect from a tribunal not only prevents (undesired) surprises but ultimately may also help to safeguard the enforceability of the award.[276] Like in any other major project, effective communication and working well with people, i.e., co-arbitrators, counsel, and parties, is essential for a successful arbitration.[277] Ideally, arbitrators should strive to establish a fruitful and continuous dialogue with the parties from the outset of proceedings.[278] One potential way of such proactive case management may involve issuing (comprehensive) procedural orders to clarify expectations early in the proceedings and to streamline the following processes. Another approach is to directly ask the parties to make an informed choice about the type of arbitral procedure they would like to experience.[279] Applying these methods will (likely) result in a more cost efficient, but also more transparent and legitimate arbitral process.

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[270] For example, violation of the parties' right to present their case, violation of the parties' right to be treated equally as well as violation of any agreements between the parties, see Berger/Jensen, *Due process paranoia*, *supra* note 269 at 79; see also Art V(1)(b), Art V(1)(d) and Art V(2)(b) NYC.

[271] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 305-306, who warns that due to their soft normativity, codified best practices might work as a bar to arbitrators' independent legal thinking and thus might limit the exercise of arbitral discretion (comparable to a "straitjacket").

[272] Carlevaris, *The Civil Law/Common Law Divide in International Arbitration*, *supra* note 109 at 226-228.

[273] *Ibid*, at 226.

[274] *Ibid*, at 228, criticizing that the result of international arbitration has been too often the mere "*overlap of elements belonging to both traditions, rather than* [] *their effective amalgamation*".

[275] See Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 65-66.

[276] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 311, noting that "*the fundamental best practice rule is 'no surprises'*".

[277] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 65.

[278] Bernardini, *The Role of the International Arbitrator*, *supra* note 63 at 116-117, who refers to this mode of communication as "interactive arbitration".

[279] Risse, *Ten Drastic Proposals for Saving Time and Costs*, *supra* note 68 at 465-466.

It may require some original legal thinking to appropriately address the parties' expectations and the particular circumstances of the case at hand.[280] Such ways of thinking may include a deeper engagement with hybrid legal systems or international commercial courts. For instance, the Singapore International Commercial Court (SICC) could offer an inspirational case study, as it blends features of domestic litigation with procedural shortcuts inspired by international arbitration.[281] Furthermore, the above-mentioned hybrid legal systems, such as Québec within Canada, Louisiana within the US, Scotland within the UK, South Africa, and Israel may serve as instructive microcosms of the procedural diversity found in international arbitration. As with arbitration, these systems require practitioners and judges to navigate multiple legal traditions simultaneously, drawing selectively on each to resolve disputes in a manner that is acceptable to parties from different legal and cultural backgrounds. These jurisdictions demonstrate how procedural compromises can be reached, how different conceptions of fairness can be reconciled, and how institutional legitimacy can be maintained in pluralistic environments. For instance, Quebec's integration of civil law substantive principles with common law-style adversarial procedures demonstrates how to preserve core legal identities while adapting to user expectations.[282] This is a common issue when blending civil and common law arbitral cultures. Scotland's approach to evidence, on the other hand, which combines written pleadings with structured oral testimony,[283] offers a model for balancing efficiency with thorough fact-finding. The coexistence of overlapping legal traditions within such systems often produces an overabundance of potentially applicable rules and gaps requiring bespoke solutions, creating conditions that closely resemble the procedural environment of international arbitration.[284] For arbitration practitioners, studying these systems thus offers a ready-made laboratory for observing how procedural hybrids evolve and function in practice. This wider, (more) original comparative legal perspective would not only broaden the analysis but also provide a stronger foundation for evaluating procedural innovation.

[280] Carlevaris, *The Civil Law/Common Law Divide in International Arbitration*, *supra* note 109 at 229.
[281] More information on the SICC may be found under <https://www.judiciary.gov.sg/singapore-international-commercial-court>, last accessed 13 August 2025; for a more academic perspective on the SICC see Yip Man, "The Singapore International Commercial Court: The Future of Litigation?" (2019) 12:1 Erasmus L Rev 82.
[282] See for a more detailed analysis Jukier, *The Impact of Legal Traditions*, *supra* note 18.
[283] For an overview of Scottish civil procedure see Shepherd and Wedderburn LLP, "Handling Disputes in Scotland: A quick guide to Scottish civil procedure" (2019), accessible via <https://shepwedd.com/sites/default/files/Handling%20Disputes%20in%20Scotland.pdf>, last accessed 13 August 2025.
[284] See Karton, *International Arbitration as Comparative Law*, *supra* note 96 at 295-314, who points out how at the same time there is "too much" and "too little" law in international (commercial) arbitration.

C. Overview

The following table demonstrates how international arbitration has developed a hybrid practice that tends to combine elements of both civil law and common law traditions into a distinct procedural framework:

Procedural Aspect	Common Law	Civil Law	International Arbitration
Pleadings	Notice pleadings, concise initial filings	Memorial style, detailed legal arguments	Hybrid: written memorials supplemented by oral hearings
Evidence production	Broad discovery, fishing expeditions common	Limited, targeted document requests only	Narrow document production under IBA Rules, no fishing allowed
Witness testimony	Oral direct and cross-examination led by counsel	Written statements, judge-led questioning	Written witness statements with (limited) cross-examination by counsel
Expert evidence	Party-appointed expert witnesses	Tribunal-appointed independent experts	Parties appoint experts, tribunals may also appoint their own
Costs	"Loser pays" in UK; each bears own costs in US	Prevailing party usually recovers costs	Costs-shifting generally applied, tribunal has discretion

V. Potential wider implications of bridging procedural differences

Given the procedural convergence of common law and civil law approaches, it is arguable that the once-perceived divide between these two traditions has ceased to exist (or at least become less divisive) in international arbitration.[285] It has been shown that arbitrators have played a

[285] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 65; Karl-Heinz Böckstiegel, "Assumptions regarding Common Law versus Civil Law in the Practice of International Commercial Arbitration" (2011) 9:3 SchiedsVZ 113 at 114; Mohtashami, *Some Observations on the Civil Law: Common Law Dichotomy*, *supra* note 47 at 75-78, who identifies the approaches towards sequencing the pre-hearing submissions (i.e., pleading vs memorial style) and the willingness to adjust the parties' agreement on liquidated damages as two of the differences remaining; see also Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 79, according to whom the great divide in international arbitration is not so much between civil law and common law jurisdictions, but rather between those jurisdictions that are friendly to arbitration and those that are not; see also Berger, *Common Law vs. Civil Law*, *supra* note 104 at 311-312, who calls for the abandonment of "*traditional binary distinctions*" such as the one made between common law and civil law.

fundamental role in this process, be it by influencing (hard) arbitral norms, drafting non-binding best practice guidelines, or developing case-specific solutions to meet the parties' demands. Thereby, they have helped to merge international arbitration proceedings into an efficient and predictable hybrid procedure, which is governed mostly by non-statutory (and non-binding) practice-made rules.[286] Thus, the creation of such transnational hybrid procedures is (or at least should be) very much desirable to all the actors involved. However, the development of such hybrid processes can also present a number of challenges.

First, practitioners should be wary of creating procedures that inadvertently favour one legal tradition over another, which is for example evidenced by the above-mentioned criticism of the IBA Rules. Although international arbitration as such is neither adversarial nor inquisitorial in nature,[287] it may seem (at least to civilian lawyers) to be dominated by common law elements, such as (albeit limited) document production, cross-examination of witnesses, and the prevailing use of party-appointed experts.[288] One potential underlying reason for this phenomenon might be the dominant use of English as the language of international arbitration proceedings, which has led to the (unconscious) adoption of procedural (and even substantive) common law principles.[289] Another reason might be the strong reputation and high quality of common law courts, which strengthens the appeal of selecting popular arbitral seats (such as London, New York, Hongkong, or Singapore[290]) in common law influenced countries. A third reason might be that most multinational corporations are based in the US and prefer arbitration to US-court litigation, which is notorious for its (unpredictable and often reputation-damaging) jury trials. Lastly, as international arbitrations are usually high-stakes disputes involving large sums of money, they will traditionally be handled by big international (i.e., American) law firms, which prefer and are used to the more lucrative common law procedures.[291] Or it might just be the case that the adversarial common law procedure is more stimulating and thus more appealing to (both civil and common law trained) lawyers than the more ordinary and document-heavy civil law approach.[292] For instance, I have heard more than one civilian arbitration practitioner say that there is nothing more exciting and satisfying than conducting a

[286] *Ibid*, at 296; some commentators call this a "procedural Esperanto" (see Brekoulakis, *Introduction*, *supra* note 110 at 9), others a "procedural lex mercatoria" (see Carlevaris, *The Civil Law/Common Law Divide in International Arbitration*, *supra* note 109 at 216).
[287] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 296.
[288] Comair-Obeid/Brekoulakis, *Introduction*, *supra* note 87 at 4; see also Bell, *Arbitration*, *supra* note 5 at 72.
[289] Elsing, *The Influence of the English Language*, *supra* note 84 at 86-87, who cautions that a language's popularity must not be confused with its neutrality.
[290] QMUL/White & Case, *2021 International Arbitration Survey*, *supra* note 4 at 6.
[291] See also Wirth, *Ihr Zeuge, Herr Rechtsanwalt!*, *supra* note 39 at 10.
[292] See also *ibid*, at 10-11, who argues that common law procedures are sometimes perceived to be more fair.

good cross-examination. Whatever the reasons for the (arguable) dominance of common law procedures may be, it should be stressed (again) that there is no default procedure in international arbitration, and it will always be up to the respective parties (and tribunals) to choose and design their preferred procedural approach. The result of this "marriage" of civil and common law in international arbitration could thus truly be the best of both worlds, i.e., curbing the common law's tendency toward excessive litigation through greater tribunal control, ensuring broader access to a fair process than currently available in certain civil law jurisdictions, and ultimately to create a more cost- (and time-) effective arbitral process.[293] Nevertheless, it is improbable that common law and civil law approaches to advocacy and proof will ever merge into a single uniform procedure, which is not only unlikely but also undesirable.[294]

Second – and arguably even more challenging – when developing hybrid procedures, practitioners must learn to navigate the tension between harmonisation and respect for legal diversity, meaning they should be wary of overregulating each and every step of the arbitral process.[295] This holds especially true in recent times, where the rise of new technologies may create ever more standardised arbitration procedures. The integration of technology into arbitral practice was accelerated by the Covid-19 pandemic.[296] Remote hearings, which were once rare, became the norm,[297] prompting procedural adjustments that encouraged convergence between common law and civil law approaches. These adjustments included more focused questioning instead of lengthy cross-examination, standardised digital bundles and shared document repositories.[298] Advances in e-disclosure tools and AI-assisted review, including predictive coding, have further streamlined evidence management and boosted procedural efficiency.[299]

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[293] Laeuchli, *Civil and Common Law*, *supra* note 37 at 45, 47; see also Foo, International Arbitration Training in Procedural Aspects, supra note 119 at 503, liking this result to a good cup of Yuan Yang (i.e., Chai latte).

[294] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 65.

[295] Berger, *Common Law vs. Civil Law*, *supra* note 104 at 306, who warns against an increasing judicialization of international arbitration; see also Bell, *Arbitration*, *supra* note 5 at 78, who believes that the future will bring even more diversity, for example through the establishment of international commercial courts; see also Comair-Obeid/Brekoulakis, *Introduction*, *supra* note 87 at 7-8, who expect (mainly) more cultural diversity in the future of international arbitration; similarly Karton, *International Arbitration as Comparative Law*, *supra* note 96 at 324, who believes that the market driven logic of international arbitration will continue to reflect the pluralism of its users.

[296] See for example Aichell Alvarado, "Chapter 10: Technology as a Vehicle to Enhance Arbitration" in Shaheeza Lalani & Steven G. Shapiro, eds., *The Impact of Covid on International Disputes* (Brill, 2023) 196 at 198-206.

[297] *Ibid*, at 198.

[298] For example, the Stockholm Chamber of Commerce (SCC) established a secure digital platform for communication and file sharing between the institution, the parties and the tribunal, *ibid*, at 200-201.

[299] See for instance Julia Sherman, Himmy Lui, Kelly Renehan & Anish Patel, "Using Technology and e-Disclosure" in GAR, *The Guide to Evidence in International Arbitration – Second Edition* (2023), available via <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/2nd-edition/article/using-technology-and-e-disclosure>, last accessed 14 August 2025 or Nadia Nicolaou, "The

Such standardised approaches based on procedural convergence not only risk diluting the unique strengths of the legal traditions involved but may also endanger the procedural flexibility of international arbitration as such, which is one of its main attractions.[300] As has been stressed throughout this paper, there is no (and should not be any) default procedure in international arbitration. Rather, it should be up to the parties to autonomously agree on their preferred procedural approach; in the absence of such a (real) choice by the parties, the preferred approach will usually be up to the arbitrators' discretion.[301] Although this discretion may be (and even should to some extent be) informed by the accepted spectrum of procedural options as outlined in arbitral norms and soft law instruments, such as the IBA Rules, the very essence of international arbitration – as a flexible and tailor-made process – leaves no room for a one-size-fits-all default procedure.

But there may also be other – more positive – wider implications of bridging the procedural differences between civil and common law. First, by comparing and merging elements of various legal traditions, international arbitration has arguably transformed the discipline of comparative law from a merely academic niche into a more prominent, practical, and lucrative discipline.[302] Thus, numerous practitioners have referred to international arbitration as "comparative law in action",[303] which is accurate since the arbitral process forces its participants to constantly compare and choose the most appropriate (and culturally acceptable) rules to resolve their dispute.[304] Second, by constantly allowing for new procedural innovations to be tested, international arbitration has also from time to time inspired changes in domestic (civil law and common law) litigation proceedings.[305] A prominent example for this are the so-called "Woolf reforms" in England in 1999, which were based on a 1996 report by Lord Woolf

evolution of arbitration technology: AI use cases and considerations" (12 June 2025), accessible via <https://www.opus2.com/arbitration-ai-use-cases/#:~:text=Arbitration%20cases%20often%20involve%20extensive,events%2C%20people%2C%20and%20entities.>, last accessed 14 August 2025.

[300] Elsing/Townsend, *Common Law-Civil Law Divide*, *supra* note 12 at 65; Berger, *Common Law vs. Civil Law*, *supra* note 104 at 305-306.

[301] Bell, *Arbitration*, *supra* note 5 at 74, 78.

[302] *Ibid*, at 61-62, citing (the great) Emmanuel Gaillard, "The Use of Comparative Law in International Commercial Arbitration" in Pieter Sanders, ed., *ICCA Congress Series No. 4 (Tokyo 1988): Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation* (Kluwer, 1989) 283 at 283.

[303] See for example Karton, *International Arbitration as Comparative Law*, *supra* note 96 at 293, citing Pierre Lalive and Pierre Karrer.

[304] *Ibid*, at 307.

[305] Karrer, *Civil Law and Common Law Divide*, *supra* note 21 at 67; see also Laeuchli, *Civil and Common Law*, *supra* note 37 at 45.

and were aimed at bringing about quicker, simpler and less adversarial litigation.[306] Because the legal framework of international arbitration is much more flexible than that of domestic court proceedings, the arbitral process is better placed to react quickly to technological innovations, such as the ability to hold hearings remotely via video-conferencing or the advancing use of AI.

Looking to the future, these developments suggest that procedural convergence will deepen, albeit perhaps not evenly. Hybrid hearings, which combine logistical efficiency with procedural fairness, could become the standard model.[307] AI tools may evolve from document review to predictive analytics, offering recommendations for bespoke procedural frameworks.[308] Unlike procedural convergence driven by human practice, AI risks embedding hidden biases or privileging particular legal traditions through its training data, which will require the vigilance of arbitral practitioners. Crucially, convergence trends are no longer confined to arbitration. The procedural innovations of international commercial courts, such as the SICC, demonstrate that the whole field of transnational dispute resolution seems to be moving towards a shared toolbox of procedural devices. All spheres are adopting efficiency measures from civil law and safeguards from common law, indicating a broader pattern of cross-pollination in global commercial justice. However, procedural convergence should not be mistaken for uniformity. The arbitration community must guard against procedural homogenisation, preserving flexibility for party autonomy and respect for cultural diversity in dispute resolution.[309] From a normative standpoint, the future of arbitration procedure will likely be shaped by this tension between convergence and divergence. While technological infrastructure and global best practices push towards harmonisation, differences in legal culture, party expectations, and case-specific needs will continue to justify procedural variety. To navigate this tension, arbitrators and institutions should invest in training to enhance cross-cultural procedural literacy,[310] adopt

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[306] *Ibid*; Michelle Bramley & Anna Gouge, "Commercial disputes: The practical impact of the Woolf reforms" (Practical Law, 1999), accessible via <https://uk.practicallaw.thomsonreuters.com/8-101-2625?transitionType=Default&contextData=(sc.Default)&firstPage=true>, last accessed 18 March 2025; see also Doug Jones, "Redefining the Role and Value of Expert Evidence" in Shashank Garg, ed., *Arbitrator's Handbook* (LexisNexis, 2022) 241 at 252.

[307] For the advantages of physical hearings and whether there is an actual right to a physical hearing see Darius Chan & Gerome Goh Teng Jun, "Chapter 11: Hearing" in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, *Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues* (Kluwer Law International, 2024) 247 at 256, 269-272, 284.

[308] Nicolaou, *The evolution of arbitration technology*, *supra* note 299.

[309] Berger, *Common Law vs. Civil Law*, *supra* note 104, at 306; Bell, *Arbitration*, *supra* note 5 at 78.

[310] Foo, *International Arbitration Training in Procedural Aspects*, *supra* note 119 at 504 ("*For legal practitioners who are involved in international arbitration, obtaining the requisite training not only in the various procedural aspects of international arbitration but also in understanding the common and civil law approaches to such procedural aspects will undoubtedly stand us in better stead. Such an 'enlightened' practitioner, armed with a*

procedural default rules that offer a balanced starting point without constraining the parties' choice and promote greater transparency in procedural decision-making.

Ultimately, the question is whether arbitration should develop into a unique legal culture with its own distinct procedural identity, or whether it should remain an eclectic blend of legal traditions. Technological advances, lessons from other procedural systems, and adaptations during the pandemic suggest that both scenarios are feasible, with arbitration's enduring strength lying in its capacity to adapt rather than conform. Given these potentially far-reaching consequences of bridging and refining procedural practices, it becomes evident that the role of international arbitrators is not merely practical but transformative. To sum it up with the words of a preeminent arbitration practitioner: "[W]*ith great power comes great responsibility*.".[311]

VI. Concluding remarks

In conclusion, the role of arbitrators in bridging procedural differences between common law and civil law traditions is not merely one of practical importance but of profound transformation. As this thesis has demonstrated, international arbitration has evolved into a distinct and flexible dispute resolution mechanism, shaped by the interplay of common law and civil law traditions. Arbitrators are at the heart of this evolution, acting as procedural architects who reconcile divergent expectations, ensure procedural fairness, and uphold the efficiency that makes arbitration the preferred method of resolving cross-border disputes.

International arbitration's hybrid nature is evident in its frameworks, which combine (more) adversarial and (more) inquisitorial elements. Soft law instruments such as the IBA Rules and the Prague Rules offer useful points of reference, yet their authority must not eclipse arbitration's greatest strength – its flexibility. The future of arbitration lies not in adopting one model wholesale, but in arbitrators exercising creativity and judgement to tailor procedures to the needs of each particular dispute. In this respect, procedural innovations – from the Redfern Schedule and Kaplan Opening to hot-tubbing of witnesses and proactive case management

holistic perspective, will be better able to serve his/her clients, including to advocate a procedure which parties understand and would comply with.").

[311] Salomon, *Introduction*, *supra* note 4 at xxix.

conferences – illustrate how arbitrators continuously adapt practices to strike the right balance between efficiency, fairness, and legitimacy.

Beyond their immediate procedural tasks, arbitrators play a wider role in shaping global dispute resolution culture. International arbitration has been described as "comparative law in action," constantly testing and blending concepts across traditions. Its innovations have even influenced domestic litigation, as seen with the English Woolf reforms, while international commercial courts such as the SICC increasingly borrow from arbitral practice. This cross-pollination demonstrates that arbitration is not an isolated enclave but a laboratory for procedural experimentation that may be able to radiate into broader transnational justice. At the same time, convergence must not be confused with homogenisation. The growing reliance on technology, hybrid hearings, and AI-assisted processes risks creating over-standardisation, potentially undermining the diversity and party autonomy that make arbitration attractive. The challenge for the future is therefore to embrace useful convergence while preserving flexibility and respect for cultural pluralism.

Looking ahead, one may ask whether international arbitration is evolving into a self-standing procedural tradition. While it draws upon both civil law and common law, its increasing reliance on hybrid practices, soft law frameworks, and innovative case management techniques suggests the emergence of a transnational procedural culture in its own right. This culture is unlikely to ever become entirely uniform as arbitration's strength lies in preserving flexibility while remaining open to procedural diversity. Yet the growing body of shared practices may gradually establish arbitration as a distinct legal tradition, marked by adaptability, pragmatism, and a commitment to reconciling difference rather than enforcing uniformity.

Ultimately, the legitimacy of international arbitration depends less on the dominance of any single legal (procedural) tradition and more on the skill of arbitrators who can navigate between them. By acting as procedural architects and cultural translators, arbitrators do more than resolve disputes: they construct transnational legal bridges where legitimacy emerges from adaptation, dialogue, and balance. This transformative role underscores that with great procedural discretion comes equally great responsibility, namely, to ensure that international arbitration remains a fair, efficient, and trusted mechanism of global dispute resolution.

Bibliography

- **Legislation (incl. international treaties)**

Austrian Code of Civil Procedure (ZPO); secs 41, 43, 226, 303-307, 601, 609.

English Arbitration Act 1996; secs 37, 60.

Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177; Art 18.

Singapore International Arbitration Act 1994; sec 12.

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, in force 7 June 1959, 330 UNTS 4739.

- **Soft law instruments**

CIArb Protocol for the Use of Party-appointed and Tribunal-appointed Experts, accessible via <https://www.ciarb.org/resources/professional-practice-guidelines/international-arbitration/>.

CIETAC Arbitration Rules, 2024.

DIS Arbitration Rules, 2018.

IBA Guidelines on Conflicts of Interest in International Arbitration, 2024, accessible via <https://www.ibanet.org/resources>.

IBA Guidelines on Party Representation in International Arbitration, 2013, accessible via <https://www.ibanet.org/resources>.

IBA Rules on the Taking of Evidence in International Arbitration, 2020, accessible via <https://www.ibanet.org/resources>.

FAI Arbitration Rules, 2024.

ICC Arbitration Rules, 2021.

ICC, Controlling Time and Costs in Arbitration, (March 2018).

LCIA Arbitration Rules, 2020.

Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), 2018, accessible via <https://www.praguerules.com/prague_rules/>.

SIAC Arbitration Rules, 2025.

UNCITRAL Model Law (UNCITRAL Model Arbitration Law, UN Document A/40/17, Annex 1).

UNCITRAL Notes on Organizing Arbitral Proceedings, 2016, accessible via <https://uncitral.un.org/en/texts/arbitration/explanatorytexts/organizing_arbitral_proceedings>.

- **Jurisprudence (incl. arbitral awards)**

Brunswick Bowling & Billiards Corp v. Shanghai Zhonglu Industrial Co Ltd [2009] HKCFI 94, [2011] 1 HKLRD 707.

JVL Agro Industries Ltd v. Agritrade International Pte Ltd ([2016] SGHC 126, [2016] 4 SLR 768).

Marbury v. Madison (U.S. (1 Cr.) 137 (1803)).

Metal-Tech Ltd v. Republic of Uzbekistan, Award, ICSID Case No. ARB/10/3 (4 October 2013).

Methanex Corporation v. United States of America, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005).

The Rompetrol Group NV v. Romania, Award, ICSID Case No. ARB/06/3 (6 May 2013).

Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, Award, ICSID Case No. ARB/05/15 (1 June 2009).

- **Books**

Alvarado, Aichell, "Chapter 10: Technology as a Vehicle to Enhance Arbitration" in Shaheeza Lalani & Steven G. Shapiro, eds., The Impact of Covid on International Disputes (Brill, 2023) 196.

Arroyo, P. Fernández, "Chapter 6: Arbitrator's Procedural Powers: The Last Frontier of Party Autonomy?" in Franco Ferrari, ed, Limits to Party Autonomy in International Commercial Arbitration (JurisNet, 2016) 199.

Bell, Gary F., "Arbitration and Comparative Law" in C.L. Lim, ed., The Cambridge Companion to International Arbitration (CUP, 2021) 61.

Bermann, George A., "Chapter 19: Applicable Law and the Civil and Common Law Divide" in Nayla Comair-Obeid & Stavros Brekoulakis, eds., The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide (Kluwer Law International, 2023) 233.

Born, Gary B., International Arbitration: Law and Practice, 3d ed (Kluwer Law International, 2021).

Born, Gary B., International Commercial Arbitration, 3d ed (Kluwer Law International, 2021).

Brekoulakis, Stavros, "Chapter 1: Introduction: The Evolution and Future of International Arbitration" in Stavros Brekoulakis, Julian D.M. Lew, et al., eds, The Evolution and Future of International Arbitration (Kluwer Law International, 2024) 1.

Carlevaris, Andrea, “Chapter 18: The Civil Law/Common Law Divide in International Arbitration: Requiem or New Dawn?” in Nayla Comair-Obeid & Stavros Brekoulakis, eds., The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide (Kluwer Law International, 2023) 215.

Chan, Darius & Gerome Goh Teng Jun, “Chapter 11: Hearing” in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues (Kluwer Law International, 2024) 247.

Comair-Obeid, Nayla & Stavros Brekoulakis, “Introduction” in Nayla Comair-Obeid & Stavros Brekoulakis, eds., The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide (Kluwer Law International, 2023) 1.

Cordero-Moss, Giuditta, “Chapter 6: Iura Novit Curia” in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues (Kluwer Law International, 2024) 111.

David, René & John E. C. Brierley, Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law, 3d ed (Stevens & Sons 1985).

Elsing, Siegfried H., “The Influence of the English Language: A Gradual Acceptance of Anglo-American Legal Culture in International Arbitration” in Stefan M. Kröll, et al., eds., International Arbitration and International Commercial Law: Synergy, Convergence and Evolution (Kluwer Law International, 2011) 85.

Foo, Yvonne, “Chapter 40: International Arbitration: Training in Procedural Aspects That Differ in Civil and Common Law Approaches” ?” in Nayla Comair-Obeid & Stavros Brekoulakis, eds., The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide (Kluwer Law International, 2023) 503.

Gaillard, Emmanuel, “The Use of Comparative Law in International Commercial Arbitration” in Pieter Sanders, ed., ICCA Congress Series No. 4 (Tokyo 1988): Arbitration in Settlement of International Commercial Disputes Involving the Far East and Arbitration in Combined Transportation (Kluwer, 1989) 283.

Garnett, Richard, “Chapter 4: Demystifying the Burden of Proof in International Arbitration” in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues (Kluwer Law International, 2024) 67.

George, Amit and Rishabh Dheer, “Allocation of Cost and Award of Interest by the Arbitral Tribunal” in Shashank Garg, ed., Arbitrator’s Handbook (LexisNexis, 2022) 413.

Glenn, H. Patrick, Legal Traditions of the World: Sustainable diversity in law, 5th ed (OUP, 2014).

Haugeneder, Florian, “Party-Appointed and Tribunal-Appointed Experts in International Arbitration” in Christian Klausegger, et al., eds., Austrian Yearbook on International Arbitration 2020 (Manz, 2020) 177.

Jones, Doug, “Redefining the Role and Value of Expert Evidence” in Shashank Garg, ed., Arbitrator’s Handbook (LexisNexis, 2022) 241.

Karrer, Pierre A., “The Civil Law and Common Law Divide: An International Arbitrator tells it like he sees it” in ICDR, Handbook on International Arbitration & ADR, 3d ed (Juris Legal Information, 2017) 65.

Kim, Kevin & Ashutosh Ray, “Procedural Innovations for Efficiency in International Arbitration” in Shashank Garg, ed., Arbitrator’s Handbook (LexisNexis, 2022) 445.

Kröll, Stefan M., “Chapter 2: The Normative Framework on the Taking of Evidence” in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues (Kluwer Law International, 2024) 23.

Laeuchli, Urs Martin, “Civil and Common Law: Contrast and Synthesis in International Arbitration” in ICDR, Handbook on International Arbitration Practice, 2nd ed (Juris Legal Information, 2017) 37.

Lew, Julian D.M., Loukas A. Mistelis & Stefan M. Kröll, Comparative International Commercial Arbitration (Kluwer Law International, 2003).

Lew, Julian D.M. & Simona Valkova, “Chapter 1: Cultures and the Taking of Evidence” in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues (Kluwer Law International, 2024) 3.

Marshall, Tim, Prisoners of Geography (Elliott & Thompson, 2015).

Merryman, John Henry & Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America, 4th ed (SUP, 2019).

Mohtashami, Reza, “Chapter 6: Some Observations on the Civil Law: Common Law Dichotomy – The Approach to Procedural and Legal Issues” in Nayla Comair-Obeid & Stavros Brekoulakis, eds., The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide (Kluwer Law International, 2023) 75.

Popova, Ina C. & Lisa Wang Lachowicz, “Chapter 5: Standard of Proof in International Commercial Arbitration” in Franco Ferrari and Friedrich Jakob Rosenfeld, eds, Handbook of Evidence in International Commercial Arbitration: Key Concepts and Issues (Kluwer Law International, 2024) 87.

Rangachari, Rekha & Kabir Duggal, “Addressing Evidence in International Arbitration: A Snapshot of General Principles and Best Practices” in Shashank Garg, ed., Arbitrator’s Handbook (LexisNexis, 2022) 183.

Rechberger, Walter, “Vor § 266 ZPO” in Hans W. Fasching and Andreas Konecny, eds, *Zivilprozessgesetze*, vol III/1 (Manz, 2017).

Sachs, Klaus M. & Nils Schmidt-Ahrendts, “Protocol on Expert Teaming: A New Approach to Expert Evidence” in Albert Jan van den Berg, ed., ICCA Congress Series No. 15 (Rio

2010): Arbitration Advocacy in Changing Times (ICCA & Kluwer Law International, 2011) 135.

Salomon, Claudia T., "Introduction" in Shashank Garg, ed., Arbitrator's Handbook (LexisNexis, 2022) xxix.

Schneider, Michael E., "Chapter 25: The Uncertain Future of the Interactive Arbitrator: Proposals, Good Intentions and the Effect of Conflicting Views on the Role of the Arbitrator" in Stavros Brekoulakis, Julian D.M. Lew, et al., eds, The Evolution and Future of International Arbitration (Kluwer Law International, 2024) 379.

Waincymer, Jeffrey Maurice, Procedure and Evidence in International Arbitration (Kluwer Law International, 2012).

Wood, Derek, "Chapter 14: Common Law Advocacy in International Arbitrations: Fit for Purpose?" in Nayla Comair-Obeid & Stavros Brekoulakis, eds., The Plurality and Synergies of Legal Traditions in International Arbitration: Looking Beyond the Common and Civil Law Divide (Kluwer Law International, 2023) 171.

- **Journal articles**

Berger, Klaus Peter, "Common Law vs. Civil Law in International Arbitration: The Beginning or the End?" (2019) 36:3 J Intl Arbitration 295.

Berger, Klaus Peter & J. Ole Jensen, "Due process paranoia and the procedural judgment rule: a safe harbor for procedural management decisions by international arbitrators" (2017) 14:54 Revista Brasileira de Arbitragem 73.

Bernardini, Piero, "The Role of the International Arbitrator" (2004) 20:2 Arbitration Intl 113.

Böckstiegel, Karl-Heinz, "Assumptions regarding Common Law versus Civil Law in the Practice of International Commercial Arbitration" (2011) 9:3 SchiedsVZ 113.

Elsing, Siegfried H. & John M. Townsend, “Bridging the Common Law-Civil Law Divide in Arbitration” (2002) 18:1 Arbitration Intl 59.

Ginsburg, Tom, “The Culture of Arbitration” (2003) 36 Vanderbilt Journal of Transnational Law 1335.

Jukier, Rosalie, “The Impact of Legal Traditions on Quebec Procedural Law: Lessons from Quebec’s new Code of Civil Procedure” (2015) 93 Can Bar Rev 211.

Kaplan, Neil, “If It Ain’t Broke, Don’t Change It” (2014) 80:2 Intl J Arbitration, Mediation & Dispute Management 172.

Karton, Joshua, “International Arbitration as Comparative Law in Action” (2020) 2:7 J Dispute Resolution 293.

Kochansky, Gregory, “Hot Tubbing and Expert Conferences – Using Concurrent Expert Evidence to Streamline Construction Arbitration” (2019) 74:3 Dispute Resolution J 81.

La Porta, Rafael, Florencio Lopez-de-Silanes & Andrei Shleifer, “The Economic Consequences of Legal Origins” (2008) 46:2 J Economic Literature 285.

Luttrell, Sam & Peter Harris, “Reinventing the Redfern” (2016) 33:4 J Intl Arbitration 353.

Mahoney, Paul G., “The Common Law and Economic Growth: Hayek Might Be Right” (2001) 30:2 J Leg Studies 503.

Man, Yip, “The Singapore International Commercial Court: The Future of Litigation?” (2019) 12:1 Erasmus L Rev 82.

Reed, Lucy F., “The 2013 Hong Kong International Arbitration Centre Kaplan Lecture – Arbitral Decision-Making: Art, Science or Sport?” (2013) 30:2 J Intl Arbitration 85.

Risse, Jörg, “Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings” (2013) 29:3 Arbitration Intl 453.

Rivkin, David W., “Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited” (2008) 24:3 Arbitration Intl 375.

Wirth, Markus, “Ihr Zeuge, Herr Rechtsanwalt! – Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden” (2003) 1:1 SchiedsVZ 9.

- **Online materials**

Bramley, Michelle & Anna Gouge, “Commercial disputes: The practical impact of the Woolf reforms” (Practical Law, 1999), accessible via <https://uk.practicallaw.thomsonreuters.com/8-101-2625?transitionType=Default&contextData=(sc.Default)&firstPage=true>.

Educational resources created by the Administrative Office of the U.S. Courts, accessible via <https://www.uscourts.gov/about-federal-courts/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix/grove-city-college-v-bell-glossary#:~:text=A%20dissenting%20opinion%20is%20an,result%20reached%20in%20a%20case> for the definition of “dissenting opinion”.

Information on the Singapore International Commercial Court (SICC), accessible via <https://www.judiciary.gov.sg/singapore-international-commercial-court>.

Nicolaou, Nadia, “The evolution of arbitration technology: AI use cases and considerations” (12 June 2025), accessible via <https://www.opus2.com/arbitration-ai-use-cases/#:~:text=Arbitration%20cases%20often%20involve%20extensive,events%2C%20people%2C%20and%20entities.>

Queen Mary University of London and White & Case, “2021 International Arbitration Survey: Adapting Arbitration to a Changing World” (2021), accessible via <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf>.

Shepherd and Wedderburn LLP, “Handling Disputes in Scotland: A quick guide to Scottish civil procedure” (2019), accessible via <https://shepwedd.com/sites/default/files/Handling%20Disputes%20in%20Scotland.pdf>.

Sherman, Julia, Himmy Lui, Kelly Renehan & Anish Patel, “Using Technology and e-Disclosure” in GAR, The Guide to Evidence in International Arbitration – Second Edition (2023), available via <https://globalarbitrationreview.com/guide/the-guide-evidence-in-international-arbitration/2nd-edition/article/using-technology-and-e-disclosure>

University of Ottawa, “Common law systems and mixed systems with a common law tradition”, accessible via <https://www.juriglobe.ca/eng/sys-juri/class-poli/common-law.php>.

University of Ottawa, “World Map”, accessible via <http://www.juriglobe.ca/eng/rep-geo/cartes/monde.php>.