ConcepciónSexton&Martinez
ATTORNEYS AT LAW

**"Is Domestic Arbitration Broken?":**

**What Domestic Arbitration Can Learn From The Lessons of International Arbitration**

* Carlos F. Concepcion
Scott A. Burr

In recent years, a lively debate has ensued about whether domestic arbitration is "broken" in the United States. Many corporate counsel hold the view that arbitration no longer offers sufficient benefits over litigation. They primarily cite the failure of arbitrators to control the process so that lengthy hearings, discovery and the time to render a reasoned decision create a process that has all the flaws and none of the benefits of litigation. Attorneys blame their clients for wanting them to prolong the process and arm twist the opponent and the arbitrators for failing to make tough decisions that presumably would control the other side. Studies show consistently that the total cost and length to decision in U.S. arbitration comes close to litigation.[1]

In contrast to U.S. domestic arbitration, international arbitration usually involves parties located in different countries, who come from vastly different cultures, and speak different languages. As a result, international arbitration has brought together attorneys trained in the different legal traditions of the common law and civil law. These systems of law represent

---

* Carlos F. Concepcion is founder of Concepcion Sexton & Martinez (CSM), a complex litigation boutique law firm located in Miami, Florida. Mr. Concepcion heads up the firm's dispute resolution practice group. He serves as an arbitrator with the International Chamber of Commerce (ICC), and the International Center for Dispute Resolution (ICDR) of the American Arbitration Association. He is also a Panel Member of the International Institute for Conflict Prevention and Resolution (CPR).

Scott A. Burr is a member of the dispute resolution practice group at CSM and has represented clients in arbitrations in numerous venues applying various institutional rules, including ICDR, ICC, ICSID and IACAC. He is certified by the Florida Bar as a specialist in International Law

[1] Fulbright & Jaworski, Third Annual Litigation Trends Survey Findings 24-25 (2006); Proskauer Rose, Trends and Developments in International Legal Practice 6 (2008).

fundamentally contrasting approaches to dispute resolution.[2] In recent years, counsel, arbitrators and arbitral institutions have blended these approaches in international arbitration in order to expedite and better serve the parties to the proceedings. As Prof. Hans Smit has stated, there is a "marriage" of civil and common law in contemporary international arbitration.[3] The results have been the best of both systems, taming the common law tendency toward over-litigiousness by greater tribunal control and providing an overall more cost-effective process. Many of these approaches adopted from the civil law tradition in international arbitration may prove useful in U.S. domestic arbitration to repair the perceived problems plaguing it.

***Document Discovery***

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

---

[2] The majority of the world's population lives under the civil law. The civil law system is steeped in Roman law, which eventually led to the Napoleonic Code, the foundation of French law. The civil law spread to the rest of continental Europe, Russia, China, most of Asia, Latin America, and part of Africa. The common law system is the Anglo-American legal tradition based on English law. It spread to the United States, Canada, India, Australia and the rest of the British Commonwealth. *See* Urs Martin Laeurchil, "Civil and Common Law: Contrast and Synthesis in International Arbitration," Disp. Resolution J. 89 (Aug. 1, 2007).

[3] Hans Smit, "Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence," International Council for Commercial Arbitration Congress 162, 165 (Series 7 Nov. 1994, Kluwer, 1996).



Concepción, Sexton & Martinez
355 Alhambra Circle, Suite 1250 • Coral Gables, Fl. • 33134 • Telephone: 305.444.6669 • Facsimile: 305.444.3665
ww.cfclaw.com

Today, a limited amount of discovery is typically available, albeit under the strict control and discretion of the arbitral tribunal.[4] Under the rules of most international arbitral institutions, such as the International Court of Arbitration of the International Chamber of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), and the International Center for Dispute Resolution ("ICDR) of the American Arbitration Association, the arbitral tribunal is given the broad power to determine whether, and to what extent, discovery will be permitted. For instance, the ICC Rules give the tribunal authority to "establish the facts of the case by all appropriate means," and "may summon any party to provide additional evidence."[5] Likewise, the LCIA and ICDR Rules explicitly authorize the arbitral tribunal to order the pre-hearing production of documents.[6] Although discovery is thus permitted to a certain extent, the scope of such discovery is generally far more limited than is permitted in the United States.

This consensus has been embodied in a set of rules issued by the International Bar Association called the IBA Rules on the Taking of Evidence in International Commercial Arbitration (hereafter 'IBA Rules'). Those rules, developed by a committee of lawyers drawn from both traditions, permit a party to submit a "Request to Produce" to the arbitrator, in which the requesting party may describe documents or 'a narrow and specific requested category of documents' that are reasonably believed to exist and to be in the possession of the adverse party,

[4] Javier H. Rubenstein, "International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions," 5 Chicago J. Int'l Law 1 (2004).

[5] ICC International Rules of Arbitration art 20, ¶ 1.

[6] See LCIA Arbitration Rules art. 22.1(e) (authorizing the tribunal to "order the production of any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant"). See also ICDR Rule art 19 (empowering the tribunal to "order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate").


Concepción, Sexton & Martinez
355 Alhambra Circle, Suite 1250 • Coral Gables, Fl. • 33134 • Telephone: 305.444.6669 • Facsimile: 305.444.3665
ww.cfclaw.com

together with an explanation of how the documents requested are 'relevant and material to the outcome of the case'.[7] The IBA Rules contain no provision for depositions or interrogatories. Both are rare in international arbitration. Interrogatories are almost never used. Depositions tend to be employed only when both sides want them (as may happen if both parties are represented by American lawyers) or when there is no other way to preserve or present the testimony of an obviously important witness. This limited discovery serves to reduce both the cost and the length of time of an arbitration.

***Use Of Documents At The Hearing***

How documents are used and presented at the arbitration hearing also adds to the length of the arbitration. In an international arbitration, a civil law practitioner will likely present the tribunal with a neat set of documents well in advance of the hearing. Those documents will be considered self-authenticating, and counsel will use the hearing to draw the arbitrator's attention to key provisions without any preliminary introduction by a witness. A common law lawyer, in contrast, may well have presented a similar binder to the tribunal in advance, but will expect to have each document authenticated, presented, and explained by the testimony of a live witness. This is a costly process because a live witness must testify about each document a party wishes to introduce.

---

[7] IBA Rule 3.3:

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


Concepción, Sexton & Martinez
355 Alhambra Circle, Suite 1250 • Coral Gables, Fl. • 33134 • Telephone: 305.444.6669 • Facsimile: 305.444.3665
ww.cfclaw.com

The converging practice on the presentation of documents in international arbitration is for each party to submit in advance to the tribunal and the adverse party the documents that it intends to use as evidence at the hearing, without any particular form of introduction or authentication.[8] The IBA Rules, however, set forth a list of grounds upon which an adversary may object to the introduction of a document or other evidence, including lack of sufficient relevance, privilege or other grounds for confidentiality, and fairness.[9] The effect is to require a party to show why a document proffered by the other side should not be admitted, rather than as in the United States for the proffering party to show why it should be admitted. The IBA Rules nevertheless represent a sensible solution in a context that is supposed to be free of the technical rules of evidence that govern exhibits in common law proceedings.

***Witness Testimony***

The method of witness testimony also can prolong an arbitration or significantly reduce it. Perhaps the most fundamental difference between the common law and civil law modes of dispute resolution lies in the manner in which evidence is presented to the finder of fact. In the common law tradition, testimony is presented to the finder of fact principally through live oral testimony of witnesses, rather than in written form. While written declarations are permissible in certain pre-trial settings, such declarations cannot generally be offered at trial in lieu of oral testimony, for they are considered inadmissible hearsay.[10] The questioning of witnesses is also conducted by counsel for the parties, with each party having the right to have their counsel cross-examine witnesses directly in the presence of the finder of fact.

---

8 Siegfried H. Elsing and John M. Townsend, "Bridging the Common Law Divide in Arbitration," 18 No. 2 Arbitration Int'l (2002).

9 IBA Rule 9.2. All of those grounds, and others, such as burden, are also available as grounds under those rules for opposing a document request.

10 F. R. Evid. 801.



Concepción, Sexton & Martinez
355 Alhambra Circle, Suite 1250 • Coral Gables, Fl. • 33134 • Telephone: 305.444.6669 • Facsimile: 305.444.3665
ww.cfclaw.com

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

These different approaches to witness testimony have been bridged in international arbitration. Witness testimony is generally presented in the first instance through written witness statements, although the content of such witness statements depends heavily on the requirements imposed by the particular arbitral tribunal in each case.[11] In some instances, the arbitral tribunal will require that the written witness statements serve as a complete substitute for the witness's direct testimony at trial, with oral examination at trial commencing with cross-examination conducted by opposing counsel. In other instances, the arbitral tribunal will require that the written witness statement provide only a general overview of the witness's testimony, with the witness able to supplement their testimony with direct examination by counsel at the hearing. This practice has the advantage of shortening the hearing. It also helps to eliminate surprise, and thus serves to some extent as a substitute for depositions of those same witnesses. However, it is also generally well-established in international arbitration that any witness presented by a party must be made available to testify live before the arbitral tribunal, with the opportunity for the opposing party to cross-examine the witness.[12]

---

[11] This is the approach of the IBA Rules (see IBA Rules 4.4 and 4.5) and is an option under the ICDR Rule 20.5).

[12] This procedure again is outlined in the IBA Rules, which provide that:

> The Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting testimony of its witnesses, and thenby the presentation by Claimant


Concepción, Sexton & Martinez
355 Alhambra Circle, Suite 1250 • Coral Gables, Fl. • 33134 • Telephone: 305.444.6669 • Facsimile: 305.444.3665
ww.cfclaw.com

## *CONCLUSION*

The growing business dissatisfaction with domestic arbitration is a reality. The civil law rooted approaches that have emerged in international arbitration with respect to limitations on discovery, the self-authentication of documents, and the reliance on written witness statements have served to shorten the length and reduce the cost of arbitrations while not jeopardizing the fairness of the process. The parties, counsel, and tribunals engaged in U.S. domestic arbitration should learn from the lessons of international arbitration. The salient tools and changes in the process are available to make domestic arbitration work.

---

> of rebuttal witnesses, if any. Following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning. . . . The Arbitral Tribunal may ask questions to a witness at any time
>
> IBA Rule 8(2).



Concepción, Sexton & Martinez
355 Alhambra Circle, Suite 1250 • Coral Gables, Fl. • 33134 • Telephone: 305.444.6669 • Facsimile: 305.444.3665
ww.cfclaw.com