TAKING EVIDENCE IN ARBITRATION PROCEEDINGS BETWEEN COMMON LAW AND CIVIL LAW TRADITIONS – THE DEVELOPMENT OF A EUROPEAN HYBRID STANDARD FOR ARBITRATION PROCEEDINGS

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I INTRODUCTION

Differences between common law and civil law legal systems are very obvious when it comes to the taking of evidence. In international arbitration proceedings involving parties and counsel from these two legal traditions, serious conflicts may arise with regard to the taking of evidence which will need to be resolved in addition to any substantive conflict between the parties.

In practice these procedural conflicts are resolved by arbitral tribunals exercising their discretion. Indeed, most modern arbitration statutes[1] and arbitration rules[2] now include a provision giving the parties the freedom to lay down the rules for the taking of evidence. Failing such agreement, which is usually the case, the provision grants the arbitral tribunal a wide discretion to determine all procedural matters. Such a provision is also the central element of the *UNCITRAL Model Law on International Commercial Arbitration*[3] and for that reason the UNCITRAL Secretariat described it as 'the Magna Carta of Arbitral Procedure'.[4]

The present article will consider the development of common law and civil law hybrid standards in relation to the taking of evidence in spite of, or on the basis of the arbitral tribunal's wide discretion in determining procedural matters. By reference to the German and English legal systems and international

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1 See, eg, *Arbitration Act 1996* (UK) c 23, s 34; *Zivilprozessordnung (ZPO)* (German Code of Civil Procedure) §1042; *UNCITRAL Model Law on International Commercial Arbitration*, UN GAOR, 40th sess, Supp No 17, art 19, UN Doc A/40/17 (1985) ('*UNCITRAL Model Law*').

2 See, eg, *International Chamber of Commerce Arbitration Rules 1998* art 20 ('*ICC Rules*'); *London Court of International Arbitration Rules* art 14 ('*LCIA Rules*').

3 *UNCITRAL Model Law*, above n 1, art 19.

4 *Report of the Secretary-General: Analytical Commentary on Draft Text of Model Law on International Commercial Arbitration*, UN GAOR, 18th sess, art 19(1), UN Doc A/CN.9/264 (1985); Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (2nd ed, 1990) 96; Peter Binder, *International Commercial Arbitration and Conciliation in UNICITRAL Model Law Jurisdictions* (2nd ed, 2005) [5]–[013].

arbitration proceedings, it will be shown that parties to international arbitration proceedings from different legal traditions increasingly expect arbitral tribunals to exercise their discretion in taking evidence as if there was a 'concept of arbitral procedures floating in the transnational firmament'.[5] It will be argued that as a result of arbitration proceedings being able to develop hybrid common law and civil law procedural solutions, arbitration proceedings are becoming increasingly more predictable for users and are gaining ever greater acceptability in the international business community as the dispute resolution mechanism of choice.

In this article, we consider briefly the sources that contribute to the development of the hybrid common law and civil law form of arbitration proceedings (II). The development of the transnational standard shall also be demonstrated by reference to particular examples of arbitral tribunals taking evidence. Accordingly, we shall first consider briefly the approach to presenting and taking witness evidence, which seems largely standardised in accordance with the taking of witness evidence in English court proceedings (III). Secondly, we shall address the procedures for obtaining documents from the opposing party, in relation to which a clear trend is developing towards an approach more similar to that known in civil law countries (IV). Thirdly and finally, we shall assess the use of expert testimony in international arbitration proceedings (V). Throughout this article we shall refer to English and German civil procedure rules as examples of common law and civil law procedures.

II SOURCES

Hybrid procedural arbitration rules developed because arbitral tribunals simply had to provide solutions in specific cases involving parties from civil law and common law jurisdictions so as to be able to render an award.

In developing the practice of taking evidence the arbitrators took (and continue to take) into account various sources: arbitral tribunals must take into account the relevant laws at the seat of the arbitral tribunal (A). Arbitral tribunals further rely more or less directly on their own experiences of taking evidence, typically gained within their own jurisdiction (B). Finally, arbitrators and also the parties regularly relied on the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*[6] (C).

A Arbitration Statutes and other Laws at the Seat of the Arbitration

Arbitration proceedings taking place in a particular jurisdiction are generally subject to the applicable arbitration legislation (ie, the local system of law at the seat of the arbitration, such as the *Arbitration Act 1996* (UK) c 23 or the 10th book of the German Code of Civil Procedure ('*Zivilprozessordnung*')). The

5 *Bank Mellat v Helliniki Techniki SA* [1984] QB 291, 301 (Kerr LJ).

6 *IBA Rules on the Taking of Evidence in International Commercial Arbitration* (1999) International Bar Association <http://www.ibanet.org/images/downloads/IBA%20rules%20on%20the%20taking%20of%20Evidence.pdf> at 13 April 2008 ('*IBA Rules*').

arbitrators must accordingly comply with the mandatory rules and any other rules that apply unless the parties have expressly agreed to derogate from them. Mandatory rules generally include fundamental procedural rights, including the equal treatment of the parties.[7] Otherwise, national laws in developed arbitration jurisdictions are, however, unlikely to have a significant direct impact on the manner in which the taking of evidence is actually conducted.

As the so-called Magna Carta of International Arbitration Procedure has effectively been enacted in most jurisdictions in which arbitration proceedings regularly take place, arbitral tribunals will in practice enjoy a wide discretion with regard to the specific procedural rules that they apply in relation to the taking of evidence. This discretion is, however, generally likely to be exercised having due regard to the parties' expectations, insofar as they are made known to the tribunal, having due regard to the tribunals' own experiences of taking evidence and the nature of the dispute and the claims.

B The Arbitrators' Experiences and Professional Background

Procedural solutions with regard to the taking of evidence are the result of the arbitrators, sometimes together with counsel and the parties, reaching a compromise that they consider to be fair and just in the circumstances. Arbitration proceedings are mostly conducted by lawyers, acting as counsel and arbitrators. As such, they are generally educated primarily in one particular legal tradition, have experience practising in that jurisdiction and are therefore most familiar with a particular approach to the taking of evidence that they consider to be fair and just.

Apart from differences with regard to specific rules (which will be dealt with below), common law and civil law courts differ significantly in the extent to which they manage the proceedings. In common law jurisdictions the management of a case and particularly the presentation of the evidence has generally been left, to a much greater extent, in the hands of the parties. This means that in common law jurisdictions the parties generally choose which documents, witnesses, expert witnesses and other evidence to present in support of their case. In the past the English courts generally gave very little direction to the parties which resulted in volumes of irrelevant evidence being introduced into the proceedings and court proceedings generally taking a very long time. Although the principle of active case management through the court is now firmly part of the *Civil Procedure Rules 1998* (UK) ('CPR'),[8] English courts remain relatively reluctant to engage in ordering, on their own motion, the production of particular documents, the attendance of witness and/or the appointment of court-appointed expert witnesses.

By contrast, the judges in civil law jurisdictions, such as Germany, were always entrusted with the management of cases. As a result, German judges take

7 *UNCITRAL Model Law*, above n 1, art 18; *Arbitration Act 1996 (UK)* c 23, ss 1(2), 33; *Zivilprozessordnung (ZPO)* §1042(1); *European Convention on Human Rights*, opened for signature 4 November 1950, CETS No 005, art 6 (entered into force 3 September 1953).

8 *Civil Procedure Rules 1998* (UK) ('CPR') rule 1.4.

a much more active role in identifying evidence they consider relevant, and actually taking that evidence by summarising and questioning witnesses, and/or instructing their own experts on technical matters.[9]

C *IBA Rules*[10]

The *IBA Rules* are, in our experience, referred to in almost all international arbitration proceedings. The *IBA Rules* were prepared by a committee of the International Bar Association consisting of 16 arbitration practitioners of whom the majority were from civil law traditions.[11] They were published 'as a resource to parties and to arbitrators in order to enable them to conduct the evidence phase of international arbitration proceedings in an efficient and economical manner'.[12] The *IBA Rules* were designed to be used in conjunction with institutional or ad hoc arbitration rules or procedures governing international commercial arbitrations.[13] Moreover, they were intended to reflect procedures for the taking of evidence in use in as many different legal systems as possible. In that way it was hoped that these rules would enjoy the widest possible acceptance and would be particularly useful where the parties come from different legal cultures.

However, whilst the *IBA Rules* are useful in capturing various procedural solutions, they provide a menu of procedural options rather than defining one particular standard approach. As a result, the hybrid procedural rules that have developed as a matter of arbitration practice will generally fit within the broad principles set out in the *IBA Rules*, but the standard arbitration procedures are, as will be seen in the following, generally more specific than the *IBA Rules*.

III WITNESS EVIDENCE

In our experience, a standard has evolved in the taking of witness evidence in international commercial arbitrations, and this standard follows very much the taking of witness evidence in ordinary English court proceedings.

The continental European regimes are generally quite different in that the court is primarily responsible for calling and examining witnesses of fact. In ordinary German proceedings, for example, the parties to the proceedings will identify witnesses in their pleadings in relation to specific propositions.[14] Parties and/or their counsel are permitted to interview potential witnesses to elicit relevant information. However, no written witness statements are ordinarily prepared for the purposes of ordinary court proceedings. Further, in German proceedings, it is for the court to determine whether it wishes to hear, summon

9 *Zivilprozessordnung (ZPO)* §139 I. See also §142 authorising the Court to request the disclosure of the documents of its own motion; §144 authorising the Court to appoint, again of its own motion, an expert; §146 authorising the Court to summon witnesses of its own motion.

10 *IBA Rules*, above n 6.

11 IBA Working Party, 'Commentary on the New IBA Rules of Evidence in International Commercial Arbitration' (2000) *Business Law International* 3, 3.

12 *IBA Rules*, above n 6, Foreword; *UNCITRAL Model Law*, above n 1, s 18; implemented, eg, as *Zivilprozessordnung (ZPO)* §1042(1).

13 IBA Working Party, above n 11.

14 *Zivilprozessordnung (ZPO)* §373.

and question a particular witness.[15] The parties have a limited role insofar as they do not generally decide whether or not to summon a witness, and are not primarily responsible for the questioning of the witnesses.[16] Specifically, the parties are not ordinarily given an opportunity to cross-examine the witness nominated by the opposing side.

In the context of international arbitration proceedings, including those that take place in Germany or involve German parties, written witness statements are now the standard way of presenting the evidence, with the written witness statement taking the place of direct examination.[17] This acceptance of the English model has transcended the taking of witness evidence envisaged under the *IBA Rules*, which still provide for the procedure adopted in ordinary German court proceedings and also the procedure adopted in ordinary English court proceedings.[18]

Certain cultural differences arguably remain, however, insofar as the examination of the witnesses itself is concerned. More traditional civil law lawyers will generally consider themselves obliged to lead the examination and to question the witnesses, whereas common law lawyers will generally expect the parties' counsel to start to cross-examine the witness before the arbitral tribunal takes the opportunity to question a witness. In our experience the actual differences in the examination of witnesses are, however, due mainly to the arbitrators' personalities rather than their legal background: we have experienced German arbitrators who have been content to allow the parties to start with the questioning of the witnesses, and common law lawyers sitting as arbitrators who have been very keen to lead the questioning of the witnesses in place of the parties' counsel. In any event, parties to international arbitration proceedings, whether from common law or civil law traditions, can be relatively certain that written witness statements will have to be prepared, that their own witnesses will be cross-examined and that they may cross-examine the other parties' witnesses. To that extent a transnational standard has developed.

IV REQUESTING DOCUMENTARY EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

In international arbitration proceedings, it is generally accepted that documentary evidence constitutes the best evidence.[19] Given the significance of contemporaneous documents as evidence and particularly documents in the control of the opposing party, the common law and civil law procedure systems have developed rules for making available documents in the possession or control of the other party.

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15 *Zivilprozessordnung (ZPO)* §§375 ff.

16 *Zivilprozessordnung (ZPO)* §397. Parties do, however, have a limited right to ask questions of the witnesses.

17 Siegfried H Elsing and John M Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration' (2002) 18 *Arbitration International* 59, 60.

18 *IBA Rules*, above n 6, art 4.

19 Alan Redfern et al, *Law and Practice of International Commercial Arbitration* (4th ed, 2004) [6]–[69].

The following shall briefly summarise, for the purpose of illustration, the positions under the English (A) and German civil procedure rules (B), and the standard practice that has developed in international arbitration practice (C).

A Obtaining Documents in the Control of the Opposing Party under English Civil Procedure Rules

Common law lawyers consider the discovery process – in English law the disclosure process – as a 'powerful instrument of justice'.[20] A traditional disclosure process will entail the disclosure by the parties of all of the documents in their possession, including documents detrimental to their case.[21]

Typically, disclosure in ordinary English proceedings is a very cumbersome and expensive process. Following sometimes extensive searches for documents, disclosure is effected by the parties exchanging lists of documents. In such lists the parties indicate those documents in relation to which the disclosing party claims not to have to allow inspection (for example, because inspection would be disproportionate)[22] or which documents cannot be inspected due to the fact that they are no longer in the disclosing party's control.[23] The list of documents must be provided with a disclosure statement,[24] which details the extent of the search that has been made to locate those documents that the party is required to disclose. The disclosure statement is typically signed by the party, rather than by its counsel.

The accuracy and completeness of an English style disclosure exercise is mainly guaranteed by two requirements. First, solicitors owe the court a duty as officers of the court to ensure that no relevant documents have been omitted.[25] Second, persons making a false disclosure statement, without an honest belief in its truth, may be prosecuted for contempt of court.[26]

Despite the great transparency that the English disclosure regime allows for, it is also extremely lengthy and expensive. Indeed, as a result of the cost, the actual utility of the disclosure exercise, if carried out, is often questioned by the parties to English court proceedings. Moreover, it is in practice quite rare that the disclosure exercise yields a 'smoking gun'.

B Production of Documents under German Civil Procedure Rules

Civil law jurisdictions do not in general have anything equivalent to the document disclosure procedure.[27] In Germany for example, the parties submit the

20 Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration* (2nd ed, 1989) 324.
21 CPR rule 31.6.
22 CPR rule 31.10(a).
23 CPR rule 31.10(b).
24 CPR Rule 31.10(c).
25 *Woods v Martins Bank* [1959] 1 QB 55, 60.
26 CPR Rule 31.23.
27 Klaus M Sachs, 'Use of Documents and Document Discovery: "Fishing Expeditions" Versus Transparency and Burden of Proof' (2003) 5 *SchiedsVZ* 193, 194.

documents on which they rely to prove their case.[28] German courts very rarely order parties to disclose documents in their possession or control that they have chosen not to disclose. A well-known Swiss civil law commentator has explained the civil law courts' reluctance (which also translates directly to the attitude of the German courts) as follows:

> We feel that the principle *onus probandi incumbat allegandi* excludes the possibility of obtaining the help of the court to extract evidence from the other side. We react to the notion of discovery, be it English or, worse, American style, as an invasion of privacy by the court, which is only acceptable in criminal cases, where the public interest in involved … [29]

From a common law perspective, this approach would appear to be capable of giving rise to serious injustices that can be demonstrated by the following oft-cited report of a German *Reichsgericht* case:

> In order to prevail, the defendant had to prove, according to the applicable substantive law, that the plaintiff entered into contracts with third persons on more favorable terms. Such transactions, of which the defendant had some suspicions, could have easily been derived from plaintiff's business records. But the highest court in Imperial Germany said 'No' on the grounds that this would amount to nothing more than a 'fishing expedition': no one should be forced to supply the opponent with the material that the opponent needs to prove his case.[30]

This highly restrictive approach towards document disclosure has, however, been relaxed slightly by the new § 142 of *Zivilprozessordnung*; § 142 authorises courts to order a party to disclose documents in their possession to which one of the parties has made reference.[31] In practice this power is used relatively infrequently.[32] Moreover, due to the limited resources of a judge, disclosure orders based on § 142 of *Zivilprozessordnung* are relatively rare. German judges are simply not keen to be flooded with large volumes of documents that they have to review. Instead the disclosure requests generally only relate to a single document or a handful of documents.

Moreover, in the relatively rare circumstances in which a party does not disclose a document requested by the German court, it will not be compelled to do so.[33] Instead the German Court may, however, draw an adverse inference; in

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28 Christian Borris, 'The Reconciliation of Conflicts between Common-law and Civil-law Principles in the Arbitration Process' in Stefan Frommel and Barry Rider, *Conflicting Legal Cultures in Commercial Arbitration: Old Issues and New Trends* (2nd ed, 1999) 1, 11.

29 Claude Reymond, 'Civil Law and Common Law Procedures: Which is the More Inquisitorial? A Civil Lawyer's Response' (1989) 5 *Arbitration International* 357, 360–1.

30 Citing and translating a report of a decision of the Supreme Court of the German Reich, Juristische Wochenschrift (1892) 180 in Vincent Fischer-Zernin and Abbo Junker, 'Between Scylla and Charybdis: Fact Gathering in German Arbitration' (1987) 4 *Journal of International Arbitration* 9.

31 *Zivilprozessordnung (ZPO)* §142(1): '*Das Gericht kann anordnen, dass eine Partei oder ein Dritter die in ihrem oder seinem Besitz befindlichen Urkunden und sonstigen Unterlagen, auf die sich eine Partei bezogen hat, vorlegt*' (The court may order one of the parties or a third party to disclose documents in their possession to which one of the parties has made reference).

32 Gabrielle Kaufman-Kohler and Philippe Bärtsch, 'Discovery in International Arbitration: How Much is Too Much?' (2004) 1 *SchiedsVZ* 13, 16–7.

33 D Leipold in Friedrich Stein and M Jonas (ed), *Zivilprozessordnung* (27th ed, 2005) § 142, [35].

other words it will become a matter of whether a party has discharged its burden of proof (that is, the onus probandi).[34]

C Towards a Transnational Hybrid Approach in International Commercial Arbitration

Where parties, counsel and arbitrators are all from the common law or the civil law legal tradition, fundamental conflicts concerning procedural issues are unlikely to arise in arbitration proceedings. The parties are, for example, likely to agree, more or less tacitly, on English-style disclosure where both parties are English. Indeed, in English-style arbitration proceedings, even though governed by arbitration rules, the proceedings are sometimes hardly distinguishable from proceedings before the ordinary English courts. This is due in part to the use of retired judges as arbitrators and barristers as counsel. Likewise in domestic German arbitrations with German counsel and arbitrators the approach taken in relation to disclosure requests may well be inspired to a large extent by the *Zivilprozessordnung*.

However, in arbitration proceedings with parties from common law and civil law traditions, arbitral tribunals must find a solution having due regard to the parties' expectations and their background, the nature of the case and the claims, and the amount in dispute.[35]

English lawyers have in our experience generally accepted that there is no place for English-style disclosure with disclosure lists and inspection of documents in international arbitration proceedings. Tribunals consisting primarily of counsel from common law jurisdictions, who are more familiar with discovery/disclosure procedures, will however, generally be accepting of parties requesting disclosure of relatively wide categories of documents from the other party. Civil law lawyers now also accept document disclosure requests as a part of international arbitration proceedings.[36] In contrast to common law lawyers, they will, however, generally insist on disclosure of more narrow categories of documents.[37]

In spite of cultural differences that are reflected in the width of the categories of documents, it now seems accepted that parties to international arbitration proceedings may apply to the arbitral tribunal for further relevant documents in the possession or control of the other party.[38]

IV EXPERTS

Whilst a single standard can be said to have developed in relation to the taking of witness evidence and documentary evidence, the situation is slightly more

34 *Zivilprozessordnung (ZPO)* §427. See, eg, *IBA Rules*, above n 6, art 9(4).

35 Brian King and Lise Bosman, 'Rethinking Discovery in International Arbitration: Beyond the Common Law/Civil Law Divide' (2001) 12(1) *ICC International Court of Arbitration Bulletin* 24, 30–1.

36 Kaufmann-Kohler and Bärtsch, above n 32, 13.

37 Ibid.

38 *IBA Rules*, above n 6, art 3(3); King and Bosman, above n 35, 24.

complex in relation to the taking of expert evidence in international commercial arbitration.

Many arbitral tribunals are reluctant to consider widely differing accounts given by two experts, often on highly complex topics that have been 'bought' by the party instructing them. At the same time, parties are disinclined to have a single independent expert, fearing that such expert may be more sympathetic to the case of the other side. In the following, we shall briefly address the court or tribunal appointed expert (A) and then the English civil procedure system and how it developed means for ensuring that the experts' evidence can be taken as efficiently as possible (B). We shall then consider expert witness conferencing, which arbitration practitioners have developed by themselves (C).

A Tribunal Appointed Experts

In proceedings before the ordinary German courts only the court is competent to choose, appoint and instruct experts.[39] The parties are involved in this process only insofar as they may indicate in their pleadings which of their submissions must be proven by a court-appointed expert,[40] and once the expert has been appointed by the court the parties may be required to support him or her.[41]

Under all of the main arbitration rules, the arbitral tribunal has authority to direct the conduct of the hearing.[42] This includes the right to instruct a neutral, independent expert who will examine the facts of the case and express an opinion.[43] Under the *UNCITRAL Model Law*,[44] and many arbitration statutes, including the *Arbitration Act 1996* (UK) c 23,[45] and the 10th Book of the *Zivilprozessordnung*,[46] the arbitral tribunal is expressly authorised to appoint and instruct a tribunal-appointed expert.

The CPR, of course, also vests a power in the court to appoint and instruct a single expert.[47] However, other than in German court proceedings, such power is comparatively rarely used in practice. According to the *White Book Service 2007*,[48] this is mainly due to the courts not being involved in actively managing the proceedings in the early stages of the proceedings.[49] In our view, this may also be due to the fact that the English civil procedure rules and arbitration rules give the parties a choice between each having their own expert and the court/tribunal-appointed expert. If given the choice, the parties mostly appear to prefer to each have their own expert.

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39 *Zivilprozessordnung (ZPO)* §§404, 404a.
40 *Zivilprozessordnung (ZPO)* §403.
41 *Zivilprozessordnung (ZPO)* §404a; Klaus Reichold in Heinz Thomas and Hans Putzo, *Zivilprozessordnung* (28th ed, 2007), § 404a, [1]
42 *ICC Rules*, above n 2, art 20; *UNCITRAL Model Law*, above n 1, art 19(2); *LCIA Rules*, above n 2, art 14.2; *IBA Rules*, above n 6, art 6 .
43 Redfern et al, above n 19, [6]–[92].
44 *UNCITRAL Model Law*, above n 1, art 26.
45 *Arbitration Act 1996* (UK) c 23, s 37.
46 *Zivilprozessordnung (ZPO)* §1049.
47 CPR rule 35.7.
48 The Hon Lord Justice Waller (ed), *The White Book Service 2007* (2007).
49 Ibid [35.7.1].

B Party Appointed Experts – Avoiding 'Battles of Experts'

Apart from recognising the costs benefits,[50] lawyers from common law jurisdictions feel uncomfortable with court/tribunal appointed experts, because they lose control over an aspect of the case. Consequently, common law lawyers instinctively prefer appointing and instructing their own expert.

The CPR accordingly deal with the problem of having experts for the claimant and the defendant making completely contradictory statements or, more frequently, having experts even addressing entirely different questions. Firstly, the experts owe the English court a duty that overrides any other duties to their parties.[51] Secondly, the CPR allow parties to put written questions to the other side's expert which he or she must then answer.[52] Thirdly, English courts require the experts to meet with a view to preparing a joint report outlining differences of opinion and matters of agreement.[53]

International arbitral tribunals probably have less authority to require experts to be independent from the party appointing them. However, the other means of rendering more efficient the taking of expert evidence, for example, expert meetings, the preparation of joint reports or, at least, the preparation of a protocol summarising the content of the experts meeting should lie within most arbitral tribunals' powers. Indeed, the *IBA Rules* do provide that an arbitral tribunal may order experts appointed by the parties to meet and record in writing the issues which they agree and issues upon which they differ in opinion in their respective reports.[54]

C Expert Witness Conferencing

A further way of rendering the taking of oral expert testimony more efficient is through expert witness conferencing. Expert witness conferencing[55] involves hearing all expert witnesses simultaneously for each side in relation to a particular topic, rather than hearing them one after the other.

The *IBA Rules* expressly provide for the possibility of 'witnesses presented by different Parties be[ing] questioned at the same time and in confrontation with each other'.[56]

In our experience, this particular approach works best where the chairman of the tribunal (or a member of the tribunal) manages the questioning of the expert panels. The active questioning of experts by the arbitral tribunal enables the key points at issue to be identified quickly, saving time as relevant questions only need to be asked once. This approach may also elicit clearer evidence than a

50 Ibid.
51 CPR rule 35.3.
52 CPR rule 35.6.
53 CPR rule 35.12.
54 *IBA Rules*, above n 6, art 5(3).
55 See, eg, Wolfgang Peter, 'Witness Conferencing' (2002) 18 *Arbitration International* 47; Martin Hunter, 'Expert Conferencing and New Methods' in Albert Jan van den Berg, *International Arbitration 2006: Back to Basics? ICCA International Arbitration Congress* (2007) 820–25.
56 *IBA Rules*, above n 6, art 8.2.

single expert more or less 'lecturing' the tribunal. Moreover, being placed next to their peers may well compel experts to present their opinion more independently and objectively, than if they are only among laymen as concerns their specific speciality (ie, the lawyers).

D Expert Evidence in International Arbitration Proceedings – The Future

It is, of course, desirable for a tribunal that technical matters are explained only once in an authoritative manner. It is also generally in the interests of the parties that no expensive 'battle of experts' ensues during arbitration proceedings. However, as the international arbitration practice presently stands, the parties are not willing to give up their right to appoint and instruct their own experts.

Arbitratral tribunals do, however, have other means of controlling expert evidence, other than by appointing and instructing a sole expert. Another approach that has gained a significant degree of acceptance is that of expert witness conferencing. Other means such as joint reports and written questions addressed to the opposing party's expert have not thus far found much acceptance in international arbitration proceedings, although we would recommend that experts meetings with the preparation of a joint report[57] or written questions by the opposing party in advance of any hearing, be considered more regularly by arbitral tribunals.

The standard approach in international arbitration proceedings is therefore for each of the parties to have its own experts, with the tribunal-appointed experts being used only in exceptional circumstances.

VI THE UTILITY OF THE HYBRID STANDARD FOR INTERNATIONAL ARBITRATION PROCEEDINGS

The development of a hybrid standard for the taking of evidence with regard to:

- witness evidence by reference to English-style witness examination;
- document disclosure requests by reference to the civil law procedures; and
- expert evidence again taken in accordance with the common law tradition

ensures that users of international arbitration proceedings from common law and civil law environments can have greater confidence in their expectations being met during the course of the arbitration proceedings. The hybrid standard international arbitration proceedings therefore constitute a fair and just way for resolving disputes between international businesses from the common law and civil law traditions.

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57 See, eg, *S D Myers, Inc v Government of Canada*, Procedural Order No. 19 [12], where the arbitral tribunal ordered the experts appointed by the parties to meet and to review the extent to which they agree and disagree and to submit a short joint report <http://www.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersOrder19.pdf> at 13 April 2008.