Christian Koller*

# The Role of Judges and Arbitrators in Contemporary Dispute Resolution

## 1 Introduction

A comparison of judges and arbitrators can take many different forms. Issues that have attracted much attention in legal literature and played a significant role in practice, *inter alia*, include: the status of arbitrators, i.e. issues of immunity and liability[1], different approaches to judicial independence and impartiality[2] as well as the role of judges and arbitrators as settlement facilitators[3].

* The present article is based on a slightly expanded version of a presentation given at the Colloquium on Party Autonomy in Civil Procedure, University of Uppsala, 27–28 April 2010.

[1] See, e.g., S. Riegler & M. Platte, Arbitrator's Liability, in Klausegger et al. (eds.), *Austrian Arbitration Yearbook* 108 (2007); C. Hausmaninger, *Civil Liability of Arbitrators – Comparative Analysis and Proposals for Reform*, J. Int'l Arb 13 (1990); S. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, N.Y.L. Sch. J. Int'l & Comp. 15 (2000); E. Truli, *Liability v. Quasi-Judicial Immunity of the Arbitrator: The Case Against Absolute Arbitral Immunity*, Am. Rev. Int'l Arb. 391 (2006).

[2] See H.-L. Yu & L. Shore, *Independence, Impartiality, and Immunity of Arbitrators: US and English Perspectives*, Int'l & Comp. L.Q. 935 (2003); Y. Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, Loy. L.A. Int'l & Comp. L. Rev. 473 (2008).

[3] See, e.g., B. Ehle, The Arbitrator as a Settlement Facilitator, in *Walking A Thin Line – What an Arbitrator Can Do, Must Do or Must Not Do, Recent Developments and Trends*, Colloquium CEPANI40, 77 (2010); H. Raeschke-Kessler, *The Arbitrator as a Settlement Facilitator*, Arb. Int'l 535 (2005); G. Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, Arb. Int'l 187 (2009).

The present article will, however, evaluate the role of judges and arbitrators from a different perspective. It will compare the *power* of judges and arbitrators, specifically focusing on the following issues: differences regarding the conduct of the proceedings and case management (see 3.), specific questions related to the taking of evidence (see 4.), and finally the applicability of the rule *iura novit curia* (or *da mihi factum, dabo tibi ius*) in international arbitration (see 5). As an initial step, the regulatory framework relevant for such comparison will briefly be outlined (see 2.)

Since arbitration has become the preferred dispute resolution mechanism for international commercial transactions, the present comparison of judges and arbitrators will not be limited to a particular jurisdiction. It is rather based on an international approach comparing the power of judges (in civil law and common law countries) with the power of arbitrators in international commercial arbitration. Considering that internal differences in these two broad legal cultures can also be considerable, a comparison between "civil law" and "common law" necessarily entails generalizations – and sometimes also simplifications. However, there are at least certain general characteristics that distinguish civil law from common law. In international arbitration a system has evolved that is neither civil nor common law, but rather a hybrid procedure based upon both systems[4]. This has accurately been referred to as the "marriage of civil and common law"[5]. It is said to combine the best of common and civil law litigation practices.

Before delving into the intricacies of comparing judges and arbitrators, one might legitimately ask, why such comparison should be undertaken in the first place. On the one hand, the hybrid procedure developed in international arbitration might serve as a model for a transnational code of civil procedure rules. This is to some extent reflected in the *travaux preparatoires* of the UNIDTROIT Principles of Transnational Civil Procedure where it is stated that "[*i*]*t may appear sensible to take into account the experiences with international arbitration*"[6]. On the other hand it might

[4] E. V. Helmer, *International Commercial Arbitration: Americanized, "Civilized" or Harmonized?* Ohio St. J. on Disp. Resol. 48 (2003).

[5] H. Smit, Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence, in A. J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, ICC Congress Series No. 7, 164 (1994).

[6] R. Stürner, Transnational Rules of Civil Procedure – Feasibility Study, UNIDROIT

serve as a tool to (critically) reflect on the principles underlying the rules applicable in state court proceedings. Additionally, the question arises whether the experiences made in international arbitration can be used to improve state court proceedings, and if so how.[7] In other words: Can the "cross-fertilization" that occurred in international arbitration be of any use for the development of national civil procedure laws? Equally, one might ask whether the solutions adopted in state court proceedings provide guidance for arbitral proceedings. It is not uncommon that even in arbitral proceedings between parties originating from civil law systems procedures foreign to their legal background are applied, such as the exchange of witness statements or the cross examination of witnesses.[8]

The following comparison necessarily focuses on large commercial disputes; it cannot include small value or straightforward payment claims which can, in most cases, be decided much more effectively by state courts.

# 2 Regulatory framework

## 2.1 National courts

The extent of power available to judges depends on the respective legal system and is therefore governed by the *lexi fori*.[9] In the field of civil procedure law, which is to a great extent considered mandatory by nature, party autonomy is rather limited. The starting point, in international arbitration, if any exists, is completely different.[10]

Study LXXVI – Doc. 1, 14 (1999); available at http://www.unidroit.org/english/documents/1999/study76/s-76-01-e.pdf (last consulted 01.11.2010).

[7] See H. Raeschke-Kessler, Kann die Zivilgerichtsbarkeit von der internationalen Schiedsgerichtsbarkeit lernen? in H. E. Brandner et al. (eds), *Festschrift für Karlmann Geiß* 155 (2000).

[8] See, e.g., M. Wirth, *Ihr Zeuge, Herr Rechtsanwalt! – Weshalb Civil-Law-Schiedsrichter Common-Law-Verfahrensrecht anwenden*, German Arbitration Journal 9 (2003).

[9] See, e.g., P. Bernadini, *The Role of the International Arbitrator*, Arb. Int'l 113 (2004); J. Dolinger & C. Tiburcio, *The Forum Law Rule in International Litigation – Which Procedural Law Governs Proceedings to be Performed in Foreign Jurisdictions: Lex Fori or Lex Diligentiae?* Tex. Int'l L. J. 426 (1998).

[10] G. Petrochilos, *Procedural Law in International Arbitration* 2, 8 (2004).

## 2.2 Arbitral tribunals

Arbitrators derive their jurisdiction from the parties' agreement (and not from the state).[11] Both judges and arbitrators are increasingly called upon to manage the resolution of disputes fairly and efficiently. Judges must adhere to rigid rules of civil procedure and evidence which the parties in most cases may not derogate from. By contrast, in arbitration the parties can agree on a tailor-made set of proceedings (subject only to the mandatory rules and public policy requirements of the law of the seat of arbitration).[12] Failing such agreement most arbitration laws provide that the arbitral tribunal has discretion to conduct the proceedings as it considers appropriate.[13] A comparative review of statutes and cases shows that an international consensus about two major principles applicable in international arbitration has been reached: party autonomy in matters of procedure and the parties' right to due process.[14] Arbitral discretion is, of course, not unlimited. It is subject to public policy and mandatory provisions of the arbitration law in force at the place of arbitration.[15] It is generally acknowledged that arbitrators are not bound by local civil procedure rules applicable in state court proceedings.[16]

The flexibility of arbitral proceedings compared to court proceedings is often highlighted as one of its major advantages.[17] This flexibility is not

[11] See, e.g., N. Blackaby & C. Partasides, *Redfern and Hunter on International Arbitration*, at para. 2.01 (2009); J. Lew & L. Mistelis & S. Kröll, *Comparative International Commercial Arbitration*, at para. 6–1 (2003).

[12] See, e.g., F. Schwarz, The Limits of Party Autonomy in International Commercial Arbitration, in Knahr et al. (eds.), *Investment and Commercial Arbitration – Similarities and Divergences* 73 (2010); G. Born, *International Commercial Arbitration* 1321 et seqq. (2009).

[13] See Art. 19(2) UNCITRAL Model Law on International Commercial Arbitration; sec. 34(1) English Arbitration Act; Art. 1460 French Code of Civil Procedure ("CPC"); Art. 182 Swiss Private International Law Act ("PILA"); sec. 594 Austrian Arbitration Act;sec. 21 Swedish Arbitration Act.

[14] J. Lew & L. Mistelis & S. Kröll, *supra* note 11, at para. 21–16; G. Born, *supra* note 12, 1741 et seqq.; P. Bernadini, *supra* note 9, 116.

[15] See *supra* note 12.

[16] N. Blackaby & C. Partasides, *supra* note 11, at para.6.02; Art. 1460(1) CPC explicitly provides that the arbitrators "shall not be bound by any rules applicable in court proceedings unless the parties have provided otherwise in the arbitration agreement".

[17] N. Blackaby & C. Partasides, *supra* note 11, at para. 6.01; G. Born, *supra* note 12, 1743.

only based on the parties' freedom to choose the applicable procedural rules but also on the cultural clashes between civil law and common law traditions that inevitably occur in international arbitration.[18] Considering the diverse nationalities that meet as claimants and respondents in international arbitration the process requires arbitrators and parties to adapt to different legal systems and procedural patterns[19].

However, this clash of cultures entails a considerable degree of uncertainty and unpredictability in the arbitral process. Against this background International Organizations, such as the International Bar Association, the UNCITRAL and the International Law Association, have started promulgating rules of best international practice in order to achieve some level of harmonization.[20] This trend is, however, subject to criticism. To some extent legitimate complaints have been voiced that the adoption of more and more rules would amount to a judicialization of arbitration[21] and runs counter to one of its hallmarks, i.e. procedural flexibility.

For the purpose of the present article one of the most successful soft law instruments in international arbitration will be analysed, namely the IBA Rules on the Taking of Evidence in International Arbitration[22]. A revised version of the IBA Rules of Evidence was adopted by the IBA on 29 May 2010.[23]

[18] P. Lalive, *Cultural differences and international arbitration*, Euromoney 13 (1995).

[19] R. von Mehren, *An International Arbitrator's Point of View*, Am. Rev. Int'l Arb. 203 (1999).

[20] N. Voser, *Harmonization by Promulgating Rules of Best International Practice in International Arbitration*, German Arbitration Journal 113 (2005).

[21] See E. V. Helmer, *supra* note 4, 36; T. J. Stipanowich, *Arbitration: The "New Litigation"*, 7 TDM 1 (2010).

[22] Available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last consulted 01.11.2010).

[23] A commentary on the IBA Rules is available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx (last consulted 01.11.2010).

# 3 Formal conduct of the proceedings and case management early in the course of the proceedings

## 3.1 National courts

It is generally said that common law procedures are adversarial (or accusatorial) as opposed to inquisitorial. Therefore the parties, or more specifically their counsel, direct the proceedings while the judge for the most part remains passive.[24] One of the major obstacles to managerial judging in ordinary civil cases in the United States is the traditional division of responsibility between judge and jury with regard to the determination of disputed facts.[25] In England the Civil Procedure Rules drastically changed that approach by the extending and intensifying the active case management and judicial control of the civil process.[26]

Similarly, in contemporary civil procedure in all German-speaking countries, the judge assumes a strong position of control over the formal course of the proceedings.[27]

In order to promote procedural efficiency many civil procedure codes provide for case management measures early in the course of the proceedings. According to Austrian civil procedure law, for instance, the court has to hold a preparatory hearing.[28] The purpose of this hearing is on the one hand to discuss the relevant issues of law with the parties and on the other to determine together with the parties which means of evidence are to be used and in what order. Sec. 258(1) no. 4 of the Austrian Code of Civil

[24] L. Demeyere, *An essay on differing approaches to procedures under common law and civil law*, German Arbitration Journal 283 (2008); G. C. Hazard & A. Dondi, *Responsibilities of Judges and Advocates in Civil and Common Law: Some Lingering Misconceptions Concerning Civil Lawsuits*, Cornell Int'l L.J. 61 (2006).

[25] See P. Murray & R. Stürner, *German Civil Justice* 638 (2004).

[26] See P. Laughlin & S. Gerlis, *Civil Procedure* 4 (2004); N. H. Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* 48 et seqq. (2008); N. H. Andrews, The New English Civil Procedure Rules (1998), in van Rhee (ed.), *European Traditions in Civil Procedure* 167 (2005).

[27] P. Oberhammer & T. Domej, Powers of the Judge– Germany, Austria, Switzerland, in van Rhee (ed.), *European Traditions in Civil Procedure* 295 (2005).

[28] For the underlying ratio of such hearing and historical developments see, e.g., P. Oberhammer & T. Domej, Delay in Austrian Civil Proceedings, in van Rhee (ed.), *Within a Reasonable Time: The History of Due and Undue Delay in Civil Litigation* 268 (2010).

Procedure requires the judge to adopt a procedural program for the trial (so called "*Prozessprogramm*") at the end of the preparatory hearing.[29] In a similar vein, Art. 226 of the (future) Swiss Code of Civil Procedure provides that the court can conduct preparatory hearings at any time. Since hearing dates are excluded and procedural roadmaps are often drafted too vaguely, these early case management strategies – at least in Austrian civil proceedings – to a large extent miss their goal, namely to foster procedural efficiency.[30] The system enshrined in the English Civil Procedure Rules seems more efficient in this regard. In one of the two important pre-trial hearings, i.e. the "pre-hearing review", the judge may set a timetable for the trial and give only other directions for the conduct of the trial he considers appropriate.[31]

## 3.2 Arbitral tribunals

The conduct of international arbitration is largely in the hands of the parties and the tribunal. In practice the parties do not make arrangements on particular procedural questions but rather refer to institutional arbitration rules.[32] It has to be noted that institutional arbitration rules only establish a broad outline of the procedural framework, specifically identifying key events (e.g., the request for arbitration, the hearing, and the rendering of the award). Consequently, many aspects regarding the conduct of the proceedings will be subject to the arbitral tribunal's directions (exercising the discretion granted by the applicable national law or arbitration rules).[33]

It might be legitimately said that one of the factors contributing to the major success of international arbitration is the case management system that starts early in the proceedings when a procedural schedule is agreed upon between the parties and the arbitrators. This consent-based

[29] See G. Kodek, in H. Fasching & A. Konecny (eds.), *Kommentar zu den Zivilprozessgesetzen*, sec. 258 at para. 22 et seqq. (2004).

[30] It has therefore been submitted that continental European state court proceedings could be inspired by arbitral case management in this regard; see A. Reiner, *Gerichte und Schiedsgerichte*, ÖJZ 305 (2009).

[31] N. H. Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* 51 (2008).

[32] See, e.g., G. Born, *supra* note 12, 1782.

[33] G. Born, *supra* note 12, 1782.

approach forces the parties to cooperate, more specifically to agree on deadlines for submissions on points of law and evidence as well as on hearing dates. Additionally, it is common in international arbitration to hold one or two major hearings instead of splitting the proceedings into a number of short hearings. In short, the arbitral procedure will be tailored to the specific needs and circumstances of the particular case.[34]

Following an Anglo-American tradition[35] it is common in international arbitration to hold a prehearing (or preparatory) conference in order to organize the proceedings, to discuss the relevant issues and frame the necessary steps for the dispute to be resolved.[36] A useful soft-law tool providing a sort of check-list approach has been adopted by the UNCITRAL, namely the UNCITRAL Notes on Organizing Arbitral Proceedings.[37]

## 4 Taking of evidence

The power judges have in the fact-finding process to some extent indicates whether a procedural system is dominated by adversarial or inquisitorial elements. However, in both systems a trend towards strengthening the power of judges can be observed even in countries which have traditionally followed an adversarial system, such as England[38]. In the following section two areas will be highlighted where a comparison between judges and arbitrators might be useful because new ways regarding the taking of evidence have been developed in international arbitral practice, i.e. the examination of witnesses and the production of document.

[34] G. Born, *supra* note 12, 1784.

[35] See E. V. Helmer, *supra* note 4, 60.

[36] See J. Lew & L. Mistelis & S. Kröll, *supra* note 11, at para. 21–19 et seqq.; N. Blackaby & C. Partasides, *supra* note 11, at para. 6–27 et seqq.

[37] UN Doc. V 96-84935; available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1996Notes_proceedings.html (last consulted 01.11.2010); see J. Sekolec, *UNCITRAL Notes on Organizing Arbitral Proceedings – Background Remarks*, in A. J. van den Berg (ed), YB. Comm. Arb. 448 (1997); R. Ceccon, *UNCITRAL Notes on Organizing Arbitral Proceedings and the Conduct of Evidence – A New Approach to International Arbitration*, J. Int'l Arb. 67 (1997).

[38] R. Verkerk, Powers of the Judge – England and Wales, in van Rhee (ed.), *European Traditions in Civil Procedure* 307 et seqq. (2005).

## 4.1 Witness Testimony

### *4.1.1 National courts*

Traditionally in common law countries, such as England, the parties were responsible for the presentation of facts and evidence at the hearing. They even decided the order in which the witnesses were summoned.[39] However, this approach has changed drastically and judges have started to take a more active role. Under the English Civil Procedure Rules 1998 the judge has the power to influence the sequence in which witnesses are summoned and ask questions to clarify issues.[40] The use of written witness statements and cross-examination is a method typical for common law rules on evidence.[41] The technique of asking questions in the format of cross-examination is different from the questioning of witnesses in civil law jurisdictions. Cross-examination typically entails so-called "leading" or "closed questions", in other words, questions that suggest or contain the answer.[42] The interrogation stops abruptly when the answer sought is given. The emphasis placed on witness testimony may be explained historically: Due to the presence of the jury in common law litigation, the oral presentation of evidence as well as the examination and cross-examination of witnesses by the parties played an important role.[43]

Under civil law procedure the court is in control of the taking of evidence, and it is generally the judge's task to question witnesses. Cross-examination in the strict sense of the term does not usually exist in civil law countries. It is often said that civil law lawyers consider documentary evidence to be, in general, more reliable than testimonial evidence.[44]

[39] H. Smit, *supra* note 5, 163; R. Verkerk, *supra* note 38, 312.

[40] R. Verkerk, *supra* note 38, 313.

[41] See, e.g., Rule 32.11 of the English Civil Procedure Rules; I. Varga, *Beweiserhebung im transatlantischen Schiedsverfahren* 182 et seqq. (2006); F. Schäffler, *Zulässigkeit und Zweckmässigkeit der Anwendung angloamerikanischer Beweismethoden in deutschen und internationalen Schiedsverfahren* 16 (2003).

[42] M. McIlwrath & John Savage, *International Arbitration and Mediation: A Practical Guide* 309 (2010).

[43] L. Demeyere, *supra* note 24, 281 et seqq.

[44] See S. Elsing & J. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, Arb. Int'l 59 (2002); for a critical view on the reliability of documents see L. Shore, *Three Evidentiary Problems in International Arbitration: Producing the Adverse Document, Listening to the Document that does not Speak for itself, and Seeing the Witness through her Written Statement*, German Arbitration Journal 78 (2004).

### *4.1.2 Arbitral tribunals*

In international arbitration the different approaches to witness testimony outlined above are combined. It is now common that the parties submit written witness statements in advance of the hearing[45]. Mostly it is agreed that these statements represent the witnesses' direct evidence, which means that the time for questions by the party nominating the respective witness can be considerably reduced.[46] Art 8.3 lit b of the IBA Rules provides that 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. Although it does not explicitly say so the hearing is mainly limited to cross-examination and possibly re-direct examination. Finally, the arbitral tribunal may ask questions to a witness at any time according to Art. 8.3 lit g IBA Rules.[47] At the same time the tribunal shall have complete control over the Evidentiary Hearing[48] at all times, which clearly shows that the IBA Rules are also influenced by civil law traditions.[49]

This combined approach shortens the time needed for the hearing and at the same time avoids surprises during the hearing. Under the 1999 version of the IBA Rules each witness who has submitted a witness statement had to appear for testimony at an evidentiary hearing, *unless the Parties agree otherwise*. The revised version of Art. 8.1 IBA Rules slightly changes that approach since each party *shall inform the arbitral tribunal* and the other party of the witnesses whose appearance it requests. This touches upon the principle of immediacy and requires the parties to actively request the appearance of a witness.[50]

As regards examination techniques, Art 8.2 IBA Rules provides that questions to a witness during direct and re-direct testimony may not be

45 See Art 4.4 IBA Rules.

46 See, e.g., S. Elsing & J. Townsend, *supra* note 44, 59; M. Bühler & C. Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?*, J. Int'l Arb. 11 et seqq. (2000); P. Griffin, *Recent Trends in the Conduct of International Arbitration – Discovery Procedures and Witness Hearings*, J. Int'l Arb. 27 (2000).

47 M. Bühler & C. Dorgan, *supra* note 46, 25.

48 See Art. 8.1 IBA Rules.

49 See Commentary on the IBA Rules, *supra* note 23, 23.

50 See Commentary on the IBA Rules, *supra* note 23, 17.

*unreasonably leading*. It follows that the tribunal has the power to forbid such leading questions upon the objection of the opposing party.[51]

The drafting of witness statements and adoption of cross-examination techniques in international arbitration raise additional problems related to the pre-hearing contact between counsel and witnesses.[52] It might cause an imbalance when the counsel to one of the parties is restricted by ethical rules for attorneys to be in contact with a witness. This topic goes beyond the scope of the present article. In the author's view it is doubtful whether such rules equally apply to arbitral proceedings as long as the tribunal makes sure that witnesses are not improperly influenced or at least the decision is not based on such testimony.

## 4.2 Documentary Evidence

### *4.2.1 National courts*

Provisions empowering judges to order document production in civil proceedings differ greatly in various jurisdictions. On the one hand, the US Federal Rules of Civil Procedure ("FRCP") provide for vast pre-trial discovery, one of the most important instruments of which is document production[53]. US Discovery is broad, – in simplified terms – it encompasses any document which may lead to admissible evidence, even if it does not constitute evidence in and of itself. The duty to produce documents covers any relevant document, including internal documents and documents which are contrary to that party's interest.[54] Exceptions do, of course, exist. Discovery is, *inter alia*, limited by legal privileges, such as attorney-client privilege or protection of business secrets.[55]

On the other hand the English Civil Procedure Rules 1998[56] ("CPR)

[51] G. Born, *supra* note 12, 1844.

[52] See G. von Segesser, *Witness Preparation in International Commercial Arbitration*, ASA Bulletin 222 (2002); C. Oetiker, *Witnesses Before the International Arbitral Tribunal*, ASA Bulletin 262 (2007); M. Bühler & C. Dorgan, *supra* note 46, 10 and 19; H. van Houtte, *Counsel-Witness Relations and Professional Misconduct in Civil Law Systems*, 19 Arb. Int'l 457 (2003).

[53] See Rule 26(1) FRCP.

[54] G. Kaufmann-Kohler, *Globalization of Arbitral Procedure*, Vand. J. Transnat'l L. 1325 (2003); J. B. Oakley & V. D. Amar, *American Civil Procedure: A Guide to Civil Adjudication in US Courts* 182 (2009).

[55] See G. Kaufmann-Kohler & P. Bärtsch, *Discovery in international arbitration: How much is too much?* German Arbitration Journal 16 (2004).

[56] See Rule 31 et seqq CPR.

have curbed documentary discovery. First, it does not apply in small claims litigation at all[57]. Second, the definition of standard disclosure (mainly) requires the parties to disclose the following documents: (a) adversely affecting its case, (b) adversely affecting another party's case, and (c) supporting another party's case.[58] Disclosure is also subject to the standard of reasonableness, i.e., only a reasonable search is required, and the overriding principle of proportionality[59]. It may, e.g., be disproportionate to search for a certain document if the number of documents involved outweighs the (potential) evidentiary significance of the document to be located during the search.[60]

Civil law systems do not usually provide for document discovery. Each party produces the document on which it tends to rely in support of its case. There is no general obligation to also produce any documents that may negatively affect one's case.[61] Under most civil law regimes document production requests must specifically describe a document in the possession of the opponent. Additionally, in order to obtain such document, it must either be relevant with regard to the fact alleged or the party relying on it as evidence can demand the production of the document under the provisions of the applicable law[62].

Under Austrian law, for instance, a party alleging that the opposing party possesses a relevant document can request the court to order the opposing party to produce said document. According to sec. 303(2) ACCP the party requesting the production of a document has to specify its content as precisely as possible and to point to the facts it intends to prove with the requested document. Provided one of the following conditions is met, the opposing party is obliged to produce the document: (a) if the opposing party itself relied on the document; (b) if the opposing party is under such obligation to produce the document under

[57] See Rule 31.1(2) CPR.

[58] See, e.g., N. H. Andrews, *supra* note 26, 168.

[59] See Pracitce Direction 31A, point 2.

[60] G. Kaufmann-Kohler & P. Bärtsch, *supra* note 5455, 16; see 31.7 CPR.

[61] See, e.g., G. Born, *supra* note 12, 1892; G. Kaufmann-Kohler & P. Bärtsch, *supra* note 5455, 16; K. Sachs, *Use of documents and document discovery: „Fishing expeditions" versus transparency and burden of proof*, German Arbitration Journal 194 (2003).

[62] S. Elsing & J. Townsend, *supra* note 44, 59; for document production requests under German law see P. Murray & R. Stürner, *supra* note 25, 277; G. Kaufmann-Kohler & P. Bärtsch, *supra* note 5455, 17.

the applicable substantive law; or (c) if the document, according to its content, is considered a joint document ("gemeinschaftliche Urkunde", see sec. 304[3] ACCP).[63]

According to Chapter 38 of the Swedish Code of Civil Procedure anyone possessing a document that can be assumed to be of importance as proof, is obliged to produce it. Similar to document production requests under Austrian law the motion must be specific as to the contents and relevance of the document to be produced. The obligation to produce documents does not apply to documents covered by legal privilege or business secrets.[64]

### *4.2.2 Arbitration*

Once again a compromise has been developed in international arbitration. Failing any contrary agreement by the parties US-style discovery or even English-style disclosure are not available in arbitration.[65] It is however generally accepted that arbitral tribunals might grant some level of disclosure exercising their procedural discretion.[66] It has sometimes even been suggested that a refusal to grant the production of a document might amount to a violation of the respective parties' right to be heard under specific circumstances.[67]

According to Art 3.3 IBA Rules a tribunal will allow the production of documents, provided the party requesting can prima facie establish the following requirements: (a) the documents sought are identified with reasonably specific ("description of a *narrow and specific category* of documents), (b) they relate to facts relevant and material for the outcome of the dispute, (c) they are in the possession or control of the other party, and (d) they are not protected by some privilege, or do not contain information subject to commercial confidentiality or special political or insti-

[63] See S. Riegler & C. Koller, Austria, in L. Mistelis et al. (eds.), *World Arbitration Reporter* 76 et seq. (2010).

[64] See B. Lindel, Evidence in Sweden, in J. M. Lebre de Freitas (ed.), *The Law of Evidence in the European Union* 422 (2004); C. Broman & M. Granström, Sweden, in S. R. Grubbs, *International Civil Procedure* 715 (2003).

[65] R. Pietrowski, *Evidence in International Arbitration*, Arb. Int'l 392 (2006).

[66] L. Shore, *supra* note 44, 77; G. Kaufmann-Kohler, *supra* note 54, 1327; Commentary on the IBA Rules, *supra* note 23, 7.

[67] Cf A. Z. Marossi, *The Necessity for Discovery of Evidence in the Fact-Finding Process of International Tribunals*, J. Int'l Arb. 513 (2009).

tutional sensitivity. Privileges in international arbitration raise difficult conflict of law issues.[68] Even their qualification as a matter of substance or procedure is approached differently in various jurisdictions. While under Austrian law privileges are matters of procedure, the prevailing trend in international arbitral practice favours a substantive law qualification. It is argued that the tribunal shall apply the law of the jurisdiction with which the relevant communication is most closely connected, i.e., the law where the party has its place of business.[69] Art 9.3 IBA Rules provides specific guidelines arbitral tribunals may take into account when dealing with privilege issues, such as the attorney-client privilege and the so-called "without prejudice" or "settlement" privilege.[70]

In the event that the privileged or confidential nature of a document is controversial, Art 3.8 IBA Rules allows for the review of the documents be entrusted to an independent and impartial expert, bound by confidentiality, whose assignment is it to report to the arbitral tribunal on the principle and scope of protection.[71]

The requirement to specifically describe the document and the interrelation with facts relevant and material for the outcome should exclude so-called (inadmissible) "fishing expeditions" (in German referred to as "*unzulässiger Ausforschungsbeweis*").[72]

[68] See, e.g., M. Sindler & T. Wüstemann, *Privilege across borders in arbitration: multi-jurisdictional nightmare or a storm in a teacup?* ASA Bulletin 610 (2005); O. Meyer, *Time to Take a Closer Look: Privilege in International Arbitration*, J. Int'l Arb. 365 (2007); C. Tevendale & U. Cartwright-Finch, *Privilege in International Arbitration: Is It Time to Recognize the Consensus?* J. Int'l Arb. 823 (2009); K. P. Berger, *Evidentiary Privileges under the revised IBA Rules on the Taking of Evidence in International Arbitration*, IntALR 171 (2010).

[69] S. Riegler & C. Koller, *supra* note 63, 74.

[70] See Commentary on the IBA Rules, *supra* note 23, 25; cf K. P. Berger, *supra* note 68, 172.

[71] See, e.g., C. Krapfl, *Die Dokumentenvorlage im internationalen Schiedsverfahren* 258 (2007).

[72] See Commentary on the IBA Rules, *supra* note 23, 8.

# 5 The Principle of iura novit curia

According to the *iura novit curia* principle ("the court knows the law") the legal assessment of the case lies within the responsibility of the judge.[73] In this regard, the court is not limited to the legal arguments advanced by the parties even if the parties explicitly want to exclude the application of a certain rule. This raises the question whether arbitrators also enjoy full authority with regard to legal questions. Since (international) arbitral tribunals have no *lex fori*, a comparison can only be made as regards the application of foreign law.[74]

In some jurisdictions the content of foreign law is considered to be a fact and must be proven like any other factual issue. In contrast, in other jurisdictions it is the court's task to establish the content of the applicable law based on the principle of *iura novit curia*.[75] In state courts such questions naturally only arise with regard to foreign law.

## 5.1 National courts

The status of foreign law is approached differently in various jurisdictions.[76] The different approaches however do not strictly follow a common law – civil law divide. Under English law, for instance, parties have to prove and plead foreign law as if it were a factual matter.[77] By contrast, German, Swiss (Art 16 PILS) and Austrian law (§ 3 and 4 Act on Private International Law "IPRG") follow the maxim *iura novit curia* according to which the court is assumed to know the law (and apply it *ex officio*).[78] The parties only have to prove the facts supporting their claim and iden-

[73] See, e.g., K. P. Berger, *The International Arbitrator's Dilemma: Transnational Procedure versus Home Jurisdiction*, Arb. Int'l 219 (2009).
[74] G. Kaufmann-Kohler, "The Governing Law: Fact or Law?" – A Transnational Rule on Establishing its Contents, in M. Wirth (ed.), *ASA Special Series No. 26 – Best Practices in International Arbitration* 79 (2006).
[75] This is, e.g., the case under Finnish and Swedish law, see M. S. Kurkela, *'Jura Novit Curia' and the Burden of Education in International Arbitration – A Nordic Perspective*, ASA Bulletin 486 (2003).
[76] See ILA, *Final Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration* 8 (Rio de Janeiro Conference 2008), available at http://www.ila-hq.org/en/committees/index.cfm/cid/19 (last consulted 01.11.2010).
[77] Dicey, Morris & Collins, *The Conflict of Laws* 255 (2006).
[78] See P. Oberhammer & T. Domej, *supra* note 27, 303; G. Kaufmann-Kohler, *supra* note 74, 80.

tify the relief they seek. An intermediate system applies in US federal litigation: pursuant to Rule 44.1 of the Federal Rules of Civil Procedure pleading foreign law rests with the parties and the responsibility to ascertain its content is shared between the court and the parties.[79]

In short three approaches can be differentiated: (a) those in which the court has to apply foreign law and ascertain its content *ex officio*, in other words, foreign law is treated as law, (b) those where foreign law is essentially treated as if it were a factual matter and therefore requires the parties to plead and prove foreign law, and (c) the mixed approach taken by the FRCP where courts have broad authority to conduct their own research but no duty to do so.[80]

## 5.2 Arbitral tribunals

The question whether the *iura novit curia* principle also applies in international arbitration, and if so, to what extant, can be particularly relevant in cases where the parties fail to raise pertinent legal issues.[81] Additionally, it might be indispensable for the arbitral tribunal to ascertain the contents of the applicable law in case of default by the respondent.[82] In general, the following questions can be differentiated in international arbitral practice: How should arbitrators acquire information about the contents of the applicable law? How should arbitrators interact with the parties about the contents of the applicable law? How should arbitrators make use of the information they receive about the contents of the applicable law?

Most arbitration laws are silent on those issues. Notably, the English Arbitration Act provides an exception to this rule. Sec. 34(1)(g) of the Act clarifies that the issue of "whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law" qualifies as one of the procedural and evidential matters falling within the tribunal's

79 See L. Teitz, *From the Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, Journal of Maritime Law and Commerce 97 (2003).

80 ILA Report, *supra* note 76, 8 et seq.

81 See A. Dimolitsa, *The equivocal power of the arbitrators to introduce ex officio new issues of law*, ASA Bulletin 426 (2009); T. Giovannini, International Arbitration and Jura Novit Curia – Towards Harmonization, in M. Á. Fernández-Ballesteros & D. Arias (eds), *Liber Amicorum Bernardo Cremades* 501 (2010).

82 See A. Dimolitsa, *supra* note 81, 429, for further examples.

discretion. This provision does, however, not provide guidance as to how the tribunal should exercise its power.

The application of the *iura novit curia* principle in international arbitration is, at least in principle, also confirmed by the ILA in its Resolution No. 1/2008 (Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration)[83]:

> "1. At any time in the proceedings that a question requiring the application of a rule of law (including a question of jurisdiction, procedure, merits or conflicts of laws) arises, arbitrators should identify the potentially applicable laws and rules and ascertain their contents insofar as it is necessary to do so to decide the dispute.
>
> 2. In ascertaining the contents of applicable law and rules, arbitrators should respect due process and public policy, proceed in a manner that is fair to the parties, deliver an award within the submission to arbitration and avoid bias or appearance of bias."

In a similar vein, the Swiss Federal Tribunal has decided that the principle of *iura novit curia* also applies to arbitral proceedings.[84] It has, however, also been confirmed in case law that the introduction of new issues of law by the arbitral tribunal is subject to the fundamental principle of due process.[85] Notably, the Swiss Federal Tribunal set aside an award where the parties were not given the opportunity to comment on legal arguments applied by the arbitral tribunal, because those arguments were not foreseeable.[86] At the same time the Swiss Federal Tribunal, however, noted that the *iura novit curia* principle should be applied in arbitration with caution.[87] A similar stance has been taken by the French Cour de cassation annulling an award based on a provision of the French Civil Code not invoked by the parties.[88]

[83] Available at http://www.ila-hq.org/en/committees/index.cfm/cid/19 (last consulted 01.11.2010).

[84] Arrêt du Tribunal Federal ("ATF") 4A_400/2008, ASA Bulletin 495 (2009); for further references see C. Müller, *Swiss Case Law in International Arbitration* 160 (2010).

[85] For a detailed analysis see A. Dimolitsa, *supra* note 81, 431; T. Giovannini, *supra* note 81, 503.

[86] ATF130 III 35, ASA Bulletin 574 (2004); in this case tribunal relied on contractual provisions not invoked by the parties.

[87] ATF 4P.4/2007, ASA Bulletin 152 (2008).

[88] Cour de cassation (1re Ch. civ.) 14 March 2006, Rev Arb 653 (2006).

Provided that the status of the governing law is procedural in nature, the arbitral tribunal has discretion when determining its content, failing any contrary agreement by the parties.[89] The arbitrator's autonomy is, however, restricted by basic procedural principles such as the parties' right to be heard.[90] The tribunal cannot base its decision on a wholly unexpected rule neither party has invoked.[91]

Strictly equating judges with arbitrators when it comes to the application of the *iura novit curia* principle would not be appropriate in international commercial arbitration.[92] Such approach would entail the risk of bias or at least the appearance of bias. This does, however, not exclude appropriate directions in relation to legal issues that are relevant. To the contrary, a "*laissez faire* approach" employed by the arbitral tribunal could lead to considerable difficulties in the deliberation phase. If the tribunal realizes only at that stage of the proceedings that the parties were "on the wrong track" it will ultimately have to reopen the proceedings.[93] In other words much time and money will possibly have been invested in vain.

In the author's view the possibilities for arbitrators to introduce new issues of law should only be used in exceptional circumstances, e.g., if rules of public policy or of a mandatory nature are potentially concerned.[94] It may be difficult to differentiate between "new issues" and such issues that only amount to a substantiation or reinforcement of legal arguments already brought forward.[95] Moreover, it is questionable whether the tri-

[89] G. Kaufmann-Kohler, *supra* note 74, 81.

[90] See *supra* note 85.

[91] G. Kaufmann-Kohler, *supra* note 74, 82.

[92] See ILA Report, *supra* note 76, 12; ILA Resolution No. 1/2008, *supra* note 83, para. 4.

[93] A. Dimolitsa, *supra* note 81, 431.

[94] See ILA Resolution No. 1/2008, *supra* note 83, para. 6 which states:
"In general, and subject to Recommendation 13, arbitrators should not introduce legal issues – propositions of law that may bear on the outcome of the dispute – that the parties have not raised."
Para. 13 in turn deals with special circumstances and provides:
"In disputes implicating rules of public policy or other rules from which the parties may not derogate, arbitrators may be justified in taking measures appropriate to determine the applicability and contents of such rules, including by making independent research, raising with the parties new issues (whether legal or factual), and giving appropriate instructions or ordering appropriate measures insofar as they consider this necessary to abide by those rules or to protect against challenges to the award."

[95] Arbitrators may rely on additional sources without further notice to the parties if

bunal should (only) have the discretion to introduce legal issues[96] and arguments on the merits not invoked by the parties or whether it should be under an obligation to do so[97]. According to some authors a distinction needs to be drawn between issues emerging from the contract and those arising from provisions of the applicable law. Only with regard to the former should an obligation to raise (new) legal issues with the parties be endorsed.[98]

As to the content of foreign law, the arbitrators should primarily receive information by the parties.[99] This is because the transnational legal environment is too diverse, potentially involving participants from different legal cultures. Additionally, access to the applicable law can pose considerable difficulties, be it for reasons of language, availability or reliability of the relevant sources.[100]

# 6 Conclusion

The brief comparative analysis outlined above shows that the clash of legal cultures occurring in international arbitration has a significant impact on the role judges and arbitrators play in contemporary dispute resolution. As regards the comparison of judges and arbitrators and the potential areas for a "cross-fertilization" between arbitral and state court proceedings, the following points can be made:

First, despite the procedural flexibility granted to parties in international arbitration, arbitrators have a comparatively strong position. This is because in most cases parties only agree on a broad outline of the procedural framework leaving the conduct of the proceedings to the direction of the arbitrators. Once a legal battle has started, an agreement on specific procedural issues has no reasonable chance.

Second, the early case management approach applied in arbitration and the opportunity to hold one or two major hearings could also inspire

those sources merely corroborate or reinforce other sources already addressed by the parties; see ILA Resolution No. 1/2008, *supra* note 83, para. 10.

96 Cf A. Dimolitsa, *supra* note 81, 429; G. Kaufmann-Kohler, *supra* note 74, 84.

97 Cf T. Giovannini, *supra* note 81, 500; at the same time, however, emphasizing that the first duty in this regard falls under the parties' responsibility.

98 A. Dimolitsa, *supra* note 81, 429.

99 See ILA Resolution No. 1/2008, *supra* note 83, para. 5.

100 G. Kaufmann-Kohler, *supra* note 74, 84.

national civil procedure law – particularly in civil law countries – in fostering procedural economy.

Finally, for the settlement of large commercial disputes the hybrid procedure of common and civil law developed in international arbitration might also provide guidance for enhancing procedural flexibility in state court proceedings. The success of international arbitration shows that a great level of party autonomy in civil procedure and a procedural model based on cooperation between decision-making bodies and parties does not necessarily imperil procedural efficiency. In a more and more globalized world the strict application of "traditional evidentiary rules and procedural principles" cannot always keep up with the needs of international commerce.