

ORIGINAL SCIENTIFIC PAPER

PRACTICAL ASPECTS OF APPLYING DIFFERENT
LEGAL TRADITIONS IN INTERNATIONAL
ARBITRATIONSDragan Zelić¹Nenad Baroš²*Faculty of Economics at University of Banja Luka*

Abstract: *There is no unified and comprehensive definition of arbitration in legal science.³ Most of the positive regulations that regulate it, both in the world and in our country (the Arbitration Act), omit the issue of its definition. However, in science and in legal practice, arbitration is most often defined through arbitration dispute, its elements, course and legal effects, and through indicating differences between arbitration and judicial process, i.e., arbitration and other alternative dispute resolution methods. It is concluded that arbitration is an alternative to judicial settlement of a dispute, formed by consensus or consent of the will of the parties involved, private, and that its decisions are legally binding and final.^{4 5} This paperwork is trying to explain differences and different way of conducting in case when participants in arbitration cases are from different legal systems, especially differences between the most important and the most spreader legal systems in the world, European, civil law system and Anglo-Saxon law (common law). In the second and third chapter, attention is paid to the procedural and material differences between the continental and the common law arbitration procedures, especially in differences between the investigative (continental legal system) and the common law principles of the proceedings. In the fourth chapter, the difference between the starting of the arbitration procedure was dealt with, while in chapter five, special attention was paid to the presentation of evidence in the mentioned legal systems. The*

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3 Jean-Francois Poudret, Sébastien Besson et all. *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007) 1-3.

4 Maja Stanivuković, *International Arbitration* (Belgrade: Official Gazette, 2014) 19-20

5 Poudret, Besson, *Comparative Law of International Arbitration*. 3-12.

witnesses and expert witnesses deal with the sixth and seventh chapters of the paper, while the question of the privacy of the dispute is left behind for the last chapter of the paper, followed by a conclusion.

Key words: *Arbitration, arbitration dispute, continental legal system, common law*

I INTRODUCTION

The speed, efficiency, adaptability of the process to the needs of the parties and the specific nature of the various cases, as well as the relatively low price in relation to the court decision, are just some of the reasons for the popularity of arbitration in resolving international business disputes. Over the past fifteen years (statistics refer to the period between 2000 and 2013), the number of cases reported to international arbitration institutions increased by more than 60%. The biggest jump was recorded after the global economic crisis in 2008. Experts agree that the current trend will continue in the future and that it is a natural consequence of the globalization of the world economy.⁶

The parties involved in the international arbitration dispute are not separated only geographically and linguistically, but often come from very different legal systems. Particular difficulties arise in cases where one party comes from a civil law system, whereas the other party comes from a common law system. However, such cases are very frequent. Of more than two hundred states and autonomous entities in the world, seventy is characterized by the common law legal system, in part or in its entirety.⁷ Those are former colonies of the British Empire and countries under strong English cultural influence. These include, in addition to the British Empire (Scotland excluded) and USA as the strongest economy in the world, numerous African and Asian countries that are currently going through a dynamic economic development. Most of the transatlantic and transpacific trade takes place in the division of two very different legal traditions, so the number of arbitration cases in which the elements of both are mixed is relatively large. By looking at the similarities and differences between the civil and the common law arbitration procedure, there is a proposal for their unification and overcoming differences in order to successfully resolve an arbitration dispute in which the involved parties (and often arbitrators) are accustomed to the different legal traditions and solutions they offer.

⁶ Mark Bezan, James Nicholson, Howard Rosen, FTI Journal *Trends in International Arbitration*, <http://www.fticonsulting.com/insights/fti-journal/trends-in-international-arbitration>. Accessed on 24.02.2018

⁷ Central Intelligence Agency (CIA), *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>. Accessed on 12.03.2018

II PROCEDURAL AND MATERIAL DIFFERENCES BETWEEN CONTINENTAL AND *COMMON LAW* ARBITRATION

Similarities and differences between civil and common law arbitration procedure may be roughly divided into procedural and substantial (material). Procedural differences are numerous and encompass the largest portion of differences between these two approaches to international arbitration. Substantial differences between civil and common law arbitration are more difficult to determine, because the search for them leads us into a much wider field of substantial differences between the two great legal traditions which is a topic for itself. In the narrow context of international arbitration, the material differences between its civil and common law variants are highlighted in the issue of influence of previous judgments and their findings on the decision-making process in the current arbitration procedure, which is determined by a different understanding of the concept of *res judicata* in different legal traditions, and the issue of non-contractual punitive damages⁸. The differences in the presentation of evidence make the widest part of the procedural differences in general and represent the greatest obstacle in the unification of the procedural principles of the two legal systems. In addition, there are also different approaches to application of laws by the arbitral tribunal, secrecy of the arbitration procedure and award, different customs when it comes to taking and keeping minutes, as well as the issue of paying arbitration costs.^{9 10}

III PRINCIPLE OF INVESTIGATION AND PRINCIPLE OF PARTY CONTROL OF FACTS AND EVIDENCE

Broadly speaking, the procedure in civil law is determined by a principle of investigation, whereas in common law system, the procedure is determined by the principle of party control of facts and means of proof. Principle of investigation implies and active role of a judge, or arbitrator in conducting the procedure, collecting evidence, examining witnesses, expert witnesses and representatives of the parties, as well as in the finding the appropriate legal arguments, standards, rules and principles based on which a judgment will finally be made. Principle of party control of facts and means of proof transfers most of these tasks to the confronted parties in the procedure, i.e. their legal representatives, while

⁸ American Arbitration Association *AAA Handbook on International Arbitration Practice* (USA, 2010). 39-40

⁹ *Ibid.*, 40-45

¹⁰ Siegfried H. Elsing and John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration* (Arbitration International, Volume March 2002), 12

the judge – the arbitrator only plays the role of a moderator who observes the dispute, regulates it, ensures its fairness, and on the basis of the outcome renders his judgment.¹¹¹²

However, such a crude generalization has a large number of exceptions, to which the arbitration procedure can be partly classified. In the civil law, the litigation is characterized by numerous elements of principle of party control of facts and means of proof, which is especially true for arbitration.¹³ However, it cannot be said that the principle of party control of facts and means of proof is absolutely dominant in civil arbitration practice, as in the case of the common one, nor can the sign of equality be drawn between the perceptions of different principles in two legal traditions. Thus, we reach a mixture of these two mentioned principles in international arbitration, with different implications for different phases of the arbitration procedure. In most cases, rulebooks regulating the work of an institutional arbitration leave the parties with an option to agree on the type and course of arbitration procedure and a possibility to apply both mentioned principles.¹⁴ This is even stipulated by the English Arbitration Act 1996 which, although it was passed in the cradle of common law, allows the investigative role of a judge in a procedure.¹⁵ Governing arbitration procedure by principle of investigation or principle of party control of facts and means of proof, or their mixture, mostly does not depend on arbitration clause, international or national arbitration rules (which, as mentions, provide parties with a high level of liberty to choose) or the arbitration venue, but it depends on preferences of arbitrators, legal representatives of the parties, and the needs of a particular issue in dispute.¹⁶¹⁷ Although principle of party control of facts and means of proof often dominates international arbitration procedures, there are cases with a more active investigation role of the arbitrator which ensures a more rapid course and more equitable outcome of the arbitration procedure. The advocates of the investigative role of the arbitration body emphasize its advantage when it comes to finding documents relevant to the case, owned by only one party who does not disclose because they do not support its interest. Such are situations in which one of the parties (and sometimes both) is not adequately informed of the material, factual aspects of the disputed case, or those in which one party is

11 American Arbitration Association *AAA Handbook on International Arbitration Practice*, 40

12 Marko Knežević, „Расправно начело у српском парничном поступку“, *PhD Thesis, Novi Sad*, 2014.

13 Stanivuković, *International Arbitration*, 231

14 *United Nations Commission on International Trade Law Arbitration Rules*, article 17. paragraph 1; *Swiss Arbitration rules*, article 15. paragraph 1; *IBA rules*, article 2. paragraph 1

15 *1996 English Arbitration Act* 34(2)(g), <http://www.legislation.gov.uk/ukpga/1996/23/section/34>.

16 Alan Redfern, Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2004), 269-270

17 American Arbitration Association *AAA Handbook on International Arbitration Practice*, 40

financially much stronger than the other. In such cases the arbitrator is expected to play a more active role in processing the evidence, or even collecting it, and to appoint expert witnesses to help him in doing so. This is a way of avoiding a passive obstruction of the procedure by a party favoured by it. The question of the additional costs of an enhanced role of arbitration often fades with respect to ensuring the fairness of its final outcome.¹⁸

IV INITIATING THE PROCEDURE

Another difference between the civil and the common law of the arbitration procedure concerns the way it is initiated, and the character and role of the claim, the response to the statement of defence and counterclaim. In the civil tradition, the claim is a detailed written submission containing a statement of claim, facts, and the sum of the normative legal elements that the claimant shall refer to if the case develops. Such claim is usually accompanied by numerous attachments containing evidence to be discussed during the procedure. In relation to the written form of the claim, its concise oral presentation before the arbitral tribunal is considered secondary. On the contrary, common law practice acknowledges brief initial submissions whether a statement of claim, a statement of defence or a counterclaim. Unlike the European practice, a greater emphasis is placed on the oral presentation of submissions than on their written form. The reason for this is a different structure of the process which implies the development of a case during the arbitration itself.¹⁹ Some explain the root of such differences in the past of common law legal tradition, when trials took place before the jury whose members were often illiterate. Such a jury was unable to adequately assess the written evidence, and it was not even submitted to the jury. Instead, the parties' representatives would orally make a concise and clear statement of claim, or defense, and evidence and legal arguments would be built at later stages of the process. An administratively developed civil practice in which instead of the jurors of the case were usually decided by qualified judges, did not have such problems, and the focus of the presentation of evidence remained in writing.²⁰ International arbitration rules generally contain a more loose definition of initial submissions and norms on their content. UNCITRAL²¹ rules prescribe that the claim, in addition to basic data on the parties, statement of claim and facts in

18 Hyun Song Shin, „Adversarial and inquisitorial procedures in arbitration”, *The RAND Journal of Economics*, (1998) 381

19 Elsing and Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, 5

20 Anna Magdalena Kubalcyk, „Evidentiary Rules in International Arbitration - A Comparative Analysis of Approaches and the Need for Regulation”, *Groningen Journal of International Law*, vol3, 90

21 UNCITRAL rules, article 20. paragraphs 2, 3, 4

relation to which the disputes arises, legal grounds and arguments, and contract or another legal instrument based on which the procedure is initiated, should contain evidence that may be relevant and material to the resolution of the dispute, if possible. Swiss rules on international arbitration provide the same²². However, Swiss Code of civil procedure, which is significant for arbitration procedures conducted in that country²³, prescribe the necessary content of the claim more precisely.²⁴ According to the code, the initial submission must contain all material evidence to which the party intends to refer to, since later amendments are allowed only under very strict conditions.²⁵ On the other hand, ICSID²⁶ and IBA rules are even less specific than the Swiss. With some favoring the civil approach, this leaves a possibility of application of common law procedural practices in connection with the claim and other initial submissions. International arbitration practice favors the civil approach to filing submissions.²⁷ Such tendency is logical, especially in a mixed dispute where one party (from civil law system) tries to use more developed procedural institutes of its law in order to achieve advantage in the very beginning of a procedure. A transitional solution for practitioners of common law is the introduction of as much of the evidence and material facts as the initial submission – statement of claim (or statement of defense), without adding portions in which this material would be further exposed and explained as is customary in civil law.²⁸ In order to disclose and develop documents, legal arguments and other important elements in any case at the very beginning of the process, their inclusion in the claim, although not characteristic for the legal tradition it comes from, provides security for the common law party wherever and within any legal system guiding the arbitration.

However, such practice is often criticized as unfair to a party who does not dispose with appropriate documents, but may obtain them during the procedure, or to a party which is limited by financial means and time when preparing a statement of claim or defense.²⁹

22 *Swiss rules on international arbitration*, article 18. paragraphs 1, 2, 3

23 *Swiss rules on civil procedure* „*Schweizerische Zivilprozessordnung (ZPO)*, articles 353, 373; *Federal Statute on Private International Law (IPRG)*, article 176, 182.

24 *Swiss Code of civil procedure*, *Schweizerische Zivilprozessordnung (ZPO)*, article 221

25 *Ibid.*, articles 229. and 230

26 *ICSID Convention Arbitration Rules*, rule 31. paragraph 3

27 Paul E. Mason and Horacio A. Grigera Naón, *International Commercial Arbitration Practice: 21st Century Perspectives* (LexisNexis, 2018), chapter 2.04

28 Elsing, Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, 7

29 American Arbitration Association *AAA Handbook on International Arbitration Practice*. 41

V PRESENTATION OF EVIDENCE

The greatest difference between civil and common legal practices lies in the presentation of evidence. In the civil tradition, written evidence (documents) are, as a rule, considered to be valid *per se*, and do not require further testimonies or confirmations by expert witnesses in order to be taken into consideration. Common law, however, requires or expects oral testimonies for most of the documents, which will, as necessary but not always sufficiently, confirm their authenticity.³⁰

Disagreements regarding the presentation of evidence are particularly expressed in the context of establishing, obtaining and filing documents - the most important and widely used type of evidence in arbitration proceedings. In civil law, the burden of proof lies on the party who made a certain statement, i.e. the party who refers to a certain fact as the basis for pretension or the exercise of a right.³¹ Evidence enclosed to the statement of claim, statement of defense or the counterclaim it refers to, is to be collected by the party initiating the procedure. In doing so, the party is not obliged to include all evidence it has at its disposal, but only those parts that refer to its requests and that are in that party's favor. Hence, the party is not obligated to include damaging or self-incriminating documents. If the opposing party is not able to reach such documents, or is not aware of their existence, they will not be included in the procedure and arbitrators will not consider them whatsoever.³² Numerous arguments support this approach. In this way, the parties themselves bear full responsibility for obtaining evidence, the right to use those they have at their disposal in achieving their own goals, and the procedural risk that, in the absence of evidence, they cannot express their views or oppose the claims of the other party adequately.

In common law system, things are rather different. Obtaining evidence and its presentation is a part of the judicial or arbitration procedure. For this purpose, common law developed a special, very complex procedural institute called *discovery* where one party can force the other party to provide and present evidence (documents, responses, and even testimonies in certain cases) which is not favorable to that party.³³ Definition and translation of this term are hard to determine, due to the lack of any analogue in civil law, and because of his different perceptions, scope and objects in various common law legal systems. In the legal system of United States of America, the term *discovery* has the broadest meaning and includes gathering documents and other evidence, testimonies

30 *Ibid.*, 42

31 *Swiss Code of civil procedure*, Schweizerisches Zivilgesetzbuch (ZGB)“, article 8

32 Redfern, Hunter, *Law and Practice of International Commercial Arbitration*, 299-300.

33 *AAA Handbook on International Arbitration Practice*, group of authors, page. 41.

by parties or expert witnesses and other investigative activities related to the dispute. In British law, discovery refers exclusively to finding, gathering and presenting evidence in written form. British understanding of this procedural action is limited to obtaining documents that the opposite party is aware of or reasonably doubts its existence.

Americans, however, interpret discovery through direct meaning of the term as a procedural mean for discovering unknown fact which are then built into the case and may re-shape it significantly.³⁴

American concept of discovery causes many complications and possibilities for abuse. The most famous and the most widespread custom in legal practice of United States is the initiation of so-called „fishing expeditions“. This metaphorical term stands for a kind of obstruction of the procedure where one party through interrogatories requests submission of document or other material elements for which it has no proof or reasonable ground to believe they exist, and whose relevance is unclear and often non-existing in the case. In this way, a party that has more financial resources, or more time can prolong the dispute to the detriment of the opponent, to tire it and handicap its ability to further efficiently participate in the process. Federal rules of civil procedure passed by a Congress in 1938, and expanded on several occasions following the World War II, are grounds for the broadest and the most „liberal“ interpretation of discovery. The critics argue that these rules not only allow, but also encourage the obstruction of civil proceedings by extending and delaying the work intended to disclose evidence.³⁵

Advocates of presenting evidence in a form of common law discovery procedural institute, emphasize its fairness in revealing all important aspects of a case, and the „right to evidence“ of all parties in the procedure. According to such understanding, a party is able to request documents or other evidence for which it believes exist and which directly concern its legal arguments or claim. Hence, the party does not include new elements into the case, but solely proves the existing ones presented at the beginning of the procedure. This eliminates the possibility of falling into a trap set by American „fishing expeditions“.³⁶

Institutional rules of international arbitration provide, to a certain extent, a solution to the conflicts of various practices in the presentation of evidence in civil and common law. Although there is no explicit reference to the institute of discovery in them, its elements are present and present a kind of upgrade of the

34 Poudret, Besson, *Comparative Law of International Arbitration*, 555

35 Stephen N. Subrin, Fishing „Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules“, *Boston College Law Review Volume 39 (1998)*, 731

36 Pierre Tercierand, Tetiana Bersheda „Document Production in Arbitration: A Civil Law Viewpoint, The Search for “Truth” in Arbitration “, *ASA Special Series No. 35, JurisNet, LLC (2011)*, 81

basis that can be said to rest on the spirit of a different legal system. UNCITRAL rules³⁷ limit the burden of proving the facts to the party who presented them, but also allow the tribunal to request additional evidence from the parties at any stage of the procedure. Although this solution is based on civil law, it shows a noticeable common law impact. Arbitration rules of International Chamber of Commerce also authorize the tribunal to request additional evidence at any time.³⁸ Swiss rules on international arbitration are almost identical to UNCITRAL rules when it comes to this matter.³⁹ ICSID rules authorize the arbitration to request the parties to submit additional documents, and parties may force each other to do so only through the tribunal.⁴⁰

Rules of International Bar Association (IBA) on presenting evidence in international arbitration are the most detailed and the richest resource for overcoming differences between civil law and common law approach to this procedural instance. The effects of different legal traditions on their composition are proportionate, and solutions they offer are concise, rational and practically applicable in any part of the world. The parties are invited to consultation with regard to the procedural arrangement of the dispute in order to achieve the highest fairness possible, efficiency and speed of its resolution.⁴¹ In terms of submitting documents, the parties are given the opportunity to request documents that are not available to them from the tribunal or opposing party in the procedure.⁴² However, aberration in the common law practice of extensive discovery and getting stuck in “phishing expedition” is prevented by the Article 3 paragraph 3 of the IBA Rules. This article prescribes that the party who is filing a Request to Produce must provide a specific description of the requested document, explain the reasons for filing such requests, and explain reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party.⁴³ If the Party to whom the Request to Produce is addressed may state an objection if it believes that any of these principles has not been met⁴⁴, or it believes that the document requested is not relevant enough, if there is a legal, ethical obstacle or the document is confidentially, politically or institutionally sensitive, or if producing such document would be unreasonable burdensome for the procedure itself.⁴⁵ This type of a synthesis of European and Anglo-Saxon

37 *UNCITRAL rules*, article 27

38 *ICC rules*, article 25, paragraph 5

39 *Swiss rules on international arbitration*, articles 24

40 *ICSID arbitration rules*, Rules 33. and 34

41 *IBA Rules on the Taking of Evidence in International Arbitration*, article 2, paragraphs 1. and 2

42 *Ibid.* article 3, paragraph 2

43 *Ibid.* article 3, paragraph 3

44 *Ibid.* article 5

45 *Ibid.* article 9. Paragraph 2

process practices creates a clear, transparent, fair and rational way of overcoming their mutual differences without favoring one of the two sides, making the IBA rules the best codified compromise between two different legal systems.

VI WITNESSES

The statements of witnesses or expert witnesses, their oral testimonies or written submissions are the following procedural instances, which are treated differently in civil law or common law, and their differences are almost immense in that respect.

In civil law legal system, witness statements are secondary in relation to written evidence (documents) and arbitration procedure may be completed without giving such statements. However, this is not so common, and when one of the parties decides to summon a witness, he can make a statement in writing and in case the opposite party has no objection, it is included in the evidence in form of a document.⁴⁶ That way, witnesses does not need to be present during the hearing. If, however, the opposite party decides to state an objection to the witness statement, it has an option to examine the witness. This is sometimes done through arbitrators, when the proposals of the questions to the witness are given for consideration of arbitration which can decide to accept them and ask them, or reject them. The cases in which the witness is subjected to examination are significantly less frequent.⁴⁷

Common law, in principle, places enormous significance on witness statements. They are important not only in the context of oral testimony and its procedural importance in the narrow sense, but also as the safest way of confirming other aspects of the evidence. For example, a document will often not be considered valid and considered if its authenticity and content are not supported by a witness statement. Cross-examination is a regular occurrence, carried out by party representatives without excessive intervention of arbitrators, except for the purpose of moderation, and practice shows that it is often a crucial moment in the entire process that often decides on its final outcome. For this purpose, a mean that is permitted and used regularly is preparation of witnesses by the parties or their legal representatives to appear before the arbitration. It often includes not only the legal formulation of otherwise layman testimony and advice regarding its effective and precise disclosure before the court, but also the material formulation of the evidence in accordance with

⁴⁶ Stanivukovic, *International Arbitration*, 232

⁴⁷ Rofl Trittmann and Boris Kasolowsky, „Taking evidence in arbitration proceedings between common law and civil law traditions - The development of a European hybrid standard for arbitration proceedings”, *UNSW Law Journal Volume 31 (2008)* 334

the interest of the party calling the witness. This practice is known as witness coaching. It is an ethically very controversial and complex issue that is quite restrictively regulated even in many common law states.⁴⁸ In civil law legal practice, any preparation of witnesses, except for the technical formulation of their written statements, is completely foreign, is considered to be amoral and is usually explicitly prohibited. If a witness makes a statement that appears too tidy, arranged and conveyed to the legal stylistic form, the arbitrator will, as a rule, regard this as a product of an unauthorized preparation of testimony and, consequently, ignore the testimony, or statement.⁴⁹ Since any pre-trial preparation of a witness opens the door to their manipulation, it is advisable to explicitly prevent, or at least strictly limit its application.

Another difference between the two legal systems is reflected in the evaluation of the parties themselves who are in dispute. In common law, this is a common practice and the statements of the parties are treated according to the same criteria as the statements of other witnesses. This is not true for European law.⁵⁰

As with other procedural elements, the practice of international arbitration seeks to alleviate the differences between civil and common law approach to testimony. Cross-examination of witnesses is one of the elements in which the common law system prevailed and it is now an integral part of the procedure in international arbitration. It is believed that the longest international arbitration dispute in history, which took place between the United States and Iran after the Islamic Revolution, has influenced the acceptance of common law practice.⁵¹ Likewise, witness statements characteristic of civil law are used, and oral statements are taken only upon the explicit and argued request of one of the parties due to the increased price and additional time necessary for this.

UNCITRAL rules leave the details of witnesses' statements and testimonies to the arbitral tribunal. Hearings are closed and private, except when both parties agree on making it public. Witnesses which are not physically present may be examined through modern means of telecommunication.⁵² The rules of the International Chamber of Commerce give the tribunal the opportunity to hear witnesses, but also provide an option to resolve the dispute without oral debate, if both parties agree.⁵³ Swiss rules allow any person to be a witness in the dispute, including representatives of the participating parties. Also, clients, their

48 Berwin Leighton Paisner, *Witness preparation in international arbitration: where to start and where to stop*, <http://www.lexology.com>., pristupljeno 12.02.2018

49 Dr Andreas Respondek, *How Civil Law Principles Could Help to Make International Arbitration Proceedings More Time and Cost Effective*, <http://www.lawgazette.com.sg>. pristupljeno 14.02.2018

50 Stanivuković, *International Arbitration*, 234-235

51 American Arbitration Association *AAA Handbook on International Arbitration Practice*, 42-43

52 *UNCITRAL rules*, article 28

53 *International Chamber of Commerce arbitration rules*, article 25

employees, or legal advisers can participate in the examination of witnesses. It is also allowed to attach statements in a written form, as well as to give testimonies through a video conference.⁵⁴

Rules of the International Association of Lawyers most closely regulate witness statements in arbitration proceedings. At the same time, they are sympathetic towards the common law approach to solving this issue. Any person, including representatives of the parties themselves, may be examined as a witness. In addition, witness coaching or preparation of witnesses by the parties or their legal representative is explicitly allowed. However, enclosing written witness statements which comply with clearly set rules stipulating the exclusion of statements not confirmed by the witness during the oral debate at the hearing, if summoned, is also prescribed.⁵⁵ Such solutions are often foreign to practitioners coming from the civil law legal system and their aspirations to circumvent or change them are completely legitimate.

The oral hearing of witnesses is governed by American common law customs. The first set of questions to the witness is set by the party that called him to testify (*direct testimony*), and then the witness is subjected to cross-examination by the opposite party. After that, the first party has the right to ask additional questions regarding matters that surfaced during the cross-examination (*re-direct testimony*). The arbitral tribunal may terminate and prevent any question if it considers that it is redundant, unnecessary for the discussion, beyond the qualifications of the witness to give a reasonable answer, or procedurally obstructive in any other way. Also, the tribunal can examine the witness, or to summon any person involved directly or indirectly in the dispute to provide their oral testimonies. If the witness is prevented from physically attending the examination, the tribunal shall decide to conduct the examination through video-conference.⁵⁶

When it comes to witness examination, ICSID arbitration rules provide a good balance between civil and common law. Witnesses are examined under tribunal's control and the tribunal may also ask questions.⁵⁷ Also, it is possible to enclose written statements of witnesses, as well as its examination outside the tribunal according to the specific rules laid down by the tribunal. The parties are allowed to be present during this kind of examination.⁵⁸

54 *Swiss rules on international arbitration*, article 25

55 *IBA international rules*, article 4

56 *Ibid.*, article 8

57 *ICSID Arbitration rules*, Rule 35

58 *Ibid.*, Rule 36

VII EXPERT WITNESSES

The understanding of expert witnesses and their role in the process reflects some of the deepest differences between the approach to litigation in the civil and common law. In civil law, expert witnesses are independent experts appointed by a tribunal (*tribunal appointed experts*) in order to determine the factor to provide an adequate analysis to an arbitrator who is insufficiently familiar with the material aspects of the case. As an extended arm of the judicial authority, the imperative is the independence, neutrality and objectivity of the expert witness. Parties in the procedure may contest his analysis, directly or through their own expert witnesses (*party appointed experts/ expert witness*). Common law allows appointment of expert witnesses on rare occasions (usually when the state is involved). In a regular litigation procedure, securing findings and expert testimonies is left to interested parties. They bring their own experts whose analysis is in favor of their civil claims. Thus, the essential difference between a witness (*witness of the fact*) and expert witness is gone, and they are treated equally in the procedure, and the importance of their statements depends on other, material aspects of the case. As a result, there is often excessive, unnecessary reliance on the experts and their testimonies, on the so-called “Battle of the Experts” in which one party tries to overcome or financially exhaust the other by the number and reputation of its experts. Consequently, the more numerous the findings, the greater the chance they will be confronted and therefore will not provide adequate assistance to the judge or arbitrator, which is their primary purpose. However, common law solution advocates say that the engagement of private experts in the role of an expert witness will give a greater right to the party to be heard and to present its view of things in a better way.⁵⁹

Critics of the common law approach to expertise are numerous and common, and in international arbitration, comparative legal practice shows tendency to a greater extent to the civil approach.⁶⁰ The tribunal will usually select neutral experts whose professional opinion will be entrusted with the most attention and trust, although the arbitration is ultimately not obliged to accept it or to render an award in accordance therewith.⁶¹ Party appointed experts are often used to challenge the findings of a tribunal appointed experts from a professional point of view, or to assist in cross-examination of which parties are most often entitled. Such a solution is good because it avoids the basic problem of using the findings of party experts who are too often unrealistic, in an effort to justify their fee they received from the client.

⁵⁹ Poudret, Besson et al. *Comparative Law of International Arbitration*, 560

⁶⁰ American Arbitration Association *AAA Handbook on International Arbitration Practice*, 43

⁶¹ Poudret, Besson et al. *Comparative Law of International Arbitration*, 562

UNCITRAL arbitration rules clearly differentiate between party appointed experts (who are treated as other witnesses)⁶² and tribunal appointed experts. Upon proposal of an expert witnesses, parties may state an objection if they doubt his professional qualifications or objectivity. The tribunal has the final say in choosing the expert witness. Reports of the expert witnesses are enclosed in written form and parties are given the opportunity to provide their opinion on them. The expert witness, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate him. At this hearing, any party may present expert witnesses in order to testify on the points at issue.⁶³

The rules of the International Chamber of Commerce briefly refer to the expert issue. They stipulate both party appointed experts and tribunal appointed experts, and their cross-examination.⁶⁴

Swiss rules on international arbitration are almost identical to UNCITRAL rules.⁶⁵ International Bar Association rules regulate the issue of party appointed experts and tribunal appointed experts in most details. Party appointed expert prepares a report indicating his personal data, professional qualifications and a statement of impartiality. The report is then forwarded to the opposite party who is entitled to request an oral hearing and cross-examination of the expert in accordance with the rules applicable to other witnesses too. The tribunal may ask experts appointed by both parties to compare and potentially harmonize their findings on the same matter, and thus reduce the cost of the litigation and avoid the “Battle of the Experts”⁶⁶ In this way, common law-specific practices are used, but their most obvious weaknesses are eliminated. The greatest difference between tribunal appointed expert and party appointed expert is in the fact that tribunal appointed expert is authorized to access documents, other material evidence, or areas of investigations directly by the tribunal.⁶⁷ ICSID rules treat witnesses and expert witnesses equally, except that oath they take has a somewhat different content.⁶⁸

62 *UNCITRAL rules*, article 28

63 *Ibid.*, article 29

64 *International Chamber of Commerce arbitration rules*, article 25

65 *Swiss rules on international arbitration*, articles 25. and 27

66 *IBA international rules*, article 5

67 *Ibid.*, article 6. paragraph 3

68 *ICSID arbitration rules*, Rules 35. and 36

VIII THE ISSUE OF PRIVACY AND THE CONFIDENTIALITY OF THE DISPUTE

Privacy of the arbitration is one of its universal values and is one of the main reasons for its global popularity. Depending on the venue of the arbitration and the choice of the applicable law, the provisions governing the privacy of the dispute and its implications shall apply. Basically, there is no clear division between civil law and common law systems on this matter. Some countries that rely on civil law accept not only the principle of privacy, but also the secrecy of the arbitration award, and the entire process (France, Sweden ...). The same applies to some common law states (United Kingdom, Malaysia). Elsewhere, normative law denies the privilege of secrecy of the arbitration, and it is realized through special provisions of the arbitration agreement, at the will and agreement of the parties.⁶⁹ UNCITRAL arbitration rules allow the award to be made public only with the consent of all parties or where and to the extent disclosure is required to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.⁷⁰

According to the rules of the International Chamber of Commerce, an arbitration award is submitted exclusively to the parties.⁷¹ Swiss rules on this issue are very similar to UNCITRAL rules. Confidentiality of an arbitration award, but also of all private procedural elements, is implicit and valid for all its actors, including arbitrators, except in cases where its disclosure is required for the needs of any other trial, or for exercise of rights and the fulfilment of legal obligations of one of the parties. The arbitration award may additionally be made public upon the request addressed to the Secretariat, if the names of the parties are deleted and if both parties agree.⁷²

ICSID rules also imply that the award may be made public only if both parties agree.⁷³

IX CONCLUSION

The greatest challenges for the effective implementation of international trade arbitration concern the harmonization of not only different procedural and material provisions from different countries, but also those that rely on completely different legal bases, such as civil or common law legal traditions.

⁶⁹ American Arbitration Association *AAA Handbook on International Arbitration Practice*, 45

⁷⁰ *UNCITRAL rules*, article 34. paragraph 5

⁷¹ *International Chamber of Commerce arbitration rules*, article 34. paragraph 2

⁷² *Swiss rules on international arbitration*, article 44

⁷³ *ICSID arbitration rules*, Rule 48, paragraph 4

Responding to such challenges not only allows a regular flow and completion of the procedure, but the synthesis of various, and in some way, the opposing norms, rules and customs can also bring new qualities to solving the dispute and establish a practice that will be applied in the future. In this way, international arbitration becomes the perfect polygon for the synthesis of civil and common law institutes using the greatest achievements of both legal systems. What was once considered an obstacle now becomes an advantage.

Civil law practitioners may use certain common law transplants, such as greater freedom in obtaining evidence or examining a witness, in certain cases. However, faced with opponents whose law is characterized by such solutions, they will feel vulnerable and strive to as far as possible reverse their impact on the procedure and neutralize the advantage that the opposite party receives. Common law practitioners often feel threatened in the international arbitration since they are prevented from using the biggest part of their arsenal used within their legal system at home. Their performance is consequently offensive, characterized by the tendency to impose as much as possible of their own procedural elements on the dispute with the opposite side who is not accustomed to them, often subordinating the prognoses on the very outcome of the procedure in its initial standardization. International arbitration rules reflect not only the flexibility of arbitration as a way of resolving the dispute, but also the possibility of a synthetic approach between two legal traditions. Although widely defined and marked by solutions that leave much to the will of the tribunal or parties, they generally give priority to the legal system in which the process institute, standard, or custom in question is more developed, more perfect and adapted to the needs of the parties involved.

Permanent and complete merging of civil and common law tradition will most likely not happen in any field of international law, or in the domain of international arbitration. This certainty is good because it guarantees the preservation and development of both systems and the expansion of the field of quality solutions that each of them offers. A large part of these solutions are already at the disposal of lawyers dealing with international arbitration.

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ПРАКТИЧНИ АСПЕКТИ ПРИМЈЕНЕ РАЗЛИЧИТИХ ПРАВНИХ ТРАДИЦИЈА У МЕЂУНАРОДНИМ АРБИТРАЖАМА

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Апстракт: У правној науци не постоји јединствена и свеобухватна дефиниција арбитраже.⁷⁶ Већина позитивних прописа који ју регулишу, како у свету тако и код нас (Закон о арбитражи), изоставља питање њеног одређења. Ипак, у науци и у правној пракси арбитража се најчешће дефинише кроз приказ арбитражног спора, његових елемената, тока и правних последица, као и навођењем разлика између арбитраже и судског процеса, односно арбитраже и других алтернативних начина за решавање спорова (енг. *Alternative Dispute Resolution*). Констатује се да је арбитража алтернативна судском решавању спора, да се формира консензуалношћу односно сагласношћу воља странака које су у њу укључене, да је приватне природе, и да су њене одлуке правно обавезујуће и коначне.⁷⁷ ⁷⁸ Радом је покушано управо да се објасне разлике, односно различити начини поступања у случају када учесници у међународним арбитражама долазе из различитих правних система, нарочито разлике између два најважнија и најзаступљенија правна система у свијету, европског, континенталног правног система и англосаксонског права. (*common law*).

Кључне ријечи: Арбитража, арбитражни спор, континентални правни систем, *common law*

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⁷⁶ Jean-Francois Poudret et al. *Comparative Law of International Arbitration* (Sweet & Maxwell, 2007), 1-3

⁷⁷ Маја Станивуковић, *Међународна арбитража* (Београд : Службени гласник, 2014), 19-20

⁷⁸ Poudret et al. *Comparative Law of International Arbitration*, 3-12