Austria: Arbitration Across Borders Is Common and Civil

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Arbitration v. Litigation in Civil And Common Law Jurisdictions

The legal background of the tribunal, the parties, and their counsel can influence the scope of disclosure and discovery, which is a major point of divergence between common and civil law. Counsel and arbitrators with a US background may be accustomed to far-reaching discovery, encompassing sweeping requests for production of documents and other relevant information. This is not a generalization of the common law, as disclosure is much more limited in England and Wales. In civil law jurisdictions, evidence-taking is largely controlled by the court. In international arbitral practice, none of these approaches are strictly reflected; discovery generally is limited and depends on the procedural decisions made. Parties should beware of the legal background of the arbitrators, as this can influence how requests for broad categories of documents or prehearing witness depositions are handled.

The extent of discovery/disclosure is an important factor for parties to decide whether to arbitrate or litigate. This is case-specific; in the US for instance, it will need to be considered whether full-scale discovery is beneficial or detrimental to one's case. Indeed, many foreign parties doing business in the US may find it advantageous to insist on arbitration clauses in order to avoid full-scale discovery. Conversely, international arbitration may be beneficial for parties in civil law jurisdictions that could benefit from a proceeding encompassing features of evidence and disclosure that would not be available in domestic courts.

Similarly, civil law parties may benefit from adversarial cross-examination of witnesses. While this is not a feature of the civil law tradition, it is provided for in the IBA Rules and is generally well-established in international arbitration. For common-law trained lawyers, however, this presents difficulties, as oral depositions are rarely permitted in international arbitration. Additionally, these lawyers may need to conduct crosses on the basis of less documentary exhibits than they are accustomed to, given the more limited scope of disclosure discussed above.

Applicable Law Common Law v. Civil Law

In choosing a substantive law, various considerations need to be made. The law applicable to a dispute can determine, for instance, whether a contract is binding, valid, or enforceable, how contracts are interpreted, gap-filling, and many other issues. To illustrate, when it comes to contract interpretations, the laws of the US and England are likely to give effect to the literal language of the parties' agreement, while civil law jurisdictions generally take general principles of good faith and reasonableness into account more.

Additionally, parties should beware of the distinction between procedural and

substantive law, which is not always clear-cut and can have significant implications. For instance, common law jurisdictions typically regard statutes of limitations as procedural, while in civil law jurisdictions these are substantive law. Although common law jurisdictions are trending towards the civil law direction, this can nonetheless cause inconsistencies. Also the law governing damages and remedies is regarded as procedure in common law, and substance in civil law. Here as well, the common law approach is converging towards civil law.

Naturally, the choice of law determines how cases will be argued and legal decisions will be reached. Parties choosing common law will expect to be able to draw from analogous case law to reason their way to an outcome. Parties choosing civil law, on the other hand, will expect the arbitrator to base their decision on a codified legal framework.

Choice of Law Provisions in Civil Law And Common Law Countries

Generally, both civil and common law jurisdictions permit parties to agree on a procedural law other than the law applicable at the seat of the arbitration. Civil law jurisdictions often contain specific provisions on this. Article 182 of the Swiss Law on Private International Law provides that "[t]he parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice." Article 1509 of the French Code of Civil Procedure states that "An arbitration agreement may define the procedure to be followed in the arbitral proceedings, directly or by reference to arbitration rules or to procedural rules." Case law from various civil law jurisdictions has also recognizes party autonomy to select foreign arbitration law on multiple occasions.[1] Also Japanese and Turkish courts have recognized this principle.

In the US, the Federal Arbitration Act (FAA) is also generally held to permit the parties to agree on the procedural law governing the arbitration. The Fifth Circuit court in *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291-92 (5th Cir. 2004) held that parties chose Swiss Procedural Law. In *Remy Amérique, Inc. v. Touzet Distrib. SARL*, 816 F.Supp. 213, 216-17 (S.D.N.Y. 1993), it was held that ""the parties are free to include in their agreement a choice-of-law provision which impacts upon procedural rules." Also in the UK and other common law jurisdictions like India and Hong Kong, this is accepted.[2]

Of course, in all jurisdictions, the autonomy of the parties to choose a foreign procedural is limited by mandatory internal and external procedural requirements of the jurisdiction of seat. Internal procedural protections include, for instance, equal treatment of the parties and adequate opportunities to be heard.[3] External protections particularly entail mandatory requirements for national courts to retain supervisory jurisdiction over arbitrations conducted on local territory.[4]

It nonetheless remains uncommon for parties to select a procedural law other than the one at seat. When no choice is made by the parties, the applicable law will almost always be the law of the seat, and courts in both jurisdictions give tribunals substantial

deference when arbitrators do have to make a choice-of-law decision.[5]

When it comes to the applicable substantive law, virtually all contemporary national arbitration regimes expressly empower arbitrators to select the substantive law governing the parties' dispute in the absence of a choice-of-law clause.[6] Examples of such provisions are Art. 187 of the Swiss Law on Private International Law; Art. 1511 of the French Code of Civil Procedure; and §603(2) of the Austrian Code of Civil Procedure. While the FAA does not contain such an express provision, courts have recognized that arbitral tribunals have the authority to select the law applicable to the substance of the parties' dispute.[7]

Enforcement of Awards in Civil Law v Common Law Countries

The New York Convention is the central instrument when discussing the recognition and enforcement of foreign arbitral awards. Given the large number of state parties to the Convention (166), there is significant harmonization of arbitration rules in common and civil law countries. Generally, courts in common law and civil law jurisdictions have a pro-enforcement bias, meaning the grounds for refusing enforcement are applied narrowly. Also recognized across legal traditions is that the party resisting recognition and enforcement of an awards bear the burden of proof of showing that one of the Convention's exceptions apply.

Procedural rules, however, are not unified. A fundamental difference is that in common law countries, the enforcement of an award requires that judgment be entered upon the award. Consequently, the judgment, not the award, is enforceable. In civil law jurisdictions, in contrast, an arbitration award is enforced by a declaration of enforceability, meaning the award itself is enforced. National procedures vary in this regard.[8]

Different legal doctrines in different jurisdictions and legal families mean that the considerations given to Convention's exceptions will vary. When it comes to lack of capacity under Article V(1)(a) for instance, the capacity of legal persons in most civil law jurisdictions is governed by the law of the seat of the entity, while common law courts ordinarily look at the place of incorporation. These differences should not be too generalized: when it comes to the denial of opportunity for a party to present its case (Article V(1)(b)), national courts in both civil and common law jurisdictions give arbitrators much discretion, despite very different approaches to disclosure and witness testimony (e.g. cross-examination) taken by civil and common law courts.[9]

Issue of Third-Party Funding in Civil Law v Common Law Countries

Generally speaking, third-party funding is available to parties in arbitration proceedings in most major commercial jurisdictions, regardless whether civil law or common law. Regulation of third-party funding can be divided into three categories: legislative, *ad hoc* regulation through case law, and self-regulation. These do not, however, strictly align with legal traditions.

Legislative approaches can be seen in Hong Kong and Singapore. In 2019, for instance,

Hong Kong introduced legislative amendments that provide for the legality of third-party funding of Hong Kong seated arbitration. Both jurisdictions set requirements regarding *inter alia* disclosure and eligibility of third-party funders.

The *ad hoc*/judicial approach has been taken the common law jurisdictions of the US, England and Wales, and Australia. Common law prohibitions of maintenance and champerty present a barrier to third-party funding, but courts have taken a permissible approach. In England and Wales, for instance, third-party funding arrangements will not be found to amount to maintenance or champerty unless there is an element of impropriety.[10] Australia is more permissive and has one of the most-developed third-party funding markets. In the US, third-party funding is newer, and the approach taken depends on the state. A notable outlier is Ireland, where a 2017 Supreme Court ruling held third-party funding to be not be permitted, as champerty remains a criminal offense.

Also Austria has taken an ad hoc approach so far, where third-party funding has been endorsed by the courts, but where a legal or regulatory framework is absent. Third-party funding is, however, constrained by the rules and regulations regarding the professional conduct of lawyers.

Self-regulation can be seen in France, where third-party funding is not expressly permitted by any legislation and case law is limited. A 2017 resolution by the Paris Bar Council endorses third-party funding, especially in the context of international arbitration and provides guidance for counsel.

Prague Rules

The publication of the Rules on the Efficient Conduct of Proceedings in Arbitration ("Prague Rules") on 14 December 2018 heralded a challenge to the well-established incumbent (*i.e.* the International Bar Association ("IBA") Rules on the Taking of Evidence ("Evidence Rules")) and prompted much debate amongst the arbitral community.[11]

As an alternative to the IBA Rules, the Prague Rules seemingly more resemble the ways of civil law jurisdictions and have been getting traction in recent times. Under the Prague Rules, document production is encouraged to be avoided, and in any case kept restrictive. Furthermore, a request for any document production must be made at the case management conference and the request should contain an explanation of why the document is being sought.

The Prague Rules further encourage the resolution of disputes on a document only basis. Under the Rules, in order to have a hearing, a party must request one. This is a notable difference from the IBA Rules which are more lenient in this regard.

One of the most interesting difference though, seems to be the doctrine of Iura Novit Curia which can be translated as "Judge knows the law". Now this doctrine permits the arbitrator to apply any law he/she deems fit although the Parties will be given an opportunity to comment.

It is important to remember though that as both the Evidence Rules and the Prague Rules note in their preambles, they operate as “guidelines”, and are not meant to limit the inherent flexibility of arbitration. This must be correct – soft law should not be seen as “hard” law, no matter the regularity of use.

Some examples of differences are shown in Annex 1 Tables.

Impact of Arbitration Clauses on Non-Signatories

Arbitration is based on consent. However, sometimes a third-party that is a non-signatory may be joined to the international proceedings or even assert rights under an arbitration agreement itself. Usually, the Tribunals will look to theories of implied consent or lack of corporate personality.

Some common scenarios arise when a non-signatory participates in contract formation; there is a single contract scheme constituted b multiple documents; the non-signatory has accepted the contract or arbitration agreement; absence of corporate personality; and fraud cases.

The Tribunals will look at the reasonable expectation of the Parties, as well as of the international business community in applying these principles and deciding on the outcome.

Final Remarks

Finally, the determination between common and civil law should ideally be made at the very beginning when drafting an arbitration clause. Other decisions, such as whether to have one arbitrator or a panel of three, whether to use the IBA Rules or the Prague Rules, or what is the breadth of discovery wanted should all be considered and made while drafting in order to make the arbitration process more efficient.

Some thought should also be given to the appeal process. Although the default practice is to agree to final and binding arbitration without any appellate review, in some cases parties may still be able to obtain direct review of an adverse award by agreeing either to arbitral rules that provide for direct appeals within the arbitration process itself or to arbitrate under the laws of a jurisdiction that allows for direct review by a court. An example of this would be the AAA or its international counterpart the ICDR, pursuant to Optional Appellate Arbitration Rules. This way the standard of review is greater than the one granted by the Federal rules on Arbitration in the US for instance.

This will also depend on the jurisdiction, as there have been some jurisdictions that went completely around the standard practice, an example is Ethiopia which allows a review as well as England but unlike Ethiopia, England does so under extremely limited grounds.

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Footnotes

1. *Judgment of 24 April 1992*, 1992 Rev. arb. 598 (Paris Cour d'appel); *Judgment of 17 January 1992*, 1992 Rev. arb. 656 (Paris Cour d'appel); *Judgment of 12 November 2010, RosInvestCo UK Ltd v. Russian Fed'n,* Case No. Ö 2301-09, ¶2 (Swedish S.Ct.).

2. See, for example: Hong Kong: *Klöckner Pentaplast GmbH & Co. KG v. Advance Tech. (H.K.) Co.* [2011] HKCFI 458 (H. K. Ct. First Inst.) ""there is no rule that the *lex arbitri* must be the law of the seat of the arbitration. That is especially so where the law is chosen by the parties."; India: *Citation Infowares Ltd v. Equinox Corp.*, (2009) 7 SCC 220, ¶15 (Indian S.Ct. 2009); UK: *The Bay Hotel & Resort Ltd v. Cavalier Constr. Co.* [2001] UKPC 34 (Turks & Caicos Islands Privy Council); *Union of India v. McDonnell Douglas Corp*. [1993] 2 Lloyd's Rep. 48, 50 (QB) (English High Ct.)

3. For example: Article 182(2) of the **Swiss Law on Private International Law**: "[w]hatever procedure is chosen, the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in adversarial procedure." **English Arbitration Act**, 1996, §33 requires arbitrators to "act fairly and impartially" and give

parties “a reasonable opportunity” to present their case. Similar provisions are found in the **Belgian Judicial Code** Art. 1699; the **Netherlands Code of Civil Procedure** Art. 1039(1); and the **Hong Kong Arbitration Ordinance**, 2013, Arts. 46(1), (2).

4. This is reflected in the UNCITRAL Model Law. See: UNCITRAL, *Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006* ¶14 (2008) (“The strict territorial criterion, governing the bulk of the provisions of the Model Law, was adopted for the sake of certainty and in view of the following facts. The place of arbitration is used as the exclusive criterion by the great majority of national laws.”).

5. For example: *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 290 (5th Cir. 2004); *Judgment of 11 January 1978*, IV Y.B. Comm. Arb. 262 (Landgericht Zweibrücken) (1979) (refusing to annul award on public policy grounds where arbitral tribunal allegedly erred in choice-of-law analysis); Gary Born, ‘International Commercial Arbitration’ (2nd edn, Kluwer Law International 2014) chapter 11.

6. Article 28 UNCITRAL Model Law: “(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

7. For example: *JW Burress, Inc. v. John Deere Constr. & Forestry Co.*, 2007 WL 3023975 (W.D. Va.) (choice of substantive law is for arbitrators to decide); *Zurich Ins. Co. v. Ennia Gen. Ins. Co.*, 882 F.Supp. 1438, 1440 (S.D.N.Y. 1995) (“The issue of the law to be applied in the arbitration proceeding – including the question whether the choice of law clause in the Management Agreement applies – is for the arbitration panel.”); Gary Born, ‘International Commercial Arbitration’ (2nd edn, Kluwer Law International 2014) chapter 19.

8. For instance, the award needs an exequatur in some civil law countries. Ihab Amro, ‘Recognition and Enforcement of Foreign Arbitral Awards in Theory and in Practice: A Comparative Study in Common Law and Civil Law Countries’ (Cambridge University Press 2013)p. 70-71; United Nations Conference on Trade and Development, ‘Dispute Settlement: 5.7 Recognition and Enforcement of Arbitral Awards – The New York Convention’ (2003) (https://unctad.org/system/files/official-document/edmmisc232add37_en.pdf) p. 21.

9. See: *Abu Dhabi Inv. Auth. v. Citigroup Inc.*, 2013 WL 789642, at *7-9 (S.D.N.Y.) (denial of disclosure requests did not render proceedings fundamentally unfair); *Judgment of 24 June 1999*, XXIX Y.B. Comm. Arb. 687 (Schleswig-Holsteinisches Oberlandesgericht) (2004) (no violation of right to be heard where arbitral tribunal refused to request German courts to procure testimony from third party witnesses). Gary Born, ‘International Commercial Arbitration’ (2nd edn, Kluwer Law International 2014), chapter 26.

10. For instance, disproportionate profit or excessive control of the proceedings on the part of the third-party funder.

11. Jordan Tan, Ian Choo, 'The Prague Rules: A Soft Law Solution to Due Process Paranoia?', Kluwer Arbitration Blog, June 29 2019, http://arbitrationblog.kluwerarbitration.com/2019/06/29/the-prague-rules-a-soft-law-solution-to-due-process-paranoia/.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.