Dissertation

"When should an Arbitral Tribunal take the initiative in ascertaining the facts and the law?"

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Abstract

"What is the most effective way of a tribunal deciding a dispute between two parties when the underlying fact and the contents of the law are in question? This question has been subject to much interest from all involved in arbitration. This is the question this paper seeks to answer in circumstances where the arbitrator cannot rely on the information given by the parties to ascertain the facts and the content of the applicable law."

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I. CHAPTER ONE – INTRODUCTION

i. Background

International arbitration straddles common law and civil law traditions; procedures that govern international arbitration depend entirely on the choices of the parties and those who serve on the arbitral tribunal. The frameworks that govern international arbitrations promote flexibility by acknowledging the autonomy of the parties through the terms of the arbitration agreements and by giving arbitral tribunals latitude to decide how the arbitration should be conducted[1].

What is the most effective way of a tribunal deciding a dispute between two parties when the underlying fact and the contents of the law are in question? This question has been subject to much interest from all involved in arbitration. This is the question this paper seeks to answer in circumstances where the arbitrator cannot rely on the information given by the parties to ascertain the facts and the content of the applicable law.

Where an arbitrator cannot gain full information from the parties, the question is whether to adopt a procedure where he allows the parties to make their own cases or he undertakes his own investigations. An over generalised but nonetheless useful distinction between common law and civil law procedure is the adversarial approach of the former as opposed to the inquisitorial approach of the latter. The adversarial system can be paraphrased as the *"passive judge approach"* whilst in civil law systems as the *"active judge approach"*.

This paper will discuss these two systems in relation to ascertaining the facts and to ascertaining the law. The conclusion that one system is superior to the other is unlikely, rather that certain aspects of each are likely to be suited to certain types of cases.

ii. The Governing Rules of the Arbitration

The question as to which law governs the arbitration and therefore influences its procedure has been the subject of much discussion. Both the *Arbitration Act 1996* and the

[1] Subject to the over-arching requirement for fairness. For example English Arbitration Act Section 33(1)(a)

Model Law[2] are generally territorial. Arbitrations with their seat in England and Wales are subject to the Act and those with their seat in a country that has adopted the *Model Law* will be subject to its rules. Some nations have however amended the general territorial rule by allowing the intent of the parties to influence the law governing the arbitration; for example, the *1994 Egyptian Arbitration Act Concerning Arbitration in Civil and Commercial Matters* applies:

> *"when such an arbitration is conducted in Egypt, or when an international commercial arbitration is conducted abroad and its parties agree to submit to the provision of this Law."*[3]

It is acknowledged that national laws regarding arbitration are being slowly harmonised to confirm the importance in arbitration of party autonomy in procedural matters and due process, and more recently, procedural efficiency.[4] The progression to a *transnational* set of arbitration rules is no doubt a lengthy process with no certainty of arrival. Although the process of harmonisation is mature, the scope of the parties and the arbitrator to customise procedures to suit their dispute is undiminished.

So-called transnational rules are implemented by parties and tribunal and will be discussed below. The *2010 IBA Rules on Taking Evidence in International Arbitration* provide guidelines on document production, written witness statements and witness examinations and expert evidence and seek to achieve a compromise between civil law and common law practices. Due to their widespread adoption, the *UNICITRAL Arbitration Rules* as revised in 2010 have had a significant influence upon the merger of arbitration rules. Additionally they have also been the model for a number of institutional rules.[5] Institutional rules themselves have differing levels of influence on the harmonisation of arbitration rules dependent on their levels of adoption.

iii. Ascertaining the Facts

To a common law lawyer, normal procedural practice as far as ascertaining the facts can be very different from that of his civil law cousin. Discovery under common law procedure can be broad and non-specific with a duty on the parties to produce any

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[2] UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006

[3] Article 1, Law No. 27

[4] For example, U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958; UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006.

[5] For example, Swiss Rules of International Arbitration (Swiss Rules), January 2006

relevant documents.[6] The civil law norm is generally that each party produces the documents that it intends to rely upon. International arbitration procedure once again bridges the gap adopting measures from each tradition.

Whether the emphasis is on written as opposed to oral evidence again highlights potential differences in procedure. A convergence in practice has emerged in arbitration due to the necessity to accommodate parties and arbitrators from different legal backgrounds. If the common law tradition of advocate led cross-examination of witnesses takes precedence over the civil law tradition of judge led inquisition, one could question how this procedure is reconciled in international arbitration under certain jurisdictions where it is contrary to the rules of ethics for attorneys to be in contact with witnesses.

What should be the tribunal's attitude towards experts? Should it follow the common law template where both sides present their expert opinion and it is for the judge to decide or should arbitral procedure lean towards the civil law with the expert appointed by the tribunal?

Is the emerging pattern of compromise the right answer to ascertain the facts of the dispute expeditiously whilst maintaining fairness to both parties?

iv. Ascertaining the Law

Should the parties to arbitration prove the law or can the tribunal source the law and apply it accordingly? An analogy can be drawn with litigation and the ascertainment of foreign law although in international arbitration as all law is foreign there is no "foreign" law. The divide here as to how the law is ascertained runs more along national rather than common law – civil law lines. Therefore how is the law ascertained; does the tribunal appoint a legal expert, do the arbitrators default to the comfort of their own background or the national law of the seat?

The concept of *iura novit curia*[7] holds true in many jurisdictions but how does it sit in the context of international arbitration?

[6] The Woolf Reform of Civil Procedures 1999 restricted document disclosure under English Law.
[7] "The court knows the law"

II. CHAPTER TWO – THE ENGLISH[8] PERSPECTIVE

i. Background

Under the *1950 Arbitration Act* it was unclear as to whether or not an arbitrator was empowered to act inquisitorially. Although *Section 12(1)*[9] of the act gave provision that the parties shall:

> *"…submit to be examined by the arbitrator or umpire…' the deeply enshrined adversarial nature of English Law led many to believe that the procedure was not to be varied*[10].

Lord Cozens-Hardy M.R. in 1910 stated:

> "*What right the umpire had to call a witness I confess I do not understand*"[11]

Lord Scarman in 1981 stated:

> *"…arbitration is …an adversarial process. There is a dispute, the parties having failed to settle their difference by negotiation. Though they choose a tribunal, agree its procedure and agree to accept its award as final, the process is adversarial. Embedded in the adversarial process is a right that each party shall have a fair hearing, that each should have a fair opportunity of presenting and developing his case. In this respect, there is a comparability between litigation and arbitration. In each delay can mean justice denied. And the analogy is not falsified because of the wide variation of types of arbitration. Whether the arbitration be look-sniff or a full-scale hearing with Counsel and solicitors, the right to a fair arbitration remains. An unfair arbitral process makes no sense either in law or in fact. It is a contradiction which it is inconceivable that the law would tolerate or the parties select."*[12]

The Royal Commission on Criminal Justice in 1993[13] examined the relative strengths and weaknesses of adversarial and inquisitorial systems and stated that:

> *"We have not, however, found, either in Scotland or anywhere else, a set of practices which has so clearly succeeded in resolving the problems which arise in any other system of criminal justice that it furnishes the obvious model which all the others should therefore adopt."*

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[8] English and Welsh Law

[9] Arbitration Act 1950 Section 12(1) 'Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator of umpire, on oath or affirmation, in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrator or umpire all documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrator or umpire may require'.

[10] Mustill and Boyd, Commercial Arbitration pages 288-289; Town & City Properties (Developments) Ltd v. Wiltshier Southern Ltd and Gilbert Powell (1988) 44 BLR 1 09

[11] Enoch & Zaretzky, Bock & Co.'s Arbitration (1910) 1 K.B. 327

[12] Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd (1981) AC 909, HL, at page 999E.

[13] Page 3 Paras 11 to 15

On the other hand, the case management system introduced by the *Civil Procedure Rules 1998* requires Judges to conduct cases in a manner that has elements of an inquisitorial nature. Both rule 3.1 (the court's general powers of management) and rule 3.4 (the court's power to make order of its own initiative) whilst not allowing a fully-fledged inquisitorial process, encourage the court to take greater initiative.

The *1996 Arbitration Act* introduced, within Section 34, an inclusive list of the matters that can be determined by the arbitrators. The *Departmental Advisory Committee on Arbitration Law* (DAC) emphasised that one of the major advantages of arbitration over litigation was the ability to adapt procedure dependent on the nature of the dispute. Unambiguously Section 34(2)(g) empowered the arbitrator to act inquisitorially:

> *"Whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law."*

and Section 37[14] gave the tribunal power to appoint experts or legal advisors:

> *"Unless otherwise agreed by the parties –*
>
> *(a) the tribunal may –*
>
> *(i) appoint experts or legal advisers to report to it and the parties, or*
>
> *(ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings."*

Both these provisions are subject to the right of the parties to agree otherwise. The DAC considered fears expressed to it that due to its unfamiliarity; the inquisitorial powers could be abused (albeit in good faith) but concluded that the overriding fairness requirement of Section 33 of the Act would prevent this occurring[15]. The DAC also rejected the proposal that the tribunal should be able to act inquisitorially unilaterally[16] as this would be incompatible with the general principal of party autonomy and contrary to Article 19 of the *Model Law*[17].

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[14] Section 37 (1) Unless otherwise agreed by the parties - (a) the tribunal may - (i) appoint experts or legal advisers to report to it and the parties, or (ii) appoint assessors to assist it on technical matters, and may allow any such expert, legal adviser or assessor to attend the proceedings.
[15] Departmental Advisory Committee on Arbitration Law, Report on The Arbitration Bill para. 171 to 172.
[16] Departmental Advisory Committee on Arbitration Law, Report on The Arbitration Bill para. 173
[17] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

ii. English/ Common Law Procedure

a. Representation

Arbitrations in England and Wales are likely to involve advocates trained in adversarial procedure. Where a party or the parties have no legal representation an inquisitorial procedure may well be more appropriate. In such proceedings the parties may well be incapable of presenting their cases and challenging the opposing case and the arbitrator may find it essential to take the initiative to establish the law and the facts of the dispute in order to make a just award.

It has been suggested that where one party has legal representation and the other does not, the arbitrator should seek to redress the balance by acting inquisitorially. The line between proactive assistance and serious irregularity[18] that is challengeable must however be observed. In *Norbrook Laboratories v Tank*[19] Colman J suggested that an arbitrator who restricts legal representation to one party could be challenged under Section 68 of the 1996 Act and it was held in *Chilton v Saga Holidays PLC*[20] that an arbitrator had gone too far in refusing to allow the defendant's solicitor to cross-examine the unrepresented claimant.

b. Pleadings / Document Discovery

Written pleadings serve as preparation for the oral hearing, they are not expected to be exceedingly detailed and documents or exhibits are not necessarily attached[21]. The oral hearing by contrast require all the details of the case to be pleaded. The examination of witnesses has been described as a pre-rehearsed major theatrical performance[22] and may last several weeks.

One aspect of common law procedure[23] which when applied to arbitration may inadvertently be construed as more inquisitorial than that of civil law procedure, relates to discovery. Subject to agreement of the parties the tribunal can decide which documents will be subject to disclosure between the parties and produced by the

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18 Arbitration Act 1996 Section 68
19 (2006) EWHC 1055 Comm
20 (1986) 1 All ER 841
21 Patocchi & Meakin, Procedure and the Taking of Evidence in International Commercial Arbitration, page 885
22 FN 21
23 The procedures relating to discovery varies between common law countries such as England and Wales and those of United States. Discovery in the United State can be far more extensive than that experienced in England and Wales.

parties[24]. Full disclosure has difficulties due to cost, its time-consuming nature and the fact that orders may not be enforceable in civil law jurisdiction.

A limited amount of discovery is typically available under the rules of most international arbitral institutions, albeit under the strict control and discretion of the arbitral tribunal. The *International Court of Arbitration of the International Chamber of Commerce* (ICC), the *London Court of International Arbitration* (LCIA), and the *American Arbitration Association* (AAA) confer on the arbitral tribunal the broad power to determine whether, and to what extent, discovery will be permitted. As an example the ICC Rules give the tribunal authority to:

> *"…establish the facts of the case by all appropriate means"*[25] and *"…may summon any party to provide additional evidence"*[26].

Similarly the LCIA and AAA Rules allow the arbitral tribunal to order the production of documents.[27]

In England and Wales, parties may only seek disclosure of documents that can be identified distinctively and which they reasonably believe to exist; this avoids the "fishing expeditions" associated with US-style discovery.

c. Witnesses

The Judge will generally undertake a passive role allowing witnesses to be examined by counsel and will not normally take the initiative in encouraging the parties to settle. This tradition seemingly stemming from trial by jury where the judge does not make the decision, will not apply to arbitration, as the tribunal is the decision maker.

In common law countries the examination of witnesses by both parties is believed to be the best way of assessing the creditability of witnesses. The adversarial nature of this cross-examination whereby the party presenting the witness is entitled to ask questions first followed by questions from the opposing party combined with the requirement to re-state all relevant facts at the oral hearing often results in considerable time penalties compared with civil law procedures.

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[24] Arbitration Act 1996 Section 34(2)(d)
[25] Effective 1 January 1998: Article 20(1)
[26] Effective 1 January 1998: Article 20(5)
[27] LCIA Arbitration Rules Effective 1 January 1998: 22.1(e) to order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant. AAA on Arbitration: Article 19.3: At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.

It is suggested that such cross-examination is inappropriate where one of the parties is from a civil law jurisdiction and not accustomed and skilled in adversarial questioning. Similarly, over reliance on oral testimony can be counterproductive as arbitrators from a civil law background are naturally sceptical of witnesses affiliated to the party presenting them.

d. Experts

The common law system generally treats expert testimony as simply another aspect of its adversarial system. Each party appoint their own expert and in the not uncommon scenario that the experts hold differing views, cross-examination assists the tribunal to decide which is the more credible.

Where the parties feel particularly strongly about their respective expert evidence and wish to present their arguments in full, common law based counsel tend to promote the use of party appointed experts. However, the basic premise of an *independent* expert can be lost as each opposing *independent* expert is likely to give evidence to the benefit of those who he has been appointed by. Although party-appointed experts are instructed by definition by one of the parties, they report directly to the tribunal. This means that even though their contractual relationship is with their appointing party, their procedural reporting obligation is owed to the tribunal.

Where specific technical evidence is required, the presentation of separate expert evidence may be duplicative and/or counterproductive and extend the arbitral proceedings, causing additional, unnecessary costs.

The *Arbitration Act 1996* explicitly permits the arbitral tribunal to appoint an expert on its own initiate.[28] This right is non-mandatory and is subject to the right of the parties to reach another agreement. The tribunal must consider whether to exercise this right is consistent with its duties under Section 33(1)(b), namely to adopt procedures suitable to the circumstances of the particular case and avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. The procedure for appointing an expert must be closely defined in an order made by the tribunal at or around appointment. Section 33(1)(a)[29] confers a duty on the tribunal that any information, opinion or advice offered by any person appointed by the tribunal must

[28] Section 37

[29] "…act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent"

be communicated to the parties and the parties must be given a reasonable opportunity to comment on it. The parties need not necessarily be allowed to put questions to him or to cross-examine him (contrast art. 26(2) of the *Model Law*). The Act does not expressly require the expert to be impartial, but it would be inconsistent with its fairness and impartiality duties under Section 33 for the tribunal to appoint an expert that gave rise to doubts regarding impartiality. Under Sections 34 and 38(4) and the parties' general duty under Section 40(1) the tribunal can direct that the parties are to provide information to the expert and to give access to property.

Section 37 also enables a tribunal to appoint legal advisers to report to it with the proviso that the parties are given a reasonable opportunity to comment on any information, opinion or advice that is produced. The appointment of a legal expert by the tribunal must follow the same guideline as those required when appointing all experts; the parties must be consulted, the terms of reference or scope of instructions should be discussed, the identity of the expert should be communicated to the parties with an opportunity to comment thereon and once the procedure of the production of the experts report has been established including the nature of the flow of information between the parties, the tribunal and the expert, it should be strictly adhered to. With the overarching requirement of fairness, it is important that the expert is fully informed of any relevant background, that any arguments presented to the tribunal are presented in the same manner to the expert and that the tribunal does not or give the impression that they have decided the case on the basis of privately given advice or that the expert has decided the dispute. It is a requirement that the tribunal adopts a totally transparent procedure for obtaining information, opinion or advice.

III. CHAPTER THREE – THE INTERNATIONAL PERSPECTIVE[30]

i. Civil Law Procedure

The judge will generally take an active role in proceedings and will examine witnesses directly. It would be considered unethical for counsel to influence a witness statement or for a rehearsal to take place. The judge is more likely to actively encourage early settlement of cases, in Germany the ZPO[31] states:

> *"The court shall encourage an amicable settlement of the dispute or of parts of the dispute at each stage of the proceedings"*[32]

In arbitration the tribunal may be left in the difficult position of feeling somewhat bound when making the award, by the settlement it had proposed earlier in the process not embraced by the parties.

a. Pleadings / Document Discovery

The parties are required to present their case in full detail as early as possible in the proceedings and either include or make reference to documents and evidence that will be relied upon. In the *German Code of Civil Procedure*, if it is found that a statement or evidence should have been presented earlier, it may be ignored.[33]

One aspect of civil law procedure that is often viewed as less inquisitorial than that in practice under common law procedure is discovery. It is in the interests of both the parties to submit evidence as early as possible in order to ensure admissibility, rendering discovery sometimes unnecessary. The tradition in civil law proceedings is to permit parties to obtain a specifically described document in the possession of its opponent but only if the document is relevant or if permitted by the appropriate civil law. As an example, the *German Code of Civil Procedure* empowers the judge to order the production of documents in possession of the other party or a third party[34] if one of the parties has referred to them in pleadings.

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[30] *Zivilprozessordnung* (German act on civil procedural law).
[31] ZPO (German Civil Code of Procedure) para. 279
[32] ZPO (German Civil Code of Procedure) para. 296
[33] ZPO (German Civil Code of Procedure) para. 142
[34] Under ZPO (German Civil Code of Procedure) paras. 383 to 385 a third party can refuse if the production of documents would be unreasonable or if the party is privileged.

The cross-examination of witnesses at the hearing is only required in respect of contentious issues. Although questioning of the witnesses by the parties is allowed, it is not carried out to the same degree of intensity as in common law jurisdictions and only occurs following the primary examination, which is carried out by the judge albeit including questions suggested by the parties.

The civil law places far greater emphasis on documentary evidence as opposed to the testimony of witnesses with connections to the parties. The current standard practice in international arbitration to adopt procedure whereby, in addition to those posed by the tribunal, the parties pose questions to witnesses, is skewed more toward the common law norm.

b. Appointment of Experts

The civil law judge usually procures the expert opinion required to inquire into areas of controversy. The expert often adopts a procedure that is fairly extensive and can include hearing from the parties or the parties' experts. Article 26 of the *Model Law*[35] reads:

> 1. Unless otherwise agreed by the parties, the arbitral tribunal;
>
> (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal
>
> (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
>
> 2. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

As a further example the *Dutch Code of Civil Procedure*[36] contains a detailed provision that operates in a similar manner to the Model Law stating[37]:

> 1. The arbitral tribunal may appoint one or more experts to give advice. The arbitral tribunal shall communicate as soon as possible to the parties a copy of the appointment and the terms of reference of the experts.
>
> 2. The arbitral tribunal may require a party to provide the experts with the information required by them and to give them the necessary cooperation.
>
> 3. Upon receipt of the expert's report, the arbitral tribunal shall provide a copy of

[35] 1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006
[36] Burgerlijke Rechtsvordering
[37] Article 1042

the report to the parties without delay.

4. At the request of either party, the experts shall be examined at a hearing. A party wishing to make such a request shall inform the arbitral tribunal and the opposing party thereof without delay.

5. The arbitral tribunal shall give the parties an opportunity to examine the experts and to produce their own experts."

In countries where the tribunal is empowered to determine the arbitral procedure, this is interpreted as to include the appointment of experts (including Switzerland, France and Belgium).

Many arbitration rules and laws of civil law countries permit the tribunal to appoint independent expert witnesses. The principle of party autonomy and the requirement of a fair hearing will generally lead the tribunal to seek the parties' consent to appointment together with a stipulation that any conflict of interest should be declared. A tribunal-appointed expert will be overall procedurally less costly than separate party-appointed experts. Tribunal-appointed experts when appointed early can assist in establishing the terms of reference with respect to defining the nature and scope of the expert evidence by delineating between the matters to be determined by the tribunal and that which the expert will provide.

In Austria, the *Zivilprozessordnung*[38] (ZPO) Section 601(1) provides that:

Unless otherwise agreed by the parties, the arbitral tribunal may:

1. Appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

2. Require the parties to give the expert any relevant information or to produce, or to provide access to, any relevant documents or goods or other property for inspection by the expert.

Accordingly, Austrian law permits arbitrators under their own initiative to appoint experts. As under the English act, this authority can be excluded by the parties; parties can agree not to have tribunal-appointed experts at all, or not to have the tribunal appoint a specific expert. However under Article 20(5) of the *Vienna Rules*[39], if the tribunal considers it necessary it may on its own initiative collect evidence, and in particular may *"…call in experts"*. Absent an express agreement that excludes the arbitrator's authority to appoint an expert, both the *Vienna Rules* and Austrian law confer

[38] Zivilprozessordnung (Austrian Code of Civil Procedure 2006)
[39] Vienna International Arbitral Centre, 2006 Arbitration Rules.

this authority on the arbitrators. Where the tribunal has appointed an expert, Section 601(2) ZPO states that:

> *"Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivering his report, participate in an oral hearing. In the hearing, the parties shall have the opportunity to put questions to him."*

Subject to agreement, each party has the right to call an expert appointed by the tribunal to appear at the hearing for cross-examination. Parties are given the opportunity to challenge the expert directly should they so wish. As the expert may have a significant influence on the tribunal's decision it is important that the arbitrators do not delegate or appear to delegate their responsibility for deciding the dispute to the expert. Both Article 21[40] and Section 601(3) ZPO require the tribunal-appointed expert to be as independent and impartial, as the arbitrators themselves. Section 601(3) ZPO provides that:

> *"Sections 588 (which sets out the standard of impartiality, independence and disclosure for arbitrators) and 589(1) and (2) ZPO (challenging of arbitrators] of this law shall apply accordingly to the expert appointed by the arbitral tribunal'; while Article 21 refers to Article 16 (challenging of arbitrators)."*

Therefore, tribunal-appointed experts can be challenged like arbitrators. However as the tribunal retains ultimate control of evidentiary matters, it is the tribunal who decides on this issue with right of appeal to the state court.

[40] FN 39

IV. CHAPTER FOUR - ASCERTAINING THE CONTENTS OF THE APPLICABLE LAW

i. Iura Novit Curia

There are different approaches taken by national courts when applying foreign law. For example in Switzerland, Germany and Mexico foreign law is considered as law and it is applied accordingly. Under this principle national courts have the obligation to know the law and apply it to the facts, even if it is foreign. Contrary to this, some jurisdictions including that of England regard foreign law as a fact which must be proven. Under this system, national courts are not expected to research foreign law *ex officio*, but will apply foreign law only if proven as a fact.

The parties determined which national or other applicable law or rules applied in 88% of *International Court of Arbitration at the International Chamber of Commerce* (ICC) cases in 2009[41]. Therefore the tribunal was left to ascertain the applicable law in 12% of cases. This paper is based on the premise that the law or rules under which the arbitration is to be heard has been determined; particularly it is concerned with the ascertainment of the specific rules to be applied to individual issues.

In international arbitration, as opposed to cases heard before national courts, there are no rules as to how a tribunal should determine the content of the applicable law. The tribunal is given no guidance as to who is to identify the specific rules and how those rules, once identified, are to be applied. In fact some rules are specific in identifying what procedure cannot be applied to assist in this determination:

> *"… Any designation of the law 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…"*[42]

"Any designation made by the parties of the law of a given state shall be deemed to refer to the substantive law of that state and not to its conflict of laws rules."[43]

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41 ICC International Court of Arbitration Bulletin, Vol 21/No 1 (2010); English Law 14.3%, Swiss Law 13.1%, French Law 7.2%, US Law 7.1%, German 6%, and Brazilian 2.6%.
42 World Intellectual Property Organization Arbitration Rules, Article 59(a), January 2009
43 Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules, 22(2), January 2010

ii. Burden of Ascertainment

An acceptable generalisation of the determination of the content of or specific rules of foreign law within common law systems is that it is the parties that must plead and prove it. This can be achieved by appointing a legal expert, that the judge will have no contact with until they appear before him in court, or by certain other means.[44] The judge does not have powers to ascertain the foreign law himself. The Civil Procedure Rules state:

> *(1) This rule sets out the procedure which must be followed by a party who intends to put in evidence a finding on a question of foreign law by virtue of section 4(2) of the Civil Evidence Act 1972.*
> *(2) He must give any other party notice of his intention.*
> *(3) He must give the notice –*
> *(a) if there are to be witness statements, not later than the latest date for serving them; or*
> *(b) otherwise, not less than 21 days before the hearing at which he proposes to put the finding in evidence.*
> *(4) The notice must –*
> *(a) specify the question on which the finding was made; and*
> *(b) enclose a copy of a document where it is reported or recorded.*

Contrary to this, in civil law systems the Latin maxim "*iura novit curia*"[45] applies. This is not a literal statement, rather that the court will find out the law by whatever means it deems appropriate and in relation to foreign law, will find the appropriate law and apply it. Examples of this are found in the *Italian Private International Law 1995*:

> *"The judge shall ascertain the applicable foreign law ex officio. To that effect he may use, in addition to the instruments referred to in international conventions, information obtained through the Ministry of Justice, or from experts or specialised institutions."*[46]

Also the German ZPO[47] contains the following provision:

> *"The law which is in force in another state, customary law and by-laws require proof only to such extent as they are unknown to the court. In the establishment of these legal norms, the court is not limited to the evidence brought forward by the parties; it is empowered to make use of other sources of knowledge and to order whatever is necessary for the purposes of such utilization."*[48]

From these examples it can be seen that the judge can research the law himself, seek expert advice or ask the parties to present the law.

A significant exception to the civil law generalisation discussed above is found in French

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[44] Dicey, Morris and Collins, The Conflict of Laws, Sweet and Maxwell, 2006, 14th edition, S 9-001
[45] "The court knows the law"
[46] Article 14(1)
[47] FN 30
[48] Article 293

procedure. Parties seeking to apply foreign law must cite and prove it in order that the French Court is obliged to apply it.[49]

Sitting somewhere between the English and the civil law procedures is that of the United States. Although parties, as in other common law jurisdictions, are required to plead and prove foreign law, the court can adopt other methods in the determination of said law:

> *"A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law."*[50]

A significant question in the application of foreign law must be what do courts or tribunals do when the precise rules of the foreign law have not been identified? The obvious response is to resort to the substantive law of the court or in the case of international arbitration, the seat of arbitration or the law governing the substantive contract. Some countries have also codified this position, for example the Swiss Private International Law Act states:

> "*Swiss law shall apply if the content of the foreign law cannot be established.*"[51]

Arbitral tribunals face a far more difficult task than national courts in ascertaining the law. Courts at least have a support infrastructure relating to jurisdiction, procedure and the determination of foreign law. In international arbitration even the concept of foreign law cannot be applied as any "foreign law" is merely another national or non-national law.[52] The tribunal has no inherent nationality; it is neutral and autonomous and needs to establish its own rules for ascertaining the law.

The applicable arbitral rules rarely give tribunals any guidance on ascertaining the law, an exception however are those of the *London Court of International Arbitration* (LCIA) providing that:

> *"Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the*

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[49] Article 13 French New Code de Procedure Civil; "…invite the parties to proffer submissions on points of law which he shall deem necessary for the resolution of the dispute."
[50] United States Federal Rules of Civil Procedure, Rule 44.1.
[51] Article 16(2)
[52] For example Sha'aria law or lex mercatoria

relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute and the Arbitration Agreement."[53]

Arbitral rules do however variously empower the tribunal to establish their own procedure and adopt whichever rules they deem appropriate:

"The tribunal shall conduct the arbitration in such a manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final determination of the dispute."[54]

"The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."[55]

Party autonomy allows rules for the ascertainment of the law to be identified within the arbitration agreement or during the course of the arbitration. These scenarios are rare, however if they do arise the tribunal will generally accept them.

As with most arbitration agreements, most national laws do not specifically guide the tribunal on this issue. The most notable exception is the English *Arbitration Act 1996*[56] which empowers the tribunal to take the initiative in ascertaining the law. Other statutes[57] are less specific but give the tribunal ample flexibility to establish a suitable procedure, for example in Brazil the arbitration act[58] provides:

"The arbitrator or the arbitral tribunal may take the parties' deposition, hear witnesses and determine the production of expertises and other evidence deemed necessary, either ex officio or at the parties' request."[59]

Despite this flexibility there is still a tendency for national laws to permeate into arbitration procedures. Under the English *Arbitration Act 1996*, in absence to contrary agreement, foreign law must be proved[60] consequently English courts have held[61] that the

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[53] Article 22.1(c)
[54] Singapore International Arbitration Centre Rules 2010, Article 16.1
[55] UNCITRAL Arbitration Rules, Article 15(1)
[56] Section 34(2)(g)
[57] Other examples include UNCITRAL Model Law, Article 19; French Civil Procedure Code, Article 1460; Spanish Arbitration Act 2003, Article 25; Swiss Private International Law Act, Article 182.
[58] Law No.9.307
[59] Article 22
[60] Section 46(1)(a) "The arbitral tribunal shall decide the dispute - in accordance with the law chosen by the parties as applicable to the substance of the dispute,"
[61] Mr Justice Thomas, Hussmann (Europe) Ltd. v Al Ameen Development & Trade Co [2000] APP.L.R. 04/19, para. 42, "If there is no suggestion by the parties that there is an issue under the applicable system of law which is different from the law of England and Wales, or the tribunal does not itself raise a specific issue, then the tribunal is free to decide the matter on the basis of the presumption that the applicable system of law is the same as the law of England and Wales. To hold otherwise would mean that international arbitrations held in London would be encumbered with the considerable extra expense of

applicable law, where the parties have not raised an issue regarding foreign law, is to be that of England and Wales reasoning that the parties have impliedly so chosen.

National courts as ever have differing views on tribunals substituting their own legal arguments for those of the parties. Under the 1950 Act, in *Modern Engineering v C. Miskin*[62], the Court of Appeal in England set aside an interim award and removed an arbitrator for misconduct because he had ruled without giving one of the parties the opportunity to refute a new legal argument of its opponent.

This principle was laid down by Lord Justice Robert Goff who, referring to Lord Denning M.R.'s and Lord Justice O'Connor's statements in the case *Aiden Shipping v Interbulk*[63], states:

> *"In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have the opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts* ***or the law*** *to the tribunal."*
>
> *"…the fact remains that the award was made on the basis of a point which was never raised as an issue or argued before the arbitrators. There is plain authority that for arbitrators so to decide the case, without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct and renders the award liable to be set aside or remitted"* [64]

In 2007 of the Commercial Court where, referring in particular to the *Vimeira case*, Mrs Justice Gloster utters that:

> "*If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. This is contrary both to the substance of justice and to its appearance... These principles apply to unargued points of law or construction as they do to unargued questions of fact".*[65]

St. John Sutton, Gill, and Gearing summarised the situation as follows:

> "*…the parties are entitled to assume that the tribunal will base its decision on the evidence and argument presented by the parties. If the tribunal is minded to decide the dispute on a completely new point, the parties must be given notice of it to enable them to address the new point…*[66]

Contrary to this stance, arbitrators in Switzerland have an *ex officio* obligation although

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obtaining general evidence of foreign law relevant to the matters in issue in every case where the proper law of the contract was not the law of England and Wales.

[62] [1981] 1 Lloyd's Rep. 135 (CA)

[63] International Corn Co. N.V. v. Interbulk Ltd (The «Vimeira»), [1984] 2 Lloyd's Rep. 66 ff,HL, 75

[64] Annie Fox and others v. P.G. Wellfair Ltd [1981] 2 Lloyd's Rep. 514 ff, CA, 522 and 533,

[65] OAO Northern Shipping Co v. Remolcadores De Marin SL, [2007] 2 Lloyd's Rep., 302 ff, 305

[66] Russell on Arbitration, 23rd Ed., 2007, # 8-081, p. 489

should avoid surprising the parties by applying a rule that could not have been foreseen. If an arbitrator in Switzerland applies, as he must, the governing law beyond the submissions of the parties, there will be no case for an annulment of the award. In principle, there is no violation of due process as the parties should know that the arbitrators know the law and will apply it.

Similarly in Sweden and Finland, *iura novit curia* is a part of the procedural framework applicable in arbitration. The power of the arbitral tribunal to reclassify the issues, define the positions of the parties and their rights is, however, subject to other procedural principles such as the duty of the tribunal to submit the issues to the parties for their comments and arguments in order to avoid an unfair surprise.

What is an "unfair surprise" in a given case may not be clear. The Swiss Federal Supreme Court, on June 9, 2009, upheld an award stating that:

> "*...the Hungarian company, represented by experienced business lawyers should have anticipated the application of contractual terms addressing the termination of the construction contract."*[67]

Fouchard, Gaillard and Goldman suggest as a general rule the arbitrators must afford the parties the opportunity to discuss a rule of law to be applied. The exception would be that:

> "*the rule relied on by the arbitrators is so general in nature that it must have been implicitly included in the pleadings that the arbitrators can dispense with the need to call for a specific discussion on that point. This will be the case, for example, of the principle of good faith in the performance of contracts..."*[68]

iii. How Should Tribunals Ascertain the Law?

Arbitration is often selected as a dispute resolution method due to the very fact that national laws will not be applied uniformly. The tribunal will apply that law chosen by the parties or that found to be applicable. If parties choose London as their seat it is likely to be for the reason that London is one of the centres of international arbitration and England being party to the New York Convention[69] rather than consciously accepting that English law would permeate into matters where foreign law should be applied. Also if the tribunal in deciding the dispute fails to apply the rules chosen by the parties, the

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[67] Swiss Federal Supreme Court as of 9 June 2009- 4a_108/2009

[68] Fouchard, Gailard, Goldman, International Commercial Arbitration, Kluwer Law International, 1999, p. 950.

[69] 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention

award could be subject to challenge upon enforcement.[70]

In contrast to the situation in England, tribunals hearing arbitrations with a Swiss seat, whilst applying the law *ex officio,* may also rely on the submissions of the parties or request further details of the parties.[71] Therefore the tribunal can still apply the law differently to these submissions without the award being successfully challenged; with the proviso that the parties are aware of the tribunals intent and that they were given opportunity to comment thereon.

If legal experts are relied on, the tribunal must ensure that the questions asked of them and the evidence under review are identical. If the tribunal opts to appoint its own expert to give opinion these necessities are negated. However if the tribunal's expert is in addition to the parties' experts there are cost implications and the distinct possibility that three opinions have been procured. The answer could be the appointment by the tribunal of a single joint expert with input from both the parties. The expert then could be examined or challenged by both parties and the tribunal leading to a more objective opinion reduces cost and results in a non-contested outcome.

Alternatively tribunals, with the agreement of the parties, could elect to examine the experts jointly (conferencing or hot-tubbing).

A combination of methods can be used to include submissions of law by the parties and expert reports and research undertaken by the tribunal itself. Initially the parties could establish the content of the applicable law then where uncertainty still exists as to the applicable rules, or an important legal issue arises the tribunal may do its own research, or ask questions and seek clarifications from the parties. This has however the possibility of over-complicating the procedure and increasing the costs.

Where free to undertake its own research on points of law not argued by the parties, the tribunal should do so openly and provide the parties with the opportunity to comment on any matter that may materially affect the tribunal's decision.

Whichever method the tribunal opts for, due process is an absolute requirement. There should be no surprises and no opportunities for parties to claim that they were denied the opportunity to present or defend its case.

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[70] New York Convention, Article V(1)(c)
[71] D. _____ d.o.o., v Bank C., 2005 Schweizerisches Bundesgericht, I. Zivilabteilung, 4P.242/2004/bie

V. CHAPTER FIVE – CASE STUDIES

i. Case Reference 4A _108/2009, Swiss Federal Supreme Court, 9 June 2009

A Hungarian company had entered into a construction contract with a Swiss company for alterations to a steel plant with a *'COSS-charging system'*. After three attempts to put the new system into operation failed the Hungarian company sought to avoid the contract, asked for repayment of the sums paid and the removal of the charging system. The Swiss company refused to do so and subsequently submitted the dispute to ICC arbitration proceedings for payment of the outstanding purchase price of EUR 3,590.000.

The Arbitral Tribunal awarded the Swiss Company EUR 1,900,000 as well as the outstanding installments of the purchase price finding that the Hungarian company was not entitled to avoid the contract according to the contractual terms. The Hungarian company challenged the award before the Swiss Federal Supreme Court on the grounds that the Arbitral Tribunal had wrongly relied on contractual terms and legal provisions that were not pleaded and their application came as a surprise to the parties negating the right to be heard.

The Swiss Federal Supreme Court held that the right to be heard does not include a right to be specifically heard with regard to the legal qualification of facts introduced by the parties into the proceedings and therefore dismissed the action for annulment. This finding is in line with Switzerland's jurisprudence regarding the application of the right to be heard. Under the contractual terms, the Hungarian company was barred from avoiding the construction contract as the Swiss company had been prevented from carrying out performance tests. It was held that the application of the contractual terms was not deemed to be a surprise as the Swiss company had referred to the respective provisions several times in their submissions and therefore the Hungarian company had had ample opportunity to respond to these arguments. Additionally the Hungarian company, represented by experienced counsel, should have anticipated the application of contractual terms addressing the termination of the construction contract.

The Arbitral Tribunal shall give the parties an opportunity to express their views if it intends to base its decision on legal grounds which the parties have not invoked and

which they could reasonably not anticipate as being relevant.

ii. Case reference 4A_400/2008, Swiss Federal Tribunal, 9 February 2009

The Spanish agent of a Brazilian football player living in Portugal entered into an agreement granting the agent the right to find a new club for the football player. The football player then found a new club, allegedly without any assistance from the agent. FIFA[72] adjudicated on the matter and rejected the resultant claim from the agent for the payment of his fees.

The agent appealed to the Court of Arbitration for Sport (CAS) which also rejected his claim. In rejecting the claim the CAS supplemented its reasoning by relying on a Federal Statute which had not been referenced by either party. This Federal Statute provides for the annulment of any exclusivity clauses in agency agreements relating to employment contracts.

The Federal Tribunal found that the arbitral tribunal was wrong in assuming that the Federal Statute was applicable and in fact that such statute applied only if the agent resided in Switzerland. Therefore the agent could not have anticipated that the CAS would use the statute and neither party had relied on the statute in question during the arbitral proceedings.

In Switzerland if an arbitrator applies the governing law beyond the submissions of the parties, there will be no case for an annulment of the award. Only in extreme circumstances will the requirement for due process prevent the arbitrator from basing their award on something which the parties did not mention. However, the tribunal should not surprise the parties with legal arguments that the parties could never have expected in view of their submissions and the briefing of the case.

In this case, the Swiss Federal Supreme Court decided that the right to be heard (art. 182 para. 3 of the Swiss Federal Act on International Private Law, "PILA") does not encompass a right of the parties to be specifically heard with regard to the legal qualification of the facts they had introduced into the proceedings. However, an exception to this rule applies if the Arbitral tribunal intends to base its decision on legal grounds which the parties neither have invoked nor could reasonably anticipate as being

[72] Federation International de Football Association

relevant.

iii. D. _____ d.o.o., v Bank C. 4P.242/2004/bie Schweizerisches Bundesgericht, I. Zivilabteilung, 27 April 2005[73]

Following arbitration proceedings under the rules of the Zurich Chamber of Commerce, the Respondent applied to set aside the award on various grounds. One of the grounds being that the final award violated public policy[74]. The court held that the assignment to the parties of an arbitration to establish the content of foreign law does not violate public policy.

iv. B v A[75]

The dispute was in connection with a share purchase agreement in a Spanish company. The contract was written in English but governed by Spanish law. The arbitration was under the ICC Rules with its seat in London. Of the three arbitrators, two were from common law backgrounds and made the award, the other was Spanish, who dissented. The Spanish arbitrator suggested that the common law arbitrators did not feel comfortable with Spanish law and had decided the matter in an arbitrary fashion. The award was challenged on the grounds that the Tribunal failed to decide in accordance with the Spanish law chosen by the parties. The challenge was dismissed by the High Court on the basis that the failure to apply the chosen law was not a serious irregularity.

v. Comesa GmbH v Polar Electro Europe BV[76]

The Supreme Court of Finland upheld an award given by a tribunal in Helsinki. The claim was concerning termination compensation available to agents in a distribution contract. The contract was governed by the laws of Finland and "*the internationally mandatory Austrian law*". It contained a clause stipulating that, in the event of termination, the Distributor was not entitled to any compensation. The written and oral submissions of the parties concerned the agent's right to compensation based on the analogy with the rules applying to commercial agents. The tribunal held that no agency rules could be applied by analogy but rather the clause whereby the Distributor had waived any right to compensation upon termination was binding in principle. However, Section 36 of the

[73] Swiss Federal Court, Civil Division I.
[74] Federal Private International Law Act, 1987 Section 190(2)(d)
[75] [2010] EWHC 1862
[76] 2 July 2008, Supreme Court of Finland

Finnish Contracts Act allows a contractual provision to be adjusted or disregarded if its application would lead to an unreasonable result. The Tribunal held that, if it was not adjusted, the contract clause whereby the Distributor gave up any rights to compensation would lead to an unreasonable result due to changed circumstances.

The award was challenged by the Supplier on the ground that the arbitrators had based their ruling on general contract law although neither party had specifically pleaded it. The Supreme Court had to decide if the Tribunal had exceeded its authority or deprived a party of a sufficient opportunity to present its case. With respect to the principle of *iura novit curia*, the Supreme Court underlined that the Tribunal was not bound by the legal reasoning presented by the parties.

vi. ABB Ag v Hochtief Airport Gmb H and Another[77]

A challenge was brought under section 68 of the 1996 Arbitration Act to an arbitrator's decision on the grounds of serious irregularity. The arbitration in question was conducted under the LCIA rules with its seat in London but governed by Greek law. The dispute related to the transfer of shares and the ownership of Athens International Airport. One issue was that during the course of the negotiations leading up to the agreement, the parties were under an obligation to act towards one another in good faith. Article 207 of the *Greek Civil Code* provided that:

> *"A condition shall be deemed fulfilled if its fulfilment was impeded contrary to the requirements of good faith by the person who would have suffered a prejudice from its fulfilment. A condition shall be deemed not having been fulfilled if its fulfilment was brought about contrary to the requirements of good faith by the person who would have benefited by its fulfilment."*

Mr Justice Tomlinson considered if ABB had had the opportunity to fairly address whether Hochtief either did or could be said by ABB to have acted contrary to good faith in its actions. It was clear that ABB did have a fair opportunity. The tribunal considered the case and rejected it. Therefore the case failed. However it is clear that the Judge had no difficulty in considering the Greek concept of "good faith" argument made during the arbitration hearing.

vii. OAO Northern Shipping Company v Remolcadores De Marin SL (Remmar)[78]

Gloster J heard a challenge to set aside an award as the ground cited had not been raised

[77] [2006] EWHC 388
[78] [2007] EWHC 1821

by the respondent and because the claimant had not been given a reasonable opportunity to address that ground. Although acknowledged that section 68 is designed as a *"long stop"*, to be used only in extreme cases, the award was set aside and remitted for further consideration. The tribunal must give the parties a *"fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion"*.

VI. CHAPTER SIX – TRANSNATIONAL STANDARDS AND RECOMMENDATIONS

i. Procedure

As the majority of international commercial arbitrations are technical and complicated in nature there appears to be little benefit, except for final clarifications, in repeating pleadings orally in front of a tribunal that is made up of legal experts, other experts and professionals. If parties disclose all the facts and legal arguments as early as possible, the tribunal and the other party can study and consider these in an appropriate environment.

The ICC Rules[79] contain a list of particulars that are required prior to the tribunal being able to draw up its *Terms of Reference*[80]; these include a *Request for Arbitration*[81] and an *Answer to the Request*[82] that should include:

> (i) A description of the nature and circumstances of the dispute giving rise to the claim(s);
>
> (ii) A statement of the relief sought, including, to the extent possible, an indication of any amount(s) claimed;
>
> (iii) The relevant agreements and, in particular, the arbitration agreement;
>
> (iv) All relevant particulars concerning the number of arbitrators and their choice in accordance with the provisions of Articles 8, 9 and 10, and any nomination of an arbitrator required thereby;
>
> (v) Any comments as to the place of arbitration, the applicable rules of law and the language of the arbitration.

A guide as to whether a statement of claim provides sufficient detail could be referenced to the ability of a tribunal to draw up its *Terms of Reference*. It can be seen from the ICC list above that the statement of claim should contain as many of the facts as possible including operative documents to be relied upon, but not in as much detail as that required by civil law courts. The benefits of this procedure according to *Elsing and Townsend*[83] are:

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[79] International Chamber of Commerce Rules on Arbitration
[80] Article 18
[81] Article 4
[82] Article 5
[83] Elsing, S and Townsend, J; Bridging the Common Law-Civil Law Divide in Arbitration; Arbitration International, 2002, Volume 18, Issue 1, page 60

(i) It allow a party to tell his story convincingly at the beginning;

(ii) It makes it difficult for the adverse party to claim that it was given insufficient notice of the claim;

(iii) It provides the arbitrator with a sense of confidence that all of the important cards have been lain on the table.

The tribunal by focusing on the clarification of certain identified points and by taking an active role in the hearing can direct oral submissions towards the key matters in dispute and engender interaction between the parties and the tribunal leading to decision transparency and general efficiency.

Whether the arbitral tribunal should promote an amicable settlement on its own initiative is a difficult decision. Care would be needed not to position itself so as to be psychologically bound by the proposed deal but rather to facilitate and allow the parties to explore a settlement.

Where left to the discretion of the tribunal, discovery will inevitably be influenced by the arbitrator's background. Arbitrators from common law backgrounds will tend to favour greater discovery than their counterparts from civil law jurisdictions.. A possible middle ground for arbitrators exercising discretion fairly lies in the *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration*[84] (IBA Rules). The relevant articles are:

Article 3(1): "*The parties must submit to the tribunal and to the other parties all documents available to it on which it relies, including public documents and those in the public domain.*"

Article 3(2) and 3(3): "*The parties may exchange requests for production containing a description of "narrow and specific" categories of documents that are reasonably believed to exist and are relevant and material to the issues in dispute."*

Articles 3(5) and 9(2): *"A party may object to the production of some or all of the documents requested on various grounds."*

Article 9(3)(e): "*In considering whether to exclude any document from production or inspection, the tribunal may take into account "the need to maintain fairness and equality between the Parties, particularly if they are subject to different legal or ethical rules".*

Articles 9(5)[85] and (6): "*Where a party has failed to produce evidence without adequate*

[84] International Bar Association Rules on Taking Evidence in International Arbitration adopted by the IBA Council on 29 May 2010.

[85] The IBA Working Party stated that "Article 9.5 creates an inference that where a party has failed to produce a document or make available other evidence required by the arbitral tribunal the arbitral tribunal may then conclude that such document or evidence would be adverse to the interests of that party. Arbitral tribunals routinely create such influences in current practice."

explanation, the tribunal may infer that such evidence would be adverse to the interests of that party."

This so-called middle ground is judged to be more accurately between typical civil law discovery and common law discovery represented by American-style procedure rather than that generally adopted in England and Wales. The IBA Rules do not provide for pre-hearing depositions or written interrogatories that are common in the United States, however they do contain far broader provisions than generally found in civil law systems. In fact the IBA Rules are not dissimilar to the discovery process utilised in England and Wales.

The IBA Rules provide a more detailed framework than that generally provided by the arbitration agreement, the applicable national laws and any selected institutional rules. Adoption of these rules could lead to cost and time savings by negating the particular procedural debate otherwise required.

Another area of procedure where the IBA Rules provide useful guidance in bridging the common law-civil law divide is in the presentation of witness evidence. Under Articles 4.4 and 4.5 the entire witness testimony of a party is submitted in writing to the arbitrators prior to the hearing[86]. This has the benefit of helping to eliminate surprise and to some extent is a substitution for depositions from those witnesses. As a concession to common law practices the IBA Rules make provision for oral testimony:

> Article 8(1): "…*Each witness shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.*"[87]

However the IBA Rules guide procedure towards efficiency and time-saving by abbreviating live questioning by stating in Article 8(2) that:

> *"The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading."*

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[86] American Arbitration Association Rules on Arbitration: Article 20.5.

[87] Also Article 9(5) states" Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.

Although the IBA Rules state that the tribunal may ask questions to a witness at any time, for the sake of even-handedness most tribunals allow the parties to ask questions first. Consequently the difficult questions are asked by the parties allowing the tribunal to question on remaining points of interest. This procedure will help to avoid accusations of irregularity due to the nature of tribunal questioning.

Witness conferencing, commonly known as *"hot tubbing"* has become fashionable in recent times as a method of departing from the purely adversarial procedure of witness cross-examination whilst at the same time not wholeheartedly embracing civil procedure. The practice involves the simultaneous giving of evidence by opposing witnesses and/or experts. This approach offers considerable efficiency over both alternative formats of witness by witness hearing particularly where the dispute in question involves complex technical facts. Witnesses *"in conference"* can confront each other's evidence simultaneously without the need for the usual lengthy sequential process of statements, questions and answers.

The following is an example of a potential procedure for witness conferencing that would require agreement by the parties and acceptance by the Tribunal:

> (i) In advance of the hearing each party submits a list of questions (within a maximum) for the tribunal to consider. The questions are listed in order of priority.
>
> (ii) Treating each list equally, the tribunal should ask the questions it thinks will elicit helpful evidence for its determinations. The tribunal should aim to have a balance of questions drawn as far as possible, equally from each list. The Tribunal could also ask it's own questions.
>
> (iii) To the extent possible, both parties' witnesses should be given equal opportunity to answer the questions put and/or contribute to the discussion.
>
> (iv) Each party has the right to ask supplementary questions of the witnesses. These questions should be addressed to both witnesses, where possible.
>
> (v) As far as it is reasonably possible, the tribunal should generally try to allocate the same amount of time and involvement to each party's witnesses.

Witness conferencing would appear to be best suited where the witnesses are addressing the same issues within their statements and those issues are not too document intensive. The tribunal is required to take the initiate in controlling the process and must be well versed in the statements of the witnesses. Either the tribunal can direct the initial question to the claimant's witness, then to the respondent's witness and then give the claimant's witness the opportunity for a brief reply or there can be a more general

discussion 'chaired' by the tribunal. This *inquisitorial* approach by the tribunal is more akin to the procedure practiced in civil law countries although it is an advancement from most court procedures in such countries.

This approach can be particularly beneficial when there is a dispute between two experts regarding a particular factual issue. Witness conferencing in these circumstances may often result in experts from the same field compromising and agreeing their position rather than boldly stating that their peer is plainly wrong. Where no compromise is reached however, this procedure may result in further entrenchment with the tribunal encumbered in deciding which evidence is more credible.

Parties from an adversarial procedural background may regard witness conferencing as a loss of control over their oral witness evidence. The process of cross-examination allows counsel to ask questions that will verbalise all the important issues within a witness's statement; however witness conferencing relies on the tribunal and the witnesses themselves to air their important issues. Witness conferencing is clearly not be suitable in cases where one side intends to undermine the other side's expert or challenge facets of their statement.

There appears to be very little difference between the position under the *1996 Arbitration Act* and the law prevailing in many civil law countries regarding the appointment of an expert by the arbitral tribunal. Where the matters in question are of a technical or scientific nature, it is more advisable to have one tribunal-appointed or a single joint expert. In international construction disputes, tribunals sometimes order the party-appointed experts to meet separately before the hearing, in order to establish a set of agreed technical facts and issues. Occasionally, a tribunal may require its own expert to attend such a meeting or, alternatively, report to the tribunal in respect of those issues the party-appointed experts were unable to agree on.

There are clearly problematic issues with both party- or tribunal-appointed experts. As an alternative, single joint expert could provide independent evidence on either technical or legal aspects, be appointed by and receive their mandate from both parties but report directly to the tribunal. A single joint expert will provide a cost saving in comparison to having two separate party-appointed expert witnesses and this cost saving will be extended in likely event that the proceedings are less lengthy.

Under the current ICC Rules there are no express powers pursuant to which the tribunal may adopt a pro-active approach to case management. The new ICC rules[88] state however that:

> *"The Tribunal will hold a case management conference as soon as possible after the terms of reference are drawn up. At this conference, any necessary case management measures will be ordered and a procedural timetable will be drawn up in order to ensure that the arbitration is conducted in an expeditious and cost-effective manner. The conference may be conducted in person, or by video or telephone conference. Both the parties and the Tribunal are under a duty to conduct the arbitration in an expeditious and cost- effective manner. To this end, the Tribunal may take any provisional measures it deems appropriate."*[89]

Under LCIA rules[90] the parties and the Tribunal are under a general duty to avoid unnecessary expense and delay so as to provide a fair and efficient means for the resolution of the parties' dispute.

ii. Ascertaining the Law

As identified above[91] the tribunal is provided with little guidance from either national laws or institutional rules as to how to ascertain the content of the applicable law. Often-used methods do not seem to sit comfortably within arbitration. *Iura novit curia*[92] lays the burden of knowing and applying the law firmly in the lap of the tribunal; even when one of the arbitrators is an expert in the applicable law should the remaining arbitrators rely on their colleagues opinion or rather act as a whole? Similarly, applying the *fact approach* to proof of law allows the arbitrator to stand back from finding or even understanding the applicable law and is merely persuaded by the parties' experts. The tribunal has a duty to apply the applicable law therefore simply falling back to the default law of the seat or that known by the tribunal, is unsatisfactory.

In practice arbitral tribunals are likely to follow the processes used globally in national courts, furthermore the tribunal will be influenced by the processes adopted at the seat, under the substantive law, the origins of the arbitrators and those of the parties and their representatives. These various processes are amalgamated to suit the dispute's particular circumstances. The tribunal's power to take the initiative in ascertaining the law is of great value allowing it to research the law and to appoint experts to advise where necessary.

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[88] Effective as of January 2012
[89] Articles 22.2, 24.1 & 24.3
[90] Article 14.1
[91] Chapter IV page 21
[92] FN 45

Any process adopted by the tribunal must render the resulting award enforceable. Examples of this requirement can the found within both the ICC and the LCIA rules:

> *"In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law."*[93]

> *"In all matters not expressly provided for in these Rules, the LCIA Court, the Arbitral Tribunal and the parties shall act in the spirit of these Rules and shall make every reasonable effort to ensure that an award is legally enforceable."*[94]

Complying with due process is a fundamental requirement of rendering an enforceable award. Due process can be achieved here by applying the law chosen by the parties and where a choice has not been expressly made, by applying law it deems suitable:

> *"The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected."*[95]

> *"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. Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."*[96]

During the process of applying the law the tribunal must ensure that the parties are fully informed of how the tribunal intend to analyse the rules in question, how the they expect evidence to be presented and whether the tribunal are to take the initiative in ascertaining the law. At all times the tribunal must guard against exceeding its mandate defined by the arbitration agreement:

> *"(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);*
>
> *(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties"*[97]

Challenges may also be brought if the tribunal fails to apply rules of law not raised by the parties. The tribunal is therefore left in a situation where the parties can submit a challenge if the law raised or not raised by the parties is not applied. To help prevent successful challenges of this nature the tribunal must obtain the parties' agreement or at

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[93] ICC Rules of Arbitration 1st January 1998, Article 35
[94] LCIA Arbitration Rules, 1 January 1998, Article 32.2
[95] Federal Private International Law Act 1987, Article 187
[96] UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, Article 28(1) and (2)
[97] English Arbitration Act 1996, Section 68(2)(b) and (c)

the very least give clear direction as to how it intends to ascertain the content of the applicable law:

> *"Providing an opportunity for litigants to comment on the law remains vital both to the arbitrator getting it right and to the parties' sense of being treated justly."*[98]
>
> *"Under Swedish arbitration practice, which is applicable to this proceeding, it is established that the principle of iura novit curia applies; therefore, the Arbitral Tribunal, in applying the law, is not bound by the pleadings made by the parties, and may by its own motion apply legal sources or legal qualifications that have not been pleaded by the parties. In respect of international arbitration taking place in Sweden, it is sometimes suggested that the principle iura novit curia applies, but the parties should be notified of new legal sources introduced by the arbitrator, so that they have the possibility to comment on them. Leaving aside the question of the necessity of following such suggestion on a general basis, the Arbitral Tribunal observes that, in the instant case, the Arbitral Tribunal does not introduce a new legal source: it applies the legal sources invoked by the Claimant in a way different from the way pleaded by the Claimant. Under Swedish arbitration law the right of the arbitrators to make their own legal qualifications is not limited, even if this results in imposing remedies different from those pleaded by the parties…Also in respect of international disputes arbitrated in Sweden it is recognized that arbitrators should be able to present legal arguments on a rationale that neither party has presented…"*[99]

In circumstances where a tribunal fails to apply mandatory rules the resultant award may be set aside as it violates public policy. Arbitrators may also decide not to apply the governing law when this is contrary to public policy.

[98] "Arbitrators and Accuracy", Professor William Park, Journal of International Dispute Settlement, Volume 1, No.1 February 2010, 25-53.
[99] Stockholm Chamber of Commerce Arbitral Award, Iurii Bogdanov, Agurdino, Invest Ltd, Agurdino–Chimia JSC v. Moldova, 22 September 2005, 2.2.1

VII. CHAPTER SEVEN – FINAL CONCLUSION

Each and every case that comes to arbitration is different and will be conducted in different ways, the rules and procedures used must be those that reflect the wishes of the parties and that are best suited to the dispute in question.

The very international nature of many arbitrations require the tribunal to be open to the advantages of procedures other than those of their background. Arbitrators from Civil Law countries should appropriately adopt the adversarial procedures of Common Law countries and similarly Common Law arbitrators should adopt inquisitorial procedures of Civil Law countries where they are best suited to the case in hand.

The English Arbitration Act 1996 set in train the shift towards a more inquisitorial approach for arbitrations with their seat in England and Wales. This was reinforced in 1999 by the civil procedure reform turning the passive judge into a managerial judge. Much of this reform was driven by the desire for cases to be dealt with more expeditiously and efficiently; this desire is still present today. The recently revised IBA Rules[100] are a valid attempt to harmonise procedure and continue this progression by confirming that it is the arbitrator who controls the hearing, has the power to commission experts, call witnesses of fact and obtain evidence. Whilst the primary motivation for this shift towards a more active arbitrator is commendable, it must be remembered that to conduct cases on an inquisitorial basis the arbitrator will need to be proficient in instructing his own experts, possess the material to make such an appointment fair and productive and be an accomplished questioner.

Generally arbitrators are not faced with the issue of establishing the content of the substantive applicable law, and resolve the dispute by interpreting the contract terms and applying principles of law. Therefore, documents and other evidence submitted by the parties are analysed by the tribunal, in order to determine the dispute.

When it is not possible to resolve the dispute according to contractual terms, arbitrators must apply a law that is foreign to them and unknown. Here, arbitrators must use all available methods in order to establish the contents of the law. Where tribunals are

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blessed with arbitrators with specific knowledge on the applicable law this should of be utilised in full. Where possible, the continental tradition and the common law approach can be combined for the benefit of the parties. This methodology allows for independent study with expert reports and pleadings on the content of the foreign law submitted by the parties. This approach offers a practical solution for the arbitral tribunal when tasked with establishing the content of the law. Arbitrators by questioning expert witnesses directly may ascertain the contents of the applicable law or clarify any issue. Alternatively by adopting the adversarial procedure of hearing the experts from both parties together in discussion on legal matters may also provide the tribunal with the answers it requires.

Iura novit curia is understood and applied differently in different jurisdictions varying from a strict duty to an authority. A mandatory obligation to ascertain and apply the law in arbitration would tend to undermine the finality of the award and thus dilute one of the advantages of arbitration. It seems unsatisfactory and lacking clarity that a situation may arise whereby the arbitrator has not been empowered to ascertain the law and the parties have not expressly chosen the law. In this regard it is desirable that arbitrators are permitted, under national legislation, to ascertain the law without the option of party veto.

Whilst there are national rules for determining the content of "foreign" law in national courts, they are uniform or complimentary and their application differs within civil law and common law systems. A tribunal therefore has the advantageous freedom and flexibility to select the method best suited to determine the applicable rules to reach the correct decision in each case. Always, the tribunal must follow a method that is reasonable, objective, fair and transparent.

All involved in arbitration may question whether the methodology of ascertaining the facts and the law can be addressed more frequently in the agreement to arbitrate, although some would ague that this is a premature stage at which determine these issues as they are dependent on the background of the arbitrators and the nature of the issues in question. If deemed premature at the agreement stage, the same arguments would not be so tenable at the point of referral. At referral stage the Tribunal can create certainty of expectations.

It is possible, although difficult to envisage, that a set of universal transnational procedural rules to govern international arbitrations will one day be available and will be

adaptable to every dispute in question. Until that time however, international arbitration will no doubt continue to satisfactorily evolve procedures to serve the needs of parties from both common law and civil law traditions.

APPENDICES

I. COMPARISON OF SELECTED INTERNATIONAL ARBITRATION RULES

TOPIC	CPR[101]	ICC[102]	ICDR/AAA[103]	LCIA[104]	UNCITRAL[105]
Standard for Disclosure by Arbitrators	Any circumstances that might give rise to justifiable doubt regarding the arbitrator's independence or impartiality. (R 7.3.)	Every arbitrator must be and remain independent of the parties. Prospective arbitrators must "sign a Statement of Independence and disclose in writing. . . any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties." (Art. 7.)	Any circumstances likely to give rise to justifiable doubts as to the arbitrator's impartiality or independence. (Art. 7.)	All arbitrators shall be and remain at all times impartial and independent of the parties and shall not act as advocate for any party. (Art. 5.2.) Written statement required to affirm impartiality and independence. (Art. 5.3.)	"Any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." (Art. 9.)
Seat of the Arbitration—The Procedural Law	Determined by Tribunal if parties have not agreed. The award is deemed made at such place. (R 9.5.)	Referred to as the place of arbitration. Fixed by the Court unless agreed by the parties. (Art. 14 (1).)	Parties may agree; if not, Administrator makes initial determination but final decision is with Tribunal within 60 days of its constitution. (Art. 13 (1).)	Parties may agree; if not, the seat is London unless the LCIA determines another location is more appropriate after soliciting comment of the parties. (Art. 16.)	If not designated by the parties, it is determined by Tribunal having due regard to the circumstances of the arbitration. (Art. 16 (1).)
Substantive Law	Determined by Tribunal if not designated by the parties. (R. 10.1.)	Determined by Tribunal if not designated by the parties. (Art. 17 (1).)	Determined by Tribunal if not designated by the parties. (Art. 28 (1).)	As designated by the parties or, if the tribunal determines that the parties have made no agreement, the tribunal shall apply the law(s) or rules of law which it considers appropriate. (Art. 22.3.)	As designated by the parties or, if no agreement, as determined by the Tribunal applying the conflicts-of- law rules which it considers applicable. (Art. 33 (1).)

[101] International Institute for Conflict Prevention and Resolution
[102] International Chamber of Commerce
[103] International Centre for Dispute Resolution/ American Arbitration Association
[104] London Court of International Arbitration
[105] United Nations Commission on International Trade Law

General Standard for Production of Documents	Tribunal may order "such disclosure as is appropriate in the circumstances, taking into account the needs of the parties and the desirability of making disclosure expeditious and cost effective." (R 11.)	Silent. Generally quite limited.	The Tribunal may order parties to deliver a summary of reliance documents (Art. 19 (2)), but also may order parties to produce "other documents, exhibits or other evidence it deems necessary or appropriate." (Art. 19 (3).)	Tribunal has the power to order any party to produce to it and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession which the tribunal determines to be relevant. (Art. 22.1 (e).)	The Tribunal may order parties to deliver documents they intend to present (Art. 24 (2).), but also may order parties to produce "documents, exhibits or other evidence." (Art. 24 (3).) Often disclosure is quite limited.
General Discretion and Obligation in Conducting the Proceedings	"Subject to these International Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate." (R 9.1.) The Tribunal is obligated to manage the proceeding firmly in order to complete proceedings as economically and expeditiously as possible. (R 9.2.) The Tribunal shall determine the manner in which the parties present their cases. (R 12.1)	The tribunal "shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." (Art. 15 (2).) The tribunal shall be in "full charge" of the hearings. (Art. 21 (3).) If the Rules are silent, the parties may agree upon rules or, failing that, the tribunal may establish such rules. (Art. 15 (1).) Tribunal to proceed "within as short a time as possible to establish the facts of the case by all appropriate means." (Art. 20(1). "In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules . . ." (Art. 35.)	"Subject to these Rules, the Tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." (Art. 16 (1).) The Tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. (Art. 16 (2).)	Tribunal required to "act fairly and impartiality as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent," and avoid "unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute." (Art. 14.1.) Unless agreed otherwise by the parties, the tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the tribunal may determine to be applicable. (Art. 14.2.) The tribunal shall have the "fullest authority to establish time limits for meetings and hearings. (Art. 19.5.)	"Subject to these Rules, the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." (Art. 15 (1).)

Formal Judicial Rules of Evidence	Not required to be applied. (R 12.2)	Excluded by implication and interpretation. (Art. 20.)	Excluded by implication and interpretation. (Art. 16, 19.)	Excluded by implication and interpretation. May be applied by order of the tribunal. (Art. 22.1 (f).)	Excluded by implication and interpretation. (Art. 25(6.)
Tribunal Requests for Evidence	Permitted. (R 12.3.)	The tribunal may summon any party to provide additional evidence. (Art. 20 (5).)	Permitted. (Art. 19 (3).)	Apparently permitted under Art. 22.1.	Permitted. (Art. 24 (3).)
Tribunal Requests for Evidence	Permitted. (R 12.3.)	The tribunal may summon any party to provide additional evidence. (Art. 20 (5).)	Permitted. (Art. 19 (3).)	Apparently permitted under Art. 22.1.	Permitted. (Art. 24 (3).)
Tribunal Appointment of Neutral Experts	Permitted. (R 12.3.)	Permitted. (Art. 20 (4).)	Permitted. (Art. 22.)	Permitted. (Art. 21.)	Permitted. (Art. 27.1.)
Specific Procedures for Tribunal Experts	No.	No.	Yes. (Art. 22.)	Yes. (Art. 21.1.)	Yes. (Art. 27.)
Written statements of witnesses	Discretion of the Tribunal. (R. 12.2.)	Silent; parties' written submissions mentioned in Art 20(2).	Permitted. (Art. 20 (5).)	Permitted. (Art. 20.3.)	Permitted. (Art. 25 (5).)

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