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Bridging Traditions: A Critical Analysis of the Civil–Common Law Divide in International Arbitration

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ABSTRACT

The debate surrounding the divide between civil and common law traditions in international arbitration continues to shape procedural expectations and normative choices in arbitral practice. This article critically examines two influential perspectives on the subject—Pierre Karrer's position that experienced arbitrators transcend the civil–common law divide, and Andreas Respondek's call for integrating civil law principles to improve efficiency. While Karrer downplays the practical implications of procedural diversity, Respondek critiques the entrenched influence of common law methods in arbitration practice. Through a comparative analysis of their arguments, this article interrogates the persistence of procedural tensions in international arbitration and explores the scope for reconciling flexibility with efficiency in arbitral design.

I. INTRODUCTION

This paper evaluates the following 2 pieces related to the common law v. civil law divide in international arbitration:

1. Pierre Karrer, 'The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It' (2008) 63(1) Dispute Resolution Journal 72–79.
2. Andreas Respondek, 'How Civil Law Principles Could Help to Make International Arbitration Proceedings More Time and Cost Effective' (February 2017) Singapore Law Gazette.

Dr. Pierre Karrer's article, *"The Civil Law and Common Law Divide,"* aims to dispel the perceived myth between the civil law and common law traditions in international arbitration by downplaying the significance of the divide, asserting that experienced arbitrators tend to merge the best practices from both traditions. On the other hand, Dr. Andreas Respondek, in *"How Civil Law Principles Could Help to Make International Arbitration Proceedings More Time and Cost Effective,"* offers a more structured critique, claiming that civil law methods

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could streamline arbitration proceedings, which are heavily influenced by common law practices.

The two viewpoints, though distinct, offer complementary insights into the evolving nature of arbitration, and when combined, they provide a solid foundation for critiquing the procedural frameworks that are prevalent in the international arbitration framework.

II. THE CIVIL-COMMON LAW DIVIDE: A REALITY OR AN OVERSTATEMENT?

Karrer's major argument is that the divide between civil and common law is largely overstated, especially among experienced arbitrators. He claims that as arbitrators from these two traditions take a comparative and practical approach, their disparities become less pronounced. While it is true that arbitrators with international expertise frequently tailor their procedures to the specific case at hand, Karrer's conclusion may be unduly simplistic. His thesis ignores the deep-rooted procedural and cultural disparities that continue to influence how cases are conducted, from the perspectives of parties and their legal teams.

Karrer reduces the distinction between the two systems by focusing almost entirely on arbitrators' adaptability, ignoring the reality that legal traditions influence expectations and approaches to dispute resolution in profound ways.[2] Common law systems, which emphasize adversarial processes, prioritise evidence presentation, cross-examination, and discovery. In contrast, civil law systems that adopt an inquisitorial method place a larger focus on documented evidence, with the tribunal taking a more active role in information gathering. These disparities in legal cultures can cause tension when parties from various traditions approach arbitration with conflicting expectations, frequently resulting in procedural complexities and inefficiencies.

Dr. Respondek takes a more nuanced perspective of this division, claiming that international arbitration is still significantly impacted by common law traditions, owing to the prominence of Anglo-American law firms and organisations. He claims that the use of common law procedures in international arbitration has resulted in considerable inefficiencies, particularly in terms of time and money. The adversarial nature of common law procedures, with an emphasis on thorough document discovery and cross-examination, frequently results in protracted cases. Respondek believes that civil law practices, such as early document production and increased reliance on written submissions, could speed up arbitration and save costs. This argument strikes at the heart of the procedural issues faced by parties in

[2] Julian DM Lew, Loukas A Mistelis, and Stefan Michael Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003).

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international arbitration, particularly in terms of discovery, witness testimony, and the handling of evidence.

While Karrer may be correct that arbitrators have the ability to blend practices from both traditions, Respondek's critique of the common law bias in international arbitration highlights the persistent procedural divide. It is not simply a matter of arbitrators changing their approaches; the entire framework of international arbitration procedures, which is based on common law principles, frequently skews the process in favour of parties who are acquainted with adversarial systems. This is an important point that Karrer's article fails to effectively address.

III. PROCEDURAL FLEXIBILITY

Karrer highlights procedural flexibility as one of the main advantages of international arbitration, claiming that it enables arbitrators to tailor the process to each case. He claims that arbitrators are the most adaptable people in the room, but lawyers, particularly those from common law traditions, tend to be more rigid, approaching arbitration as litigation. However, while flexibility is one of the most appealing aspects of arbitration, Karrer's viewpoint lacks the necessary nuance. Flexibility, while valuable, can lead to unpredictability, which can cause delays and increase expenses, especially when parties use ambiguous procedural rules to extend proceedings.[3]

Furthermore, Karrer's description of arbitrators as intrinsically adaptable suggests that their adaptation is always beneficial. However, procedural flexibility can lead to inconsistent application of norms and standards across instances, causing uncertainty for parties, particularly those coming from legal systems where procedures are more regulated and predictable. This lack of procedural clarity can be a substantial disadvantage for parties unfamiliar with the more open-ended, common law-style proceedings that are prevalent in international arbitration. The lack of defined criteria can sometimes compromise the efficiency that arbitration is intended to deliver.

Respondek takes a more critical view of procedural flexibility, particularly in the context of common law-dominated arbitration. He contends that the common law emphasis on adversarial proceedings—in which attorneys play an important role in acquiring evidence and questioning witnesses—often results in inefficiencies. Respondek calls for a more structured method based on civil law principles, in which the tribunal has a more active role in directing the process. This would decrease the need for extensive discovery and cross-examination,

[3] Gary B Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021).

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making arbitration more efficient and cost-effective. Respondek believes that by minimising the role of lawyers in evidence collecting and relying more on written submissions, arbitration may be made more predictable and efficient.

The difference between Karrer's and Respondek's perspectives underscores a key tension in arbitration: while flexibility allows for innovation and adaptation, it also creates room for inefficiencies and delays. Arbitrators, in their efforts to balance the interests of both parties, may create procedural confusion, resulting in extended disagreements. Respondek's suggestion for a more structured method, in which arbitrators play an active part in directing the process, provides a realistic answer to this challenge. Parties can reduce the delays and expenses associated with lengthy discovery and cross-examination by implementing greater procedural clarity, particularly in the early stages of arbitration.

IV. THE IBA RULES OF EVIDENCE: BEST PRACTICES OR COMMON LAW BIAS?

One of the fundamental differences between the civil and common law traditions is their approach to evidence and discovery. Karrer's assessment of the IBA Rules of Evidence is one of the most thought-provoking parts of his article. He rejects the notion that the IBA Rules are a compromise between civil and common law traditions, claiming that they reflect the best practices of experienced arbitrators. However, this overlooks the criticism that the IBA Rules are skewed toward common law procedures, particularly in their handling of document production and cross-examination.

Respondek delves deeper into this issue, arguing that the IBA Rules—and by extension, many arbitration proceedings—are substantially influenced by common law traditions. He contends that common law-style discovery, which is key to adversarial systems, is a major source of inefficiency in arbitration. The vast document production and witness testimony required in common law proceedings can significantly increase the duration and cost of arbitration. In contrast, civil law systems place a larger focus on documenting evidence while limiting the role of witnesses. Respondek goes on to suggest that civil law ideas should be more effectively integrated into international arbitration to counterbalance the common law bias. He advocates for earlier document production and more reliance on documentary evidence, which could reduce the need for lengthy witness testimony and cross-examination. This critique of the IBA Rules aligns with Respondek's broader argument that the adversarial nature of common law procedures leads to unnecessary delays and costs.

Respondek's proposal for a more systematic approach to evidence gathering offers a practical solution to one of the most significant difficulties confronting international arbitration. His

idea that arbitrators take a more active role in handling evidence, rather than relying on the parties to engage in adversarial discovery, could assist cut the time and cost of arbitration. In contrast, Karrer's work fails to address the practical reality of how discovery is done in arbitration and provides no tangible solutions to the inefficiencies caused by the common law system.

V. WITNESS TESTIMONY: MANIPULATION OR TRUTH-SEEKING?

Karrer's analysis of witness testimony and cross-examination, while insightful, glosses over the deeper implications of these processes in arbitration. He acknowledges the distinction between civil and common law approaches—where common law systems place significant emphasis on oral testimony and cross-examination, while civil law systems prioritize documentary evidence. However, Karrer downplays the potential for witness coaching and manipulation in common law-style cross-examination, suggesting that experienced arbitrators can manage these issues effectively. His assumption that experienced arbitrators can manage these risks effectively is somewhat optimistic and overlooks the procedural challenges that can arise when parties are from differing legal traditions.

Respondek, on the other hand, takes a more critical approach, pointing out the inefficiencies and potential biases created by extended witness testimony and cross-examination. He contends that the common law emphasis on cross-examination frequently leads to witness coaching, in which lawyers train witnesses to give favourable testimony. This, he claims, impairs arbitration's truth-seeking function and raises costs because lawyers spend a significant amount of time preparing witnesses for cross-examination. The possibility of manipulation is decreased in civil law systems, because witness testimony is secondary and often delivered in writing. Respondek advocates for a greater reliance on documented evidence in arbitration, claiming it is more reliable than witness testimony.

Respondek's critique of witness testimony aligns with his broader argument that common law procedures are inefficient and prone to abuse. By limiting the adversarial role of lawyers in cross-examination and focusing more on written evidence, arbitration could become more efficient and less prone to manipulation.[4] This would also reduce the costs associated with lengthy cross-examination, making arbitration more accessible to parties from both civil and common law traditions. Karrer's article, on the other hand, ignores these practical concerns, providing few specific solutions to the issues raised by witness evidence and cross-

[4] Edna Sussman and Solomon E Wilkinson, 'Witness Preparation: Limits on Interviewing Witnesses for International Arbitration' (2011) 22 *American Review of International Arbitration* 481.

examination.

VI. CONCLUSION: TOWARD A MORE EFFICIENT ARBITRATION FRAMEWORK

In conclusion, Karrer and Respondek provide opposing but complementary assessments of the civil-common law divide in international arbitration. Both pieces emphasise the ongoing issues of combining flexibility, efficiency, and fairness in arbitration, and they provide useful insights into how the practice of international arbitration may change in the future.While Karrer downplays the relevance of the split, emphasising arbitrators' flexibility and adaptation, Respondek contends that the common law bias in arbitration proceedings has resulted in inefficiencies that may be rectified by introducing more civil legal concepts. Karrer's claim that skilled arbitrators can combine civil and common law procedures is sound in theory, but it oversimplifies the difficulties that result from different procedural expectations. Respondek's call for a more structured, civil law-influenced approach to arbitration is more compelling, as it addresses the practical concerns of time.

The future of international arbitration lies in finding a balance between the flexibility championed by Karrer and the procedural efficiency advocated by Respondek ensuring that arbitration remains a viable and attractive option for resolving international disputes.

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