

BRIDGING THE DIVIDE:

Litigation in civil law jurisdictions,
common law jurisdictions and the United States, and
how the IBA Rules strike a compromise

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General Theories

CIVIL LAW	COMMON LAW	UNITED STATES
<ul style="list-style-type: none"> • Concept of inquisitorial system. • Focus is on judges, who decide both facts and the law. • Judges responsible for eliciting adequate and relevant evidence. • Lawyers' role is to assist the judge in fulfillment of his responsibilities. 	<ul style="list-style-type: none"> • Concept of adversary system. • Role of lawyers is to advocate the best theory for their clients based on the available evidence and law. • Role of judge is to decide between competing presentations of evidence and law. • England, Canada and Australia*: Parties generally only entitled to a jury in criminal cases, but not in civil cases. 	<ul style="list-style-type: none"> • Concept of adversary system, with same roles for judges and lawyers as other common law countries. • Jury trials more common than in civil law or other common law jurisdictions. • Jury trials used both for criminal and civil cases.

* Common law systems include the United States, England, Canada, Australia, New Zealand, South Africa, India, Israel, Singapore, Hong Kong, and Bermuda. Practices can differ widely across countries. Therefore, for ease of reference, this material refers to three exemplar countries when discussing common law jurisdictions: England, Canada and Australia.

The Pleadings

CIVIL LAW	COMMON LAW	UNITED STATES
<ul style="list-style-type: none"> • Case must be fully developed before it is filed -- pleadings typically contain full statement of facts and law, along with supporting documents. • For example, the German system requires specific fact pleading and does not permit mere notice pleading. German procedure also requires a party to designate the means of proof (for example, by identifying documents and witnesses) for each factual assertion in the pleadings. 	<ul style="list-style-type: none"> • Pleading in common law jurisdictions represents a middle ground between civil law's full and complete pleading and the United States' notice pleading standard. • In England, pleadings are formalistic and must contain a "statement . . . of the material facts on which the party pleading relies"; a statement of "the necessary particulars;" and a summary of the evidence the claimant has against the defendant. 	<ul style="list-style-type: none"> • Notice pleading requirement: Pleadings must contain "a short and plain statement" of the claim. FRCP 8(a); <i>see also Bell Atl. Corp. v. Twombly</i>, 550 U.S. 544 (2007) and <i>Ashcroft v. Iqbal</i>, 556 U.S. 662 (2009) that retired the "no set of facts" pleading standard and articulated a facial plausibility standard.

The Pleadings

(cont'd)

CIVIL LAW	COMMON LAW	UNITED STATES
<ul style="list-style-type: none">• Other civil law countries have slightly different pleading standards but uniformly require some level of fact pleading beyond the American system's notice regime (<i>i.e.</i> a complaint in Spain must provide a complete narrative of the factual background and reference all documents that are to be attached to the complaint; in French pleading, the plaintiff must provide a statement of the facts to justify the claim).	<ul style="list-style-type: none">• Canada: Every pleading must contain a concise statement of the material facts on which the party relies, but not the evidence by which those facts are to be proved. Conclusions of law may be pleaded only if the material facts supporting them are pleaded.• Australia: The “material facts” must be pleaded in summary form. Once an issue is joined in the pleadings, the court and the parties are confined to the facts contained therein.	

Disclosure/Discovery:

General theories

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Limited disclosure - each party proves its own case. • Conducted under strict control of the tribunal / court. • Pretrial disclosure almost entirely unavailable. 	<ul style="list-style-type: none"> • Permits some disclosure, but it is carefully circumscribed. No other common law country allows the liberality of US-style discovery. • In England and Australia the test is closer to the US than anything else. Parties have to disclose any document that might be relevant and whether it helps or hurts their case. This is referred to in England as “General Disclosure” and is fairly broad. 	<ul style="list-style-type: none"> • Pretrial discovery is broadly allowed in multiple forms to unearth “relevant evidence” on the case. <i>See</i> FRCP 26-37; FRE 401. 	<ul style="list-style-type: none"> • Effort to synthesize and harmonize civil law and common law concepts. • “These [Rules] are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions.” IBA Rules, Preamble.

Disclosure/Discovery:

Documents held by adversary party

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Civil law courts seldom order parties to produce materials which they had not voluntarily proffered as evidence. Instead, parties typically engage in “disclosure.” The court directs each party to disclose materials that support its case or, in some instances, the adversary's case. 	<ul style="list-style-type: none"> • Permissible document disclosure more expansive than civil law, and slightly less broad than U.S. “Fishing expeditions” are not allowed. • England: A party must disclose documents upon which it intends to rely and any other document which adversely affects its own case or which affects or supports any other party's case. 	<ul style="list-style-type: none"> • Broad concept of discovery that encompasses a wide swath of documentary evidence. • Parties can demand documents from opposing party if the evidence is “reasonably calculated to lead to the discovery of admissible evidence.” FRCP 26(b)(1). • If party does not request a helpful document for their case, they might not get it in discovery process. 	<ul style="list-style-type: none"> • Strikes a middle ground between civil and common law. • Vehicles for obtaining information include: voluntary identification and production of documents on which each party will rely and Requests to Produce.
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Disclosure/Discovery:

Documents held by adversary party (cont'd)

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Germany: Parties not required to disclose documents to the other party; instead a party must only produce to the court those documents that will support its case. • France: Parties generally only produce the documents that support their respective cases. 	<ul style="list-style-type: none"> • In Australia, documents required to be disclosed are those that support either party's case or that adversely affect either party's case that are within the disclosing party's possession, custody or control. Typically, parties are directed to disclose documents by these specified categories as opposed to more "general discovery." 	<ul style="list-style-type: none"> • Broad discovery is partially due to sweeping definitions of key terms. • The Federal Rules of Evidence broadly define "relevant evidence." <i>See</i> FRE 401. • The concept of a "document" is also broadly defined in state and federal courts. 	<ul style="list-style-type: none"> • Parties may submit "Request to Produce" to arbitrator, where party may request specific documents or a narrow category of documents that are reasonably believed to exist and are in the possession of the adversary party, together with an explanation of how the documents are relevant to the case.

Disclosure/Discovery:

Documents held by adversary party (cont'd)

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Almost all of the data and documents disclosed are admitted into evidence at trial. Assumption that judges can properly evaluate the reliability/weight of evidence. 	<ul style="list-style-type: none"> • In Canada, pretrial discovery more restricted than in U.S. and is controlled by provincial codes. In Ontario, for example, parties will prepare and exchange an Affidavit of Documents, which lists and encloses all the non-privileged documents “relating to any matter in issue” within that party’s possession, custody or control. 	<ul style="list-style-type: none"> • Due to juries' perceived inability to weigh evidence fairly, the U.S. system has elaborate exclusionary rules that regulate the admissibility of certain kinds of evidence. Therefore, while many documents may be discoverable, only a select few will be presented at trial. 	<ul style="list-style-type: none"> • The Arbitral Tribunal may also, on its own initiative, request any party produce documents. • Parties may request the Arbitral Tribunal itself take whatever steps necessary to legally obtain documents from non-parties or give the requesting party leave to take whatever steps necessary to legally obtain documents.

Disclosure/Discovery: Form of Pre-trial Disclosures

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Pre-trial disclosure very limited. 	<ul style="list-style-type: none"> • Common law jurisdictions provide for some forms of pre-trial disclosures, but they are not as broad in number or scope as U.S.-style discovery. • In England, there are no depositions, but there are lengthy witness statements filed and documentary discovery is limited to a party's documents that either supports or contradicts its case. Also allows for “requests for further information” -- like U.S. interrogatories. 	<ul style="list-style-type: none"> • Provides for broad range of pre-trial discovery techniques: oral depositions, written depositions, interrogatories, requests for admission, requests for production, etc. <i>See</i> FRCP 27-33. 	<ul style="list-style-type: none"> • Do not provide for depositions, interrogatories, or requests for admission. • <i>See</i> notes on vehicles for obtaining information, above.

Disclosure/Discovery:

Form of Pre-trial Disclosures (cont'd)

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
	<ul style="list-style-type: none"> • In Australia, parties must request leave of court to file and serve discovery. If granted, requesting party must provide a list of documents it seeks to have disclosed. Documents must only be produced if they are “necessary” and in the other party’s possession or control; depositions not utilized outside specialized areas; interrogatories rarely administered. 	<ul style="list-style-type: none"> • Very little restriction on how broad the wording of discovery may be or what information it seeks (although there are limits on number of depositions, interrogatories, etc). <i>See FRCP 26 - 37.</i> 	

Disclosure/Discovery: Form of Pre-trial Disclosures (cont'd)

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
	<ul style="list-style-type: none"> • Canadian practice allows for “examinations for discovery” which are similar to depositions in the U.S., however, are more limited in scope. Rules for documentary production are codified by each province’s rules. In general, document production allowed when the documents are relevant to a matter in issue and are in the producing party’s possession, custody or control. In some cases, interrogatories can take the place of examinations for discovery. 		

Disclosure/Discovery: Privilege

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Attorney-client privilege exists as a construct of the criminal laws and ethics rules to protect “professional secrets.” Clients may not waive privilege because keeping these “secrets” is a matter of public order. As such, the privilege does not attach to documents but to a professional status and obligation. 	<ul style="list-style-type: none"> • England utilizes "legal advice privilege," which can be narrower than attorney client privilege in the US because “client” is tightly defined. English law also recognizes "litigation privilege" which can be broader than the work-product protection in the US because it can cover documents produced by a broad array of third parties. 	<ul style="list-style-type: none"> • FRCP 26(b)(5) as well as the common law doctrines of the attorney client privilege and work product doctrine shield certain documents falling within their protection from production. 	<ul style="list-style-type: none"> • IBA Rule 9 sets forth grounds on which an adversary may object to the introduction of a document or other evidence. This includes the consideration of “legal impediment or privilege under any mandatory legal or ethical rules determined by the Arbitral Tribunal to be applicable.”

Disclosure/Discovery: Privilege (cont'd)

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
	<ul style="list-style-type: none"> • Canada recognizes solicitor-client and litigation privileges. Solicitor-client privilege shares same basic definition as US attorney-client privilege, but also protect the parties' working papers. It therefore often overlaps with the litigation privilege, which creates a "zone of privacy" over certain documents. • Australia recognizes the "client legal privilege" as a fundamental right. It protects legal advice given by lawyer to client (advice privilege) and communications pertaining to actual or contemplated litigation (litigation privilege). 	<ul style="list-style-type: none"> • Attorney-client privilege protects confidential communications between an attorney and his/her client that are made for the purpose of obtaining or giving legal advice. The privilege protects only the communication, not the underlying facts. The work product doctrine protects documents and tangible things prepared in anticipation of litigation by an attorney or an attorney's agent. • Subject to certain exceptions (<i>i.e.</i>, crime-fraud exception). 	

Witness Testimony:

Fact witnesses

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Judge reviews documents before hearing / trial, including possible witness statements. • If live witnesses do appear, judges question witnesses directly, with lawyers' role limited to suggesting questions judges should ask. 	<ul style="list-style-type: none"> • In England and Australia, live direct testimony of witnesses is unusual. Instead, courts use witness statements or sworn affidavits. Direct examination of witnesses is often brief or nonexistent, and the main focus of hearings is on cross-examination. • Canada is similar to US: Lawyers elicit oral testimony from witness at trial during "examination in chief;" followed by cross. 	<ul style="list-style-type: none"> • Live direct testimony of fact witnesses is typical procedure. • Constitution's Confrontation Clause provides criminal defendants the right to "be confronted with the witnesses against him." • FRCP 43 provides for the taking of testimony in open court. 	<ul style="list-style-type: none"> • In general, any witness who submitted a witness statement should appear for live testimony, unless parties agree otherwise or Tribunal orders otherwise. • The Arbitral Tribunal may call or question witnesses on its own.

Witness Testimony: Fact witnesses (cont'd)

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Does not use cross-examination techniques. • Little weight given to witness testimony -- believes the best evidence comes from documents; witnesses with any hint of bias viewed with skepticism. 	<ul style="list-style-type: none"> • Hearsay is now admissible in England and objections to hearsay only go to the weight that should be accorded the evidence; Australia similar to U.S. -- hearsay excluded unless an exception enumerated in code applies; under Canadian precedent, hearsay is excluded unless reliable and necessary. 	<ul style="list-style-type: none"> • Cross-examination techniques common. • Federal Rules of Evidence Art. VI sets restrictions on fact witness testimony (relevance, hearsay, competency, etc). For example, hearsay is generally inadmissible, but the Rules of Evidence carve out dozens of exceptions to this general rule. 	<ul style="list-style-type: none"> • Allows for cross-examination (although parties should take into account the arbitrators' ease and familiarity with this litigation tactic). • No specific rule against hearsay -- Arbitral Tribunal shall determine the admissibility, relevance and weight of all evidence. (IBA Rule 9).

Witness Testimony:

Expert witnesses

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Tribunal appoints its own expert witness(es), who conduct independent inquiry (sometimes by consulting with each party's own experts); the tribunal's expert then prepares a report to the tribunal with his/her findings, which each party may challenge. 	<ul style="list-style-type: none"> • In England and Australia, the expert witness's duty is to the court, not the party retaining him or her. In both England and Australia, the emphasis has recently turned to witness conferencing, where the expert witnesses meet and try to reach agreement, and there has been less tolerance for conflicting expert evidence. 	<ul style="list-style-type: none"> • Parties retain their own experts. • Parties must disclose identity and key information on their expert witness early in the litigation (FRCP 26(a)). Each expert witness prepares a report stating his/her expert opinion and the reasons therefore (FRCP 26(a)). 	<ul style="list-style-type: none"> • Allows arbitrators flexibility of hearing each sides' expert, but may also appoint their own. • Where arbitrators appoint their own expert, they commonly allow parties an opportunity to question him after her has submitted report.

Witness Testimony: Expert witnesses (cont'd)

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
	<ul style="list-style-type: none"> • Canadian evidence rules stress that expert witness has overriding duty to assist the Court impartially, which takes precedence over any duty to a party, including the person retaining the expert witness. • Canadian courts tend to adhere to the standards for expert testimony enunciated in American courts (including the <i>Daubert</i> and <i>Kumho Tire</i> decisions). 	<ul style="list-style-type: none"> • Standard for expert testimony: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, [an expert witness] may testify thereto. FRE 702; <i>see also Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>, 509 U.S. 579 (1992) and <i>Kumho Tire Co. v. Carmichael</i>, 131 F.3d 1433 (1999). 	<ul style="list-style-type: none"> • Allows rebuttal experts to take issue with findings of tribunal's expert. • Growing trend of "expert summit" where experts agree on all or many points.

Presentation of Legal Argument

CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none"> • Oral argument / hearing is when lawyers make their key points, with citations to relevant authority. • Oral argument scrupulously follows written outline. 	<ul style="list-style-type: none"> • In England, lawyers prepare skeleton arguments -- outlines of the oral argument counsel will make at the hearing, along with relevant case citations -- and will provide these papers to opposing counsel and the judge. Lawyers will rely on these papers but the chief presentation of their case is at a long and in-depth hearing before the judge. 	<ul style="list-style-type: none"> • Written pre-hearing submissions (briefs) often dispose of legal issues without oral argument. Focus in US is on written advocacy, not oral argument. • Frequent use of summary judgment motions -- parties include detailed averments of the facts and law of the case in briefs and typically enter a dossier of evidence. 	<ul style="list-style-type: none"> • Tribunal holds an Evidentiary Hearing where parties will present live witness testimony. • Both parties and the tribunal may question witnesses.

Presentation of Legal Argument

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CIVIL LAW	COMMON LAW	U.S.	IBA RULES
<ul style="list-style-type: none">• Commentaries on code provisions by academics most crucial and convincing authority.• Judge(s) determine and apply the correct rule of law -- therefore duty is on judges to marshal all facts and legal arguments.	<ul style="list-style-type: none">• In Australia's Federal and State Courts, parties must submit detailed written submissions prior to a hearing. The Court may dispose of meritless cases without oral argument, but oral advocacy is still a strong part of the Australian legal system -- it's an opportunity to test theories and focus the court's attention on the most important aspects of the case.	<ul style="list-style-type: none">• Court decisions with similar fact patterns considered crucial and convincing.• It is the duty of counsel to allege and prove facts, and make all necessary legal arguments.	<ul style="list-style-type: none">• Arbitral Tribunal shall determine the admissibility, relevance and weight of all evidence. (IBA Rule 9).

Presentation of Legal Argument

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CIVIL LAW	COMMON LAW	U.S.	IBA RULES
	<ul style="list-style-type: none">• In Canada, legal argument is controlled by rules of each province. Some Canadian provinces (i.e., Ontario) allow for written motions and “factums,” which are concise written arguments stating the facts and law relied on by the party and are served on the court prior to hearings. Other provinces (i.e., Western Australia) provide that a short outline of submissions be submitted to the court prior to a hearing.		