

# Legitimacy and Validity: Diverse Expectations in International Arbitration

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# The Tribunal Approach - Common themes?

Lindy Patterson QC

# The Tribunal – Some Common Themes

- The diverse tribunal- benefits and challenges
- Common law : civil law- divide or unite?
- The Tribunal dynamics
- Approach to procedure
- The common desire for expedition?

# Common /Civil law divergence

- Several types of civil law such as Nordic; Germanic; Napoleonic
- Different approach to evidence gathering - inquisitorial as opposed to adversarial
- Some civil law systems will search out the party's case; others will deal only with what is presented to it
- The presence of the “good faith” obligation in civil law jurisdictions

It is against this background that civil and common law tribunal members come to the table

# The Diverse Tribunal

- Cultural, gender, hindsight and confirmation biases
- The culture of each tribunal member
- The background of lawyer or other professional?
- The concept of party nominee- “adjudicator, advocate or something in between?”
- Achieving or portraying a tribunal culture- contrast standing dispute boards with arbitration tribunals

# The Party Nominee- an Example?

Symbion Power LLC v Venco Intiaz Construction Co [2017] EWHC 348 (TCC)

Application under section 68(2)(d) of Arbitration Act refused- serious irregularity

Symbion's party appointed Arbitrator( A) had sent an email to Symbion's counsel

to say that both party-appointed arbitrators were upset by the conduct of the chairman; it expressed highly negative views about him; and Arbitrator A said that he was meeting the chairman and would encourage him to resign.

# The First Tribunal Exchanges

- Can set the scene
- Those who wish to underline their credentials
- Establish a position/role first off
- Those who hold back
- Who first passes comment on merits of parties' arguments?
- Allegiances- contractor/employer? Owner /charterer?

# The Roles the Tribunal Member Adopts

- Conciliator
- Proceduralist
- Technical expert
- The voice of reason?

Allocation/adoption of roles amongst the tribunal?

Relevance of common law /civil law background, if any?

Adapting style to meet the differing cultures of the parties



# Minimum Procedural Requirements

Regulation of differing approaches through Institutional Rules;

“soft” rules such as IBA Guidelines

“ a good balance between civil and common law systems”

Entitlement of parties to

- Access to information and evidence-
- Put their case
- Equal treatment

what about imbalance of resource or representation;  
differing approaches of party reps?

# Efficient Conduct of Arbitration

## Expedition

ICC rules on expedited procedure

Effective 1 March 2017

Opt out, not opt in

No requirement for urgency

Based on amount in dispute

Impact of counterclaim value

Derogation from party autonomy? - Civil lawyers more concerned?

# The Tribunal Approach – Common Themes?

More that unites than divides a diverse tribunal provided that

- there is respect/trust amongst tribunal members
- they adopt the “minimum” procedural rules

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