PROCEDURAL MODELS IN LITIGATION AND ARBITRATION

Modelos de procedimento em contencioso e arbitragem

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Área do Direito: Processual; Arbitragem
Resumo: O presente artigo examina três modelos de procedimento, a saber, o italiano-canônico, o trial model e o The Main Hearing e busca analisar a adequação desses modelos ao procedimento arbitral.

Palavras-chave: Processo civil - Procedimento - Modelos - Contencioso - Arbitragem.
Abstract: This article examines three models of procedure, the Italian-canonical, the model trial and The Main Hearing and seeks to analyze the Suitability of these Models for Arbitration.

Keywords: Civil process - Procedure - Models - Litigation - Arbitration.
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I. Prologue

If academic journals are a proxy for what is fashionable in academia, comparative law has been up to date for half a century now – and it is still surging. As can often be seen in legal history, private law was the forerunner of this development. Human beings are curious by nature. In free societies and free economies private individuals have incentives to seek adequate solutions for their legal relationships. Once such legal relationships go across a boarder, the laws of more than one State come into play, and it is only natural that individuals become curious and eager to understand the commonalities and differences of the respective laws. Not too long after the rise of the modern nation State, legal academia developed the field of comparative law and started the publication of specialized academic journals. The Société de Législation Comparée issued its first Bulletin as early as 1869.[1] Nine years later, in 1878, the first volume of the Zeitschrift für Vergleichende Rechtswissenschaft appeared.[2] The first volume of the Rabel Journal was published in 1927,[3] the first volume of the Revue internationale de droit comparé in 1949,[4] the first volume of the American Journal of Comparative Law in 1952,[5] and the first volume of the Zeitschrift für Rechtsvergleichung in 1960.[6] Other journals followed, and today the number of Journals which are dedicated to comparative law is huge. At the same time, comparative (private) law has arrived in the middle of legal academia. Courses on comparative law have become a part of the regular – although mostly not mandatory – curriculum, treatises on comparative law can be found in any law library of the world, and chairs and professorships for comparative law have been created.[7]

In comparison to comparative private law, comparative civil procedure is still in its infancy. But taking journals as a proxy, it could have a bright future. Actually, journals focused on civil procedure have since long published articles on foreign and comparative law. As an example, the Revista de processo frequently publishes contributions under the headline “direito estrangeiro e comparado”. The tradition of specialized journals started, it seems, two decades ago: In 1996 Dieter Leipold and Rolf Stürner, in collaboration with the Wissenschaftliche Vereinigung für Internationales Verfahrensrecht e.V., edited the first volume of the Zeitschrift für Zivilprozess International.[8] In 2011, the International Association of Comparative Law issued the first volume of its International Journal of Procedural Law.[9] It is encouraging that Brazil is now following this trend with the new Revista de Processo Comparado!

The author considers it as a great honor and privilege to be among the members of the board of the Revista de Processo Comparado and wishes the journal success and good luck. For his inaugural contribution to this Revista, he has chosen a topic which is comparative in even two dimensions: First, it is based on a comparative insight in the law of civil procedure in the different legal systems, and second, it compares classical civil procedure – litigation in public courts – with private dispute resolution by an authoritative decision – arbitration.[10] It is the author’s hope that readers

from both worlds find this topic interesting, remain interested in issues of comparative civil procedure and by their interest support the young journal.

II. The Topic

1. Three Models, Two Forms of Dispute Resolution and one Common Denominator

Comparative civil procedure has for a long time focused on the difference between civil law and common law procedure.[11] Until the end of the last century, this focus may indeed have reflected the most obvious divide, a divide which seemed to fit for all objects of comparison, be they individual procedural institutions like the availability of anti-suit injunctions and the recognition of a doctrine of *forum non conveniens* or more general questions like the role of the judge or the structure of the proceedings.

a) Litigation

However, at least since the last two decades, this traditional divide has no longer been as convincing as it used to be,[12] at least insofar as the structure of the proceedings in public courts is concerned. As my academic teacher Rolf Stürner has pointed out, reforms in Germany, England and Spain as well as the Codigo Civil Model para Iberoamerica brought about a new procedural model. The identification of this new model in turn allows a more precise description of the procedural models traditionally associated with the civil law and the common law. Thus we can now distinguish three models: the Italian-Canonical Model, the trial model and the main hearing model.[13]

b) Arbitration

These three models have been identified with respect to the proceedings in public courts, i.e., litigation. Yet nowadays, they also serve to analyze developments in the field of arbitration. At first glance, this may seem surprising. Due to its lack of a close relationship to one national law, arbitration seems to hover above the thorny grounds of litigation in public courts. Arbitration is different from litigation in that the arbitrator or arbitrators are typically chosen by the parties, the proceedings are confidential and the scope of review is very limited. At second glance, though, it becomes clear that there is no reason to be surprised. Like litigation, arbitration aims at an authoritative and final decision of a dispute by a third party neutral – the arbitrator or arbitral tribunal replaces the judge or the court. Despite all differences, litigation and arbitration face the identical procedural question: In which way can the facts be determined and the law applied correctly without excessive delay and cost? Each of the three models offers a different answer to this question.

2. The Clash of the Models

Grouping procedural characteristics into models would remain a mere academic exercise, interesting only to those practitioners who are involved in forms of dispute resolution outside their usual environment, if the models could not clash with each other within one and the same proceedings. But a clash of the models may occur.

a) Litigation

As far as litigation is concerned, a direct clash of different procedural models, i.e., a clash within one and the same proceedings, is relatively rare and has only modest effects.

Once started, the proceedings are normally bound to the forum and its procedural model (*perpetuatio fori*).[14] Cross-border referrals of the whole dispute which could imply a referral to a court that follows another procedural model do not occur.[15] The doctrine of *forum non conveniens*, parallel proceedings and the institution of anti-suit injunctions can be seen as moderations. If a court decides that it is not a convenient forum, proceedings had already started in this court. The proceedings in this court and the proceedings in another court which assumes jurisdiction may follow another procedural model. However, the potential clash of procedural models is rather a sequence. Furthermore, in case of *forum non conveniens*, the stay or dismissal normally take place at an early stage in the proceedings. Therefore, this cannot really be considered a clash of models. Furthermore, within the European Union, a court that would have jurisdiction according to the relevant European Regulations[16] may not decline its jurisdiction on grounds of *forum non conveniens*.[17] In case of parallel proceedings, the parties may be obliged to litigate over the same matter in courts of different procedural models. However, parallel proceedings are a clash of two proceedings and not a clash of two models within one proceeding. Moreover, in many countries parallel proceedings are normally impossible according to the rules of *lis alibi pendens*.[18] Anti-suit injunctions may force the parties to continue their dispute in another court,[19] possibly a court of another model. Anti-suit injunctions are relatively rare, though, and excluded within the European Union.[20]

A public court is composed of judges from the country of its seat.[21] The judges all enjoyed the same legal education and professional training[22] and share similar experiences with the procedural model applied in their country's courts. Therefore, a clash of models cannot occur within the court.

The parties are typically represented by counsel admitted to the bar in the country of the court.[23] This guarantees that counsel of both sides received their legal education and professional training in that very country and that counsel are experienced in litigating under the procedural model applied there.[24]

A clash of procedural models occurs in litigation only if one party has to litigate abroad, before a court which follows a different model than the one the party or her local counsel is familiar with.

b) Arbitration

As regards arbitration, things may well be different: In arbitration, a direct confrontation of the procedural models may occur, and the growth of international arbitration during the last decades makes such direct confrontation a more and more frequent phenomenon.

The procedural model chosen by the arbitrators and the parties for their arbitral proceedings may be different from the procedural model which is followed by the public court competent for certain functions of arbitration assistance and supervision.[25] In this court, the parties can be confronted with another procedural model. However, the issues to be determined by the public courts are of limited scope and do not overlap with the arbitral proceedings, but are spared from them.

More importantly, arbitral tribunals are often composed of arbitrators from different countries. A single arbitrator often has or even must have a nationality different from the nationality of the parties.[26] Moreover, parties are often represented by counsel from their respective home country as requirements on the admission of counsel to one national bar do not apply in arbitration.[27]

Thus, it is very frequent if not typical that arbitrators and counsel do not have received their legal education and professional training in countries which follow the same procedural model and do not share a common experience. This may result in an outright clash of models within one and the same proceedings.[28]

3. The Aim of this Article

For quite some time, confrontations with different legal – including procedural – cultures occurred only seldom, and lawyers and judges – sometimes even parties – found some intellectual delight in them. Yet in the last decades of the 20th century, international civil litigation became more aggressive, and the clash of legal cultures created a considerable amount of irritation, frustration and disappointment. This phenomenon was described, insofar as Europe and the U.S. were concerned, as a “judicial conflict” (“Justizkonflikt”).[29] Its reasons were manifold, but the heightened competition between European and the U.S. industries and, last but not least, the growth of international law firms who had discovered international disputes as a good source of income, seem to have contributed to the situation. In the following years, similar tensions emerged between litigants and courts in other parts of the world.

While most scholars are well aware of these facts, a more recent and, to some extent, parallel development in the field of arbitration has not yet received much attention: Over the last years, big international law firms have become aware that what is true for international litigation could also be true for international arbitration. Arbitration which used to be the playground for a relatively closed shop of boutique firms and individuals whose main jobs were in academia or the judiciary is more and more taken over by the litigation and arbitration departments of the big firms.[30] Many of the lawyers of these firms are active in the fields of litigation and arbitration at the same time. The more financial pressure they feel, the less they are able to switch from a “litigation mode” to an “arbitration mode”.[31] This means that techniques used in litigation become more and more widespread in arbitration as well. Before this background, it comes as no surprise that we are now seeing the signs of a new conflict, this time concerning arbitration.

It is the aim of this article to sharpen the reader’s understanding of the three models, to start a debate about their suitability for arbitration and to draw the stakeholders’ attention to the ALI/Unidroit Principles of Transnational Civil Procedure. This, it is hoped, can help to avoid or overcome problems that can result from a clash of the models – in litigation as well as in arbitration.

III. The Three Models

It is the contents of any kind of proceedings in the legal sphere to determine the facts and apply the law if the parties do not reach an agreement. The big question is how this can be done most effectively, i.e., with a high degree of accuracy, in a short time and at adequate cost – all this without disregarding fundamental procedural rights of the parties which are the consequence of the parties being subjects and not mere objects of the proceedings. Legal systems have been struggling with this question for centuries. Procedural law is, like other fields of the law, a history of reforms. Procedural institutions have been invented or imported in one system, abolished or ignored in another. A comprehensive overview is impossible. What seems to be possible, though, is a grouping of the various solutions in types or models which highlight the characteristic features. Compared with traditional approaches in comparative law, this approach has the advantage of putting a particular emphasis on the interdependencies among the various aspects of proceedings. As an example, the role of the parties and the judge in one phase of the proceedings influences the contents of other phases of the proceedings. The more general approach of the models goes at the expense of detail, but offers quick and valuable information for those involved in a clash of models. For this reason, the present part provides a brief overview on this approach.

1. The Italian-Canonical Model

The Italian-Canonical model is the model which has the longest tradition. It has its roots in procedural ideas developed from the times of the Enlightenment on. Its basic idea is that proceedings need a rational structure, that they should progress step by step, and that the respective roles of the persons involved depend on the step of the proceedings at issue. This model is the basis of most civil procedural laws of the Romance legal family, notably France, Italy and a number of countries in South America.[32]

a) Introductory Phase

Under the Italian-Canonical model, proceedings start with a written complaint which contains a precisely defined claim and a presentation of the facts that justify this claim. The complaint is served to the defendant who must answer it in a similarly precise way. This means that the defendant must either accept or rebut the claim, with the rebuttal being based either on a denial of the facts or legal conclusions presented by the plaintiff or on additional facts that exclude the plaintiff's alleged right. To sum up, both parties have to make precise claims and have to corroborate their claims with facts – scholars of comparative civil procedure speak of "fact pleading".[33]

b) Interim Phase

This introductory phase is followed by a preparatory, "interim" phase under the direction of a single judge. In this phase, the judge seeks to clarify the parties' positions and to identify the factual issues that need to be proven. For this purpose, the judge can fix several preparatory hearings and may, to a limited degree, administer evidence. The role of this judge is a refinement of the "examinator" who, in the scholastic proceedings of the late Middle Ages, had to determine the facts and write a report which would then be submitted or read to the judges. The "examinator" later became the "instructing judge" and in the current French Code of Civil Procedure is called the "juge de la mise en état".[34]

c) Final Phase

The final phase is the hearing before the full court. It starts with a presentation of the case as it stands by the judge who directed the interim phase.[35] The court then administers the necessary evidence and hears the pleadings of the parties or their counsel. At the end of the hearing or on a later date, the court takes, after deliberation, the decision. Traditionally, the judge who directed the preparatory phase was not a member of the court who decided the case.[36] Today, this is different,[37] and if the interim and the final phase take place before one and the same single judge, this characteristic can no longer be observed. What has remained, however, is the possibility of a sequence of preparatory hearings.[38]

2. The Trial Model

The trial model has its origins in the common law proceedings before a jury. When common law and equity were unified, the new procedural order was composed of a relatively flexible pre-trial phase inspired by equity proceedings and a traditional trial phase common law style. This in turn had two consequences. First, it altered the purpose of the final phase before the jury, which became a second fact finding phase whose only purpose is to inform the court.[39] Second, it allowed to reduce the requirements for the complaint, as a first fact finding phase was to take place before trial which would serve to inform the parties. These consequences have been developed furthest by the U.S. Federal Rules of Civil Procedure of 1938 (FRCP). In the following, in most common law countries, jury trial has disappeared. A notable exception is the U.S. where jury trial in suits at common law is guaranteed by the Constitution.[40] Although even in the U.S. only few cases are actually tried by a jury as most cases settle,[41] the idea of jury trial still exerts a decisive influence on most procedural laws in common law countries and particularly on civil procedure in the U.S.[42]

a) Introductory Phase

The trial model requires the plaintiff to put the defendant on notice that she will face a lawsuit based on a certain factual event. However, a broad and general description of the event and the kind of remedy is sufficient; the plaintiff need not announce her claim precisely and need not plead all the specific facts which corroborate the claim. In the words of Rule 8(a)(2) FRCP suffices "a short and plain statement of the claim showing that the pleader is entitled to relief". Requirements for the defense are similarly reduced. The defendant only must "state in short and plain terms its defenses", Rule 8(b)(1) (A) FRCP. Scholars call this form of pleading "notice pleading".[43]

b) Interim Phase

As already mentioned, the interim phase is modeled after the flexible fact finding phase in the former equity proceedings. However, as the trial contains another fact finding phase, the purpose of this pre-trial phase is limited to informing the parties.[44] It goes hand in hand with this purpose that the pretrial phase is completely dominated by the parties.[45] The court only intervenes if called upon by the parties to promote their fact finding. In particular, the court can order a party to cooperate or impose sanctions for non-cooperation.[46] The existence of the pre-trial phase explains why the introductory phase only requires notice pleading: It would be curious to demand from the parties to plead specific facts if after the introductory phase a complete phase of the proceedings is destined to ensure full information.

At the same time, the low pleading standard allows and at the same time demands for a very broad scope of the parties' discovery.[47] In commercial disputes, this results in requests of production of numerous documents.

c) Final Phase

The final phase of this model is the trial, a concentrated "day in court" in which the parties present their cases and evidence before the court. It is only at that very late moment that the judges or jurors who will decide the case are for the first time informed about the facts.[48] This can easily be explained with the special circumstances of a trial by jury: The time for which the jurors have to sit in court must be as short as possible; it is simply impossible to have a jury follow the development of the case from the introductory phase over the interim phase until its final decision, and to have all incidental questions decided by a jury. Of course, only few cases are actually decided by a jury. However, in cases which could possibly end before a jury, it is obvious that the proceedings must be structured accordingly, as one does not know beforehand whether the case will be settled or otherwise disposed off before trial. Interestingly, though, even in cases which as a matter of law cannot be decided by a jury, the structure of the proceedings is more or less the same.[49] It seems that the legal community in the countries which follow this model is so convinced of the structure of proceedings with a jury that it applies the same structure in all cases.

3. The Main Hearing Model

The main hearing model is the youngest of the three models. It combines elements of the two other models but has also some original features. Its development is a consequence of practical problems with either of the two other models, mostly an extremely long duration of proceedings and excessive costs. The first country to switch to this model was Germany with the reform of 1976,[50] a reform inspired by a speech delivered by Fritz Baur[51] and prepared by a project at the District Court of Stuttgart under the direction of Rolf Bender.[52] The Código Procesal Modelo para Iberoamérica, which was introduced in Uruguay in 1989 as Código General del Proceso,[53] adopted a similar approach. Around the turn of the millennium followed England with the Civil Procedure Rules of 1998,[54] a reform prepared by the reports of Lord Woolf,[55] and Spain with the new Ley de Enjuiciamiento Civil of 2000.[56] The new Swiss Code of Civil Procedure[57] allows the courts to proceed either under the Italian-Canonical model or the main hearing model, but seems to favor the latter.[58] The main hearing model shares with the Italian-Canonical model fact pleading and the participation of the judge from the very beginning on, with the trial model the idea of one single well-prepared hearing.

a) Introductory Phase

The introductory phase under the main hearing model is similar to the introductory phase under the Italian-Canonical model: Fact pleading is required from both the plaintiff as regards the factual basis of her claim[59] as well as the defendant as regards the factual basis of a denial or an exception.[60] Courts exert a relatively strict control of the complaint: If the facts alleged by the claimant do not support the claim, the complaint can be dismissed at an early stage.[61]

b) Interim Phase

The interim phase is characterized by court and party activity. The judge has a far-reaching power to clarify the facts alleged by the parties. However, as opposed to what some American observers believe,[62] this is no inquisitorial power in the sense that the judge investigates the facts on her own. On the contrary, the activity of the judge is limited by the facts alleged by the parties.[63] If a fact alleged by one party is admitted by the other party or not contested with sufficient detail, the judge must consider this fact as true.[64] The judge may decide to appoint and hear an expert, inspect a place or an object, or demand the production of documents, but in Germany she may not call a witness who has not been named or at least referred to by one of the parties.[65] The most significant role of the judge does not consist in her power to use certain means of evidence, but in her power to give hints to the parties about her preliminary view of the case and about the facts she considers relevant.[66] These hints allow for an early concentration of the dispute, and in particular a concentration of the fact finding, on those facts which are relevant for deciding the case. Obviously, such hints are impossible if the fact-finder is a jury or at least if its role is shaped accordingly.[67] At the difference to the Italian-Canonical model, the interim phase under the main hearing model is not characterized by a sequence of hearings, although this may occur if the cooperation of the parties and the judge does not work well or if things go wrong otherwise. It normally comprises not more than one preliminary hearing or no such hearing at all.[68]

c) Final Phase

The final phase consists of the "main hearing", which often is the only hearing in the instance. This main hearing is well prepared thanks to the activity of the parties and the judge during the interim phase. It starts with the plaintiff's claim, the defendant's demand for dismissal and the judge's presentation of where the case stands.[69] Then, the court administers the evidence for those facts which need to be proven because they are relevant and disputed.[70] Typically, documents have already been submitted, experts have already delivered their written opinions and inspections have already taken place or at least have been prepared by photographs so that they can take place without any further

preparation. This means that fact finding in the final phase is concentrated on very few aspects. In a typical case, fact finding in the final phase is limited to the interrogation of witnesses and experts by the court and the parties. The court and the parties then discuss the results of the evidence presented,[71] the hearing is closed[72] and the court proclaims its decision a few days or weeks later.[73]

IV. The Suitability of these Models for Arbitration

1. Old and New Commonalities of Arbitration and Litigation

Per definition, arbitration and litigation have in common that they both aim at the final and authoritative resolution of a dispute by a third party neutral. Arbitration, like litigation, presupposes a determination of facts and the application of certain rules to these facts.

Not as a matter of definition, but as a matter of fact, arbitration is nowadays much more regulated than it used to be some decades ago. Many private organizations have published sets of rules. The parties are free to agree on these rules as a mandatory framework for their arbitration.[74] But even if the parties do not agree on the mandatory character of these rules, they are used as guidelines by many arbitrators and now form a huge body of best practice rules. Much more important than these independent rules are the rules which have been developed by the arbitration institutions and apply in all arbitrations that take place under the auspices of the institution chosen by the parties.[75] Of course, in all these cases, the regulator is a private institution and not a state legislator. In addition, many of these rules are somewhat less comprehensive than the codifications of the law of civil procedure in state courts. Nevertheless, the density of these rules is impressive.

An important characteristic of arbitration is that appeals are impossible and that arbitral awards can be reviewed only to a very limited degree by public courts.[76] However, these characteristics are under pressure as well. Arbitration institutions are introducing optional appellate proceedings,[77] and the scope of review is not everywhere as limited as one might expect at first glance.[78]

All in all, the number of commonalities between arbitration and litigation is striking and growing.[79] This suggests that the procedural models discussed in the context of litigation are – at least theoretically – also options for arbitration. Before this background, it seems interesting to ask how well these three models fit with the characteristics of arbitration.

2. The Form of Arbitration to Be Used in the Analysis

An analysis of the three models must take into account that there exist various forms of arbitration, ranging from independent ad hoc arbitration to constant institutional arbitration.

In an independent ad hoc arbitration, the parties – or, if one party does not cooperate, the court – choose one or more arbitrators who are, in their role as an arbitrator, independent professionals. They may have their own staff, but there is no institutionalized infrastructure around the arbitration. Typically, the arbitrators also have another profession which is their main or at least regular source of income.

In a standard institutional arbitration, the arbitration institution provides an infrastructure to manage the cases, prescribes the respect of certain procedural rules, and perceives a fee for its services. The arbitrators, however, are still independent arbitrators and not even close to employees of the arbitration institution.

In constant institutional arbitration as it exists mainly in the U.S. where complete areas of the law have become the exclusive domain of arbitration,[80] the arbitration institution is developing more and more into a complete private courthouse: The possibility to select an arbitrator from a list may still exist, but as a matter of fact, these arbitrators rather resemble employees than independent personalities.

For the purposes of the following analysis, we shall start from the traditional idea of ad hoc or institutional arbitration. As far as the findings also hold for the third of the forms described, constant institutional arbitration, this shall be expressly indicated.

3. The Three Models Analyzed

How well then do the three models fit with arbitration? This can only be answered by confronting the characteristics of each model with the characteristics of arbitration.

a) The Italian-Canonical Model

The introductory phase of the Italian-Canonical model poses no problem for arbitration at all. To the contrary, fact pleading appears to be preferable to make a good choice of the arbitrator, to facilitate the verification of whether the dispute falls under the arbitration clause or agreement and to control cost and duration.

Two main difficulties might appear as regards the interim phase. First, the traditional form of the model with an instructing judge who at the beginning of the final phase presents the results of her activity to the court is certainly not what the parties want if they appoint more then one arbitrator: In this case, the parties' intention is that "their" arbitrator be involved in all phases of the proceedings. Of course, the president of the arbitral tribunal always has a particular

role. However, this role concerns mostly technical questions of the proceedings, like the coordination of the panel, and does not mean that complete phases of the proceedings take place before the president alone. Second, the sequence of hearings which is typical for the interim phase under the Italian-Canonical model does not lend itself to arbitration: It would be very cumbersome, time consuming and costly if the parties and the arbitrator – or even the panel of arbitrators – had to gather together physically or virtually multiple times during the proceedings.[81] The traditional arbitrator who is not only an arbitrator but also a lawyer, judge or engineer has time constraints due to her other activities. Even the arbitrator who is involved in more than one arbitral proceedings at a time or is making a living from arbitration alone will try to avoid numerous hearings. Only in constant institutional arbitration, a sequence of hearings seems practicable – although, in the eyes of the author, not recommendable.

The final phase of the Italian-Canonical model consists of a final hearing which starts with a report of the judge who conducted the interim phase. As an interim phase before a single member of the panel of arbitrators seems not very suitable for arbitration, the presentation of the report is impractical in arbitration as well. Apart from that, the final phase before the panel is perfectly in line with arbitration.

b) The Trial Model

The trial model's introductory phase which only demands notice pleading may make it more difficult to foresee the crucial questions of the dispute, so that the parties could have more difficulty in appointing an arbitrator who has the necessary expertise. Notice pleading may also render it more difficult to verify whether a dispute is covered by an arbitration clause or agreement, and may be the reason for higher cost and duration. However, it would go too far to say that the introductory phase of the trial model does not work with arbitration.

The crucial issue with the trial model is the interim phase. Obviously, a good preparation of the final hearing before the arbitrator or the panel of arbitrators perfectly fits with arbitration, as parties and arbitrators normally want to have the dispute resolved after as few hearings as possible. However, the question is whether this preparation should be left to the parties alone without any participation of the arbitrators. A first argument against a participation of the arbitrators in the interim phase is that a participation of arbitrators, like a participation of jurors, is complicated and expensive; a second argument is that a completely adversarial, party-driven discovery could be the most efficient way to determine the truth. With regard to the first argument, it is important to stress that there are considerable differences between arbitrators and jurors: The number of arbitrators – typically no more than three[82] – is smaller than the traditional American jury which counts from six to twelve jurors,[83] and arbitrators' participation can take place in a much less formal way, i.e., by any means of communication[84] and without a hearing with a judge deciding incidental questions and instructing the fact-finder. Moreover, the weight of the first argument depends, of course, on the costs which could be saved thanks to an early participation of the arbitrators. The second argument is more difficult to discuss, as for many Americans it is a matter of belief that the adversarial system is superior to all other systems. Yet adversarial pre-trial discovery is a relatively recent development which historically is a consequence of the merger of common law jury trial with equity rules on fact finding. Fact finding by the parties according to more flexible rules during pre-trial is a corollary of the strict rules on the admissibility of evidence before the jury during trial. Arbitrators are not men and women selected at random and with no expertise. To the contrary, they have been selected directly by the parties, by the party arbitrators or exceptionally by the court, and arbitrators are professionals in the field of dispute resolution. From the author's point of view, it does not impair the determination of the truth if the arbitrators are involved in an early stage of the proceedings already. In addition, early participation of the arbitrators allows for an effective concentration of the dispute by focusing only on those facts which are relevant for the case. This, in turn, can save much time and money.

The final phase of the trial model, a concentrated trial, is well suited for arbitration.[85] However, if the arbitrators already participated in the interim phase, there would be no need to repeat all the taking of evidence in the final phase. This again could save a lot of time and money.

c) The Main Hearing Model

The main hearing model's introductory phase demands fact pleading from the parties. As shown above for the Italian-Canonical model, this fits perfectly with arbitration.

At first sight, the interim phase of the main hearing model in which the judge and the parties actively prepare the main hearing faces the same doubts as the interim phase of the Italian-Canonical model. However, at the difference to the latter, the first is not characterized by a sequence of hearings advancing the case step by step, but by a strict control of relevancy, the communication of preliminary views and hints to the parties, and simultaneous orders and measures to prepare the taking of evidence on those facts which need to be proven. The tasks which the interim phase of the main hearing model confers to the judge can be assumed by arbitrators with considerably less difficulty than a sequence of hearings. At the same time, early participation of the arbitrators can help to avoid a waste of resources by an overly broad discovery and a doubling of the taking of evidence in pre-trial and trial. For this reason, the interim phase of the main hearing model seems to fit perfectly with arbitration.

If our analysis of the interim phase is correct, the final phase of the main hearing model also is perfectly suitable for arbitration: a well prepared main hearing, the administration of evidence insofar as relevant and necessary and the final pleadings.

4. Result of the Analysis

All in all, it seems that the main hearing model is the model which is the most suitable for arbitration. This result is corroborated by a number of rules from arbitration institutions which favor a procedural structure that comes close to the structure of the main hearing model. Thus, art. 4 and 5 of the 2012 ICC Rules of Arbitration, art. 7(3) of the 2013 Vienna Rules, art. 3(3), 18(2) of the 2012 Swiss Rules and art. 16(2) of the 2013 HKIAC Rules demand precise claims and a description of the basis of the claims. Although the provisions are not too strict, they favor fact pleading over mere notice pleading.[86] § 6.2 of the DIS-Arbitration Rules 1998 is even more clear in requiring fact pleading. Moreover, art. 23(1) of the ICC Rules requires the arbitral tribunal to summarize the parties' respective claims and to provide a list of issues to be determined in terms of reference which must be drawn up "as soon as" the arbitral tribunal has received the file.[87] By this provision, the arbitrators are obliged to familiarize themselves with the case at a very early point in the proceedings. This would be a waste of resources if the arbitrators did not participate any more in the proceedings before the final hearing. And indeed, art. 24 of the ICC Rules provides for an early case management conference,[88] and art. 22(2) of the ICC Rules gives the arbitral tribunal the power to adopt procedural measures. § 24.2 of the DIS Rules stipulates that the arbitral tribunal shall make the parties explain themselves in a comprehensive manner and file the proper applications. Finally, art. 29(1) of the Vienna Rules allows the arbitral tribunal to administer evidence *ex officio*, and art. 24(2)-(6) of the ICC Rules and § 27.1 of the DIS Rules clearly make the determination of the facts a matter of the arbitral tribunal.[89]

V. The Reality

1. Variety of Procedural Models

In the real world, there has always been a great variety of procedural models in arbitration. Some arbitral proceedings are conducted according to the Italian-Canonical model, although without a personal separation between an "instructing arbitrator" and the arbitral panel and a relatively small number of intermediary hearings. Other arbitral proceedings take place according to the trial model. Traditionally, most arbitral proceedings followed the main hearing model.

This variety is certainly due to the various backgrounds of the persons involved and maybe also to the nature of the case at issue. If all the arbitrators and counsel or a majority have the same procedural background, i.e., stem from countries which in the field of litigation follow the same procedural model, they are often willing to use the procedural model with which they are familiar in litigation also in arbitration. However, even then there has always been a tendency towards the main hearing model.

2. The "Americanization" of Arbitration

Yet in recent years, a new phenomenon can be observed: the constant rise of the trial model, often described – and frequently deplored – as the "Americanization" of arbitration.[90] What is meant by "Americanization" is indeed the use of a structure which comes close to the trial model. In the introductory phase the claimant limits herself to a rather general description of the relief sought and the facts on which the claim is based, so that the respondent cannot but answer in a rather generic way as well. The interim phase is dominated by party activity and the arbitral tribunal is only addressed to order cooperation, in particular the production of documents, by an unwilling party. In the final phase, the parties present "their" evidence U.S. style, which means that each party brings her witnesses and experts[91] which have been extensively "coached" before the interrogation and are cross-examined in front of the arbitrators.[92]

This "Americanization" of arbitration is a consequence of the above-mentioned situation that big international law firms have discovered arbitration and are determined to develop it into another important source of profit.[93] Today, most of these firms are dominated by partners from the U.S. This means that not only day to day management, but also strategic decisions are mostly taken from a U.S. perspective. That these firms are the driving forces behind the "Americanization" of arbitration can be the result of pure profit orientation, but also a defined strategy. On the one hand, if arbitration is similar to litigation U.S. style, the U.S. lawyers in these firms can double the benefit of their legal education and experience and apply the same tactics in litigation as well as in arbitration. On the other hand, "Americanization" of arbitration can, on the long run, marginalize lawyers and boutique law firms from civil law countries who until today occupy an important share of the legal services in the field of international arbitration.

Of course, if one disapproves this development, it would be unfair to blame American law firms alone. The clients are to blame as well.[94] It is them who choose to be represented by lawyers from big American law firms, and it is them who allow their lawyers a certain way of dealing with a case. However, although the arbitration community does not like to hear this, it is the lawyers who are to blame in the first place: Clients typically do not have sufficient knowledge to take such a decision consciously or even deliberately. In addition, a director or officer who chooses one of the big American firms as counsel will hardly be held liable for this choice. Choosing a boutique firm or an individual may seem to be more risky. With a growing number of lawsuits holding directors and officers liable, the tendency to resort to the "big names" which is strongly discussed as regards the selection of audit firms[95] will also become more important in the field of selecting arbitrators and counsel for arbitration. Finally, once the opponent has a lawyer who uses U.S. style litigation tactics in arbitration and the arbitrators tolerate it, a party has no choice but to hire a lawyer who will do the same.

VI. The Future

As always, it is difficult to make predictions, especially about the future.[96] If we nevertheless try a prediction, the current "Americanization" of arbitration could mean that in the near future, arbitration will become a rougher business for lawyers from countries other than the U.S. On the long run, though, it seems probable that the use of a procedural model which is not really suitable for arbitration could discredit arbitration as such.[97] Of course, arbitration would still keep some of its advantages, and first and foremost its confidentiality. However, if the trial model is fully applied in arbitration, other advantages like speed and cost control fade away, as the experience with the U.S. litigation industry and increasing concern about the duration and cost of arbitration[98] show. Moreover, the advantage of being able to choose arbitrators with particular expertise in a certain field of the industry would become less important if these arbitrations are reduced to the function of a passive jury. Under the trial model, the availability of a more thorough review is particularly important, as the fact-finder could not follow the development of the case. It is, therefore, no mere coincidence that the discussion about appeals in arbitration proceedings[99] has its origins in the U.S.

Of course, litigation in many countries is not much better. However, there is one important difference: Arbitration only takes place if parties opt in.[100] Litigation, in contrast, is available unless the parties opt out.[101] One and a half decades ago, Rolf Stürner gave a paper entitled: "Why are Europeans afraid to litigate in the United States?"[102] If the development continues and the trial model becomes predominant in arbitration, a speech with similar contents could bear the title "Why are Europeans afraid to *arbitrate*?", and it could be enlarged from Europeans to parties from all other countries, including – and this is important – parties from the U.S. Needless to say that if fear from arbitration becomes the mood among businesses, businesses would become more and more reluctant to sign a contract with an arbitration clause or an arbitration agreement.

VII. The ALI/Unidroit Principles of Transnational Civil Procedure as a Solution

Before this background, it is important to find a model that works well with arbitration and at the same time is acceptable for parties and lawyers from all over the world. Fortunately, it is not necessary to develop such a model from scratch. The Principles of Transnational Civil Procedure which have been ratified, for the U.S., by the American Law Institute, and for the rest of the world, by Unidroit, are a successful compromise between the legal traditions and their models. In the ALI/Unidroit Principles, *sedes materiae* are Principles 9, 11 and 14. Principle 9 on the structure of the proceedings distinguishes the three phases: the pleading phase which is the introductory phase, the interim phase, and the final phase. For the pleading phase, Principle 9.2 demands that the parties present their claims, defenses and other contentions and identify their principal evidence. Principle 11.3 completes this provision by requiring a presentation of the relevant facts, the contentions of law and the relief requested "in reasonable detail". This is no strict fact pleading, but much more than mere notice pleading. For the interim phase, Principle 9.3 starts from the idea of an active court which can, most notably, order the taking of evidence. Principle 14 corroborates this position by stating that the court is responsible for directing the proceedings, and that "the court should actively manage the proceeding" "as early as practicable". The final phase is described by Principe 9.4 as a concentrated final hearing. Principle 16 makes clear that the parties have a duty to cooperate and to grant each other access to all relevant information. This provision goes further than the outdated rules of the German Code of Civil Procedure which have already been criticized by Rolf Stürner four decades ago.[103] At the same time, it does not allow excessively broad requests to produce documents and other evidence: Principle 16.2 limits the duty to disclose to evidence which is "relevant" and "reasonably identified".

VIII. Conclusions

Which conclusions should be drawn from all this? First, it is important that lawyers and academics inform potential parties about the risk that an arbitration clause or agreement might draw them into U.S. style proceedings of the trial model, a procedural model which they may have believed to escape by choosing arbitration.

Second, arbitration institutions should seize the occasion and take a clear position on the procedural model they allow. Thus far, the procedural rules of most arbitration institutions favor the main hearing model, but do not exclude other models, probably for fear of losing business. Under the current circumstances, however, an arbitration institution which clearly and reliably excludes proceedings that follow an unsuitable procedural model could probably attract more business than it would lose.

Third, the ALI/Unidroit Principles whose primary target is civil proceedings in public courts are also perfectly suitable for arbitration. At a closer look, this is no surprise: The members of the working group who sought to bridge the gaps between different procedural models recognized themselves at an early stage in the progress that these principles also are valuable for international arbitration.[104] Their work has received the blessing of the American Law Institute and Unidroit. The clash of procedural models which has mightily come to the fore in the world of arbitration only recently has been dealt with in the world if litigation for some years already. The arbitration community needs not do anything else than help itself.

And fourth: Comparative law is valuable, in the field of litigation, in the field of arbitration, and across the two fields. It is hoped that this article gives proof of that. More is to follow. On each and any page of this new journal.

1 Year of the founding of the Société. The first volume of the Bulletin of March 1869 contains reports of the first plenary session, the first sessions of the conseil de direction, the articles and by-laws of the association and a list of members; from the second volume on we find reports on legislative projects and other scholarly articles.

2 Founded in 1878 by Franz Bernhöft and Georg Cohn and published originally by Ferdinand Enke in Stuttgart; the opening article by Bernhöft dealt with the purpose and the means of comparative law.

3 Founded in 1927 by Ernst Rabel, the first director of the Institut für ausländisches und internationales Privatrecht of the Kaiser-Wilhelm-Gesellschaft zur Förderung der Wissenschaften, and published originally by Walter de Gruyter, Berlin/Leipzig. The introduction by Rabel explains that the journal continues the sections on comparative law in older journals (Rheinische Zeitschrift, Auslandsrecht, Blätter für vergl. Rechtswissenschaft und Volkswirtschaftslehre).

4 Also published under the auspices of the Société de Législation comparée.

5 Published by the American Association for the Comparative Study of Law and starting with an introduction by Roscoe Pound; the first editor-in-chief was Hessel E. Yntema.

6 Founded by Fritz Schwind, published with Manz, Vienna, and continuing the Österreichische Hefte für die Praxis des internationalen und ausländischen Rechts (1956-1959).

7 For an overview, see, e.g., Harold Cooke Gutteridge, *Comparative Law. An Introduction to the Comparative Method of Legal Study & Research*, Cambridge: University Press, 1946, p. 17-18; Konrad Zweigert & Hein Kötz, *Einführung in die Rechtsvergleichung*, 3rd ed., Tübingen: Mohr Siebeck, 1996, p. 51 et seq.

8 Published originally by Carl Heymanns, now Wolters Kluwer.

9 Published by Intersentia.

10 The text focuses on international commercial arbitration; for the definition of internationality, see, e.g., Vicenzo Vigoriti, Arbitrato internazionale. Scelte operative, *Revista de Processo* (*RePro*) 223, ano 38, set. 2013, p. 391-392.

11 See, e.g., J. A. Jolowicz, *On Civil Procedure*, Cambridge: University Press, 2000, p. 12-19; Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 Am. J. Comp. L. 839 (1997).

12 Cf. C.H. van Rhee, Introduction, in: C.H. van Rhee (ed.), *European Traditions in Civil Procedure*, Antwerpen/Oxford: Intersentia, 2005, p. 3, 5.

13 Rolf Stürner, Procedural Law and Legal Cultures, in: Peter Gilles & Thomas Pfeiffer (eds.), *Prozessrecht und Rechtskulturen/Procedural Law and Legal Cultures*, Baden-Baden: Nomos 2004, p. 9, 12-18 (Inaugural speech to the XIIth World Congress on Procedural Law 2003 in Mexico City, organized by the International Association of Procedural Law); French version under the title "Procédure civile et culture juridique" in the Revue Internationale de Droit Comparé (R.I.D.C.) 4-2004, 797, 802 et seq.; Rolf Stürner, The Principles of Transnational Civil Procedure. An Introduction to Their Basic Conceptions, *Rabel Journal* (Rabels Zeitschrift, RabelsZ) 69 (2005), 201, 223-225; Rolf Stürner, Die "Principles of Transnational Civil Procedure". *Eine Einführung in ihre wichtigsten Grundlagen, Zeitschrift für Zivilprozess International* (ZZPInt) 11 (2006), 381, 390-391; see also Rolf Stürner & Christoph A. Kern, Comparative Civil Procedure – Fundamentals and Recent Trends, in: Osman B. Gürzumar et al. (eds.), *Halûk Konuralp Anisina Armağan/Gedächtnisschrift für Halûk Konuralp*, vol. 1, Ankara: Yetkin Yayinlari 2009, p. 997, 1001-1011 = Processo civil comparado – Tendências recentes e fundamentais, *RePro* 200, ano 36, out. 2011, p. 203, 207-217.

14 See, e.g., for Germany § 261(3) no. 2 Code of Civil Procedure (Zivilprozessordnung, ZPO), § 17(1) sentence 1 Courts Constitution Act (Gerichtsverfassungsgesetz, GVG).

15 The referral to the European Court of Justice for a preliminary ruling according to art. 267 of the Treaty on the Functioning of the European Union (TFEU) only concerns matters of interpretation and validity of European Union law. The case is stayed until the Court of Justice's ruling and continues afterwards in the same court.

16 Council Regulation (EC) 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *Official Journal* (O.J.) L 12 of 16.01.2001, p. 1; from 10.01.2015 replaced by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12.12.2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), O.J. L 351 of 20.12.2012, p. 1 (so-called Brussels I-Regulation).

17 Court of Justice of the European Union (ECJ), Judgment of 1st March 2005, Case C-281/02, Andrew Owusu v. N.B. Jackson et al., ECR 2005, I-1383, I-1445 et seq. (on the Convention of 27.09.1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, so-called Brussels Convention, predecessor of the Brussels I-Regulation).

18 See, e.g, for Germany § 261(3) 1 ZPO, § 17(1) sentence 2 GVG.

19 See generally Thomas Raphael, The Anti-Suit Injunction, Oxford: University Press 2008, *passim*; George A. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589-631 (1990).

20 ECJ, Judgment of 27.04.2004, Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit et al., ECR 2004, I-3565, I-3578 et seq.; Judgment of 10.02.2009, Case C-185/07, Allianz and Generali v. West Tankers, ECR 2009, I-663 (anti-suit injunction on the ground that proceedings would be contrary to an arbitration agreement).

21 See e.g., for Germany § 9 no. 1 German Judges Act (Deutsches Richtergesetz, DRiG).

22 See, e.g., for Germany §§ 5 et seq. DRiG.

23 Cf., e.g., for Germany § 78 ZPO, § 114 Act on Family Proceedings and Proceedings in Non-Contentious Matters (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG).

24 Special rules on the representation by counsel admitted to the bar in a foreign country, as they exist within the European Union, are of limited practical importance.

25 Cf. e.g., art. 6 Uncitral Model Law; for Brazil art. 7.º Lei 9.307, de 23.09.1996 (in the following, Lei 9.307); for Germany § 1062 ZPO.

26 Cf., e.g., art. 13(5) of the 2012 ICC Rules of Arbitration (in the following, the "ICC Rules").

27 See, e.g., for Germany Joachim Münch, in: *Münchener Kommentar zur ZPO*, vol. 3, 4th ed., Munich: C.H. Beck 2013, § 1042 mn. 64, 67. Cf. for Brazil art. 21 § 3.º Lei 9.307.

28 For some illustrations, see, e.g., George M. von Mehren & Alana C. Jochum, Is International Arbitration Becoming Too American?, *2 Global Bus. L. Rev*. 47, 48 et seq. (2011); Johannes Trappe, Arbitration in Germany – some aspects and comparison of law, *Zeitschrift für Schiedsverfahren/German Arbitration Journal* (SchiedsVZ) 2013, 167-172.

29 See, e.g., Peter Schlosser, Der Justizkonflikt zwischen den USA und Europa, Berlin/New York: De Gruyter 1985, *passim*; Walther J. Habscheid (ed.), *Der Justizkonflikt mit den Vereinigten Staaten von Amerika*, Bielefeld: Gieseking 1986, with contributions of Rolf Stürner, Dieter G. Lange, Yasuhei Taniguchi and Heribert Golsong.

30 Roger P. Alford, The American Influence in International Arbitration, 19 Ohio St. J. on Disp. Resol. 69 et seq. (2003).

31 Eric Bergsten, The Americanization of International Arbitration, 18 Pace Int'l L. Rev. 289, 300 (2006).

32 Stürner, R.I.D.C. 4-2004, supra note 12, at 803-804; Stürner & Kern, *RePro* 200, supra note 12, at 211.

33 L.J. Priestley, Transnational Civil Procedure – Fact Pleading v. Notice Pleading: its Significance in the Development of Evidence, 6 Unif. L. Rev. n.s. 841, 842 (2001); Rolf Stürner, Transnational Civil Procedure: Discovery and Sanctions Against Non-Compliance, 6 Unif. L. Rev. 871 (2001).

34 Art. 763 et seq. French Code de procedure civile; Stürner, R.I.D.C. 4-2004, supra note 12, at 802-803; Stürner & Kern, *RePro* 200, supra note 12, at 212.

35 Stürner & Kern, *RePro* 200, supra note 12, at 212.

36 Rolf Stürner, Zur Struktur des europäischen Zivilprozesses, in: Peter Gottwald & Herbert Roth (eds.), *Festschrift für Ekkehard Schumann zum 70*. Geburtstag, Tübingen: Mohr Siebeck 2001, p. 491, 497; Stürner, R.I.D.C. 4-2004, supra note 12, at 803.

37 See, e.g., for France Art. 763 et seq. Code de procedure civile.

38 Stürner, in: Festschrift Schumann, supra note 35, at 497.

39 Stürner, supra note 32, at 875, 881; Stürner, R.I.D.C. 4-2004, supra note 12, at 806-807.

40 Amendment VII to the U.S. Constitution: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United Stats, than according to the rules of the common law."

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42 Peter L. Murray & Rolf Stürner, German Civil Justice, Durham, N.C.: Carolina Academic Press 2004, p. 593.

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44 Supra note 39 and accompanying text; see also Kern, supra note 43, at 259.

45 Stürner & Kern, *RePro* 200, supra note 13, at 210; Murray & Stürner, supra note 42, at 593-594.

46 Rules 26-37 FRCP; Stürner, supra note 33, at 878.

47 Cf. Hazard et al., supra note 43, at 160-161, 172-174.

48 Stürner & Kern, RePro 200, supra note 13, at 210.

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65 Cf., e.g., for Germany §§ 142, 144, 273(2) ZPO.

66 See for Germany § 139 ZPO; for Switzerland art. 56 ZPO; cf. also for Spain art. 186 2.º LEC.

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71 See for Spain art. 185(4) LEC; for Switzerland art. 232 ZPO; for Germany §§ 279(3), 370 ZPO.

72 See, e.g., for Germany § 136(4) ZPO.

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75 See, e.g., the 2012 ICC Rules of Arbitration (41 articles and 5 appendices), the DISArbitration Rules 1998 (44 paragraphs and one appendix), the Vienna Rules 2013 (47 articles and 5 appendices), the Swiss Rules 2012 (45 articles and 2 appendices), the HKIAC Administered Arbitration Rules 2013 (43 articles and 4 schedules), the SIAC Rules 2013 (37 rules and 2 schedules).

76 See, e.g., art. V New York Convention of 10.06.1958 on the Recognition and Enforcement of Foreign Arbitral Awards; art. 34, 35 Uncitral Model Law; for Brazil art. 32, 33, 38, 39 Lei 9.307; for Switzerland art. 393, 396 ZPO, art. 190(2) IPRG; for Germany §§ 1059(2), 1060(2) ZPO. For an interesting historical overview, see Josef Kohler, Über prozeßrechtliche Verträge und Kreationen, Gruchots Beiträge 31 (1887), 276, 282 et seq. note 11.

77 American Arbitration Association, Optional Appellate Arbitration Rules, effective november 1, 2013 (AAA Optional Appellate Arbitration Rules 2013).

78 See, for England, sec. 69 Arbitration Act; for an overview, see Andrews, *RePro* 224, supra note 54, at 476, 480-482. On the doctrine of manifest disregard of the law, see Dewan v. Walia, 2013 U.S. App. Lexis 21970, 2013 WL 5781207 (4th Cir. Oct. 28, 2013), cert. denied, 2014 WL 1343626 (U.S. april 7, 2014); for a discussion of this doctrine, see, e.g., Stephan Wilske & Nigel Mackay, The Myth of the "Manifest Disregard of the Law" Doctrine: Is this Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitrations or Should International Arbitration Practitioners be Concerned?, ASA Bulletin 24 (2006), 216-228.

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81 Vigoriti, supra note 10, at 397.

82 See, e.g., art. 12(1) ICC Rules; art. 17(1), (2) Vienna Rules; art. 6(1) Swiss Rules; art. 6(1) HKIAC Rules; Rule A-5(c) AAA Optional Appellate Arbitration Rules.

83 Rule 48(a) FRCP; cf. also Ballew v. Georgia, 435 U.S. 233 (1978) (jury of less than six jurors violates due process of law).

84 Cf. art. 24(4) ICC Rules; art. 12(2) Vienna Rules.

85 Cf. Vigoriti, supra note 10, at 397.

86 Cf. also Rule A-7(c) of the AAA Optional Appellate Arbitration Rules 2013.

87 Cf. also art. 2(3) of the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

88 Cf. also Rule 16.3 SIAC Rules.

89 Less clear are art. 24 Swiss Rules, art. 22 HKIAC Rules and the IBA Rules on the Taking of Evidence.

90 Lucy Reed & Jonathan Sutcliffe, The “Americanization” of International Arbitration?, 16 Mealey’s Int’l Arb. Rep. 36, 36 (2001); see also Nicolas C. Ulmer, A Comment on “The ‘Americanization’ of International Arbitration?”, 16 Mealey’s Int’l Arb. Rep. 24, 24-25 (2001); Alford, supra note 30, at 69 et seq.; Bergsten, supra note 31, at 294 et seq.; Stipanowich, supra note 79, at 23; Hermann Bietz, On the State and Efficiency of International Arbitration – Could the German “Relevance Method” be useful or not?, SchiedsVZ 2014, 121 et seq.; Steven Seidenberg, International Arbitration Loses its Grip. Are U.S. Lawyers to Blame?, 96 A.B.A. J. 50, 51 (april 2010); William A. Park, Americanization of International Arbitration and Vice Versa Arbitration of International Business Disputes: Studies in Law and Practice, Oxford: University Press 2006; but see also Susan L. Karamanian, Overstating the “Americanization” of International Arbitration: Lessons from ICSID, 19 Ohio St. J. on Disp. Resol. 5 (2003); Elena V. Helmer, International Commercial Arbitration: Americanized, “Civilized”, or Harmonized?, 19 Ohio St. J. on Disp. Resol. 35 (2003); von Mehren & Jochum, supra note 28, at 55.

91 On the problems, see Elena Samaras & Christof Strasser, Managing Party-Appointed Experts in International Arbitration – Analysis of the Current Framework and Best Practice Proposals –, SchiedsVZ 2013, 314-321.

92 Vigoriti, supra note 10, at 397.

93 Alford, supra note 30, at 70, 80-88; Bietz, supra note 90, at 126; Seidenberg, supra note 90, at 52.

94 Cf. also Seidenberg, supra note 90, at 51-52.

95 See, e.g., Mark A. Clatworthy, Gerald H. Makepeace & Michael J. Peel, Selection bias and the Big Four premium: new evidence using Heckman and Matching models, 39 Accounting and Business Research 139 (2009).

96 This bonmot is attributed to a number of different sources, inter alia, Karl Valentin, Mark Twain and Niels Bohr.

97 Bietz, supra note 90, at 121, 126-129; Seidenberg, supra note 90, at 51-55.

98 See, e.g., Ulrike Gantenberg, Methods of Reducing Costs in International Commercial Arbitration, SchiedsVZ 2012, 17; Anke Sessler, Reducing Costs in Arbitration – The Perspective of In-house Counsel, SchiedsVZ 2012, 15.

99 Cf. supra note 77 with accompanying text.

100 Cf., e.g., art. 7 Uncitral Model Law; for Brazil art. 3.º Lei 9.307; for Germany § 1029 ZPO.

101 Cf., e.g., art. 8 Uncitral Model Law; for Germany § 1032(1) ZPO.

102 Rolf Stürner, Why are Europeans Afraid to Litigate in the United States?, Saggi, Conferenze e seminari, vol. 45, Rome: Centro di studi e ricerche di diritto comparato e straniero 2001.

103 Rolf Stürner, Die Aufklärungspflicht der Parteien des Zivilprozesses, Tübingen: Mohr Siebeck 1976, *passim*.

104 ALI/Unidroit Principles, Scope and Implementation, Comment P-E; Stürner, RabelsZ 69 (2005), supra note 13, at 213.