

California International Arbitration Week

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CALIFORNIA
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ASSOCIATION

CA California
Arbitration

March 11-14, 2024

Hyatt Regency Embarcadero
San Francisco

Civil v. Common Law: How they Differ and Why this Matters for International Arbitration

MCLE: 1 Hour

Thursday, March 14, 2024

Speakers:

Ara Cho

Grant L. Kim

Nicolas Wiegand

Steve Kim

Sunyoung Kim

Conference Reference Materials

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KCAB
INTERNATIONAL

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LIMNEXUS LLP

Civil v. Common Law: *Panelists*



Ara Cho
Peter & Kim
Seoul



Grant Kim
LimNexus
San Francisco



Steve Kim
KCAB
International
Seoul

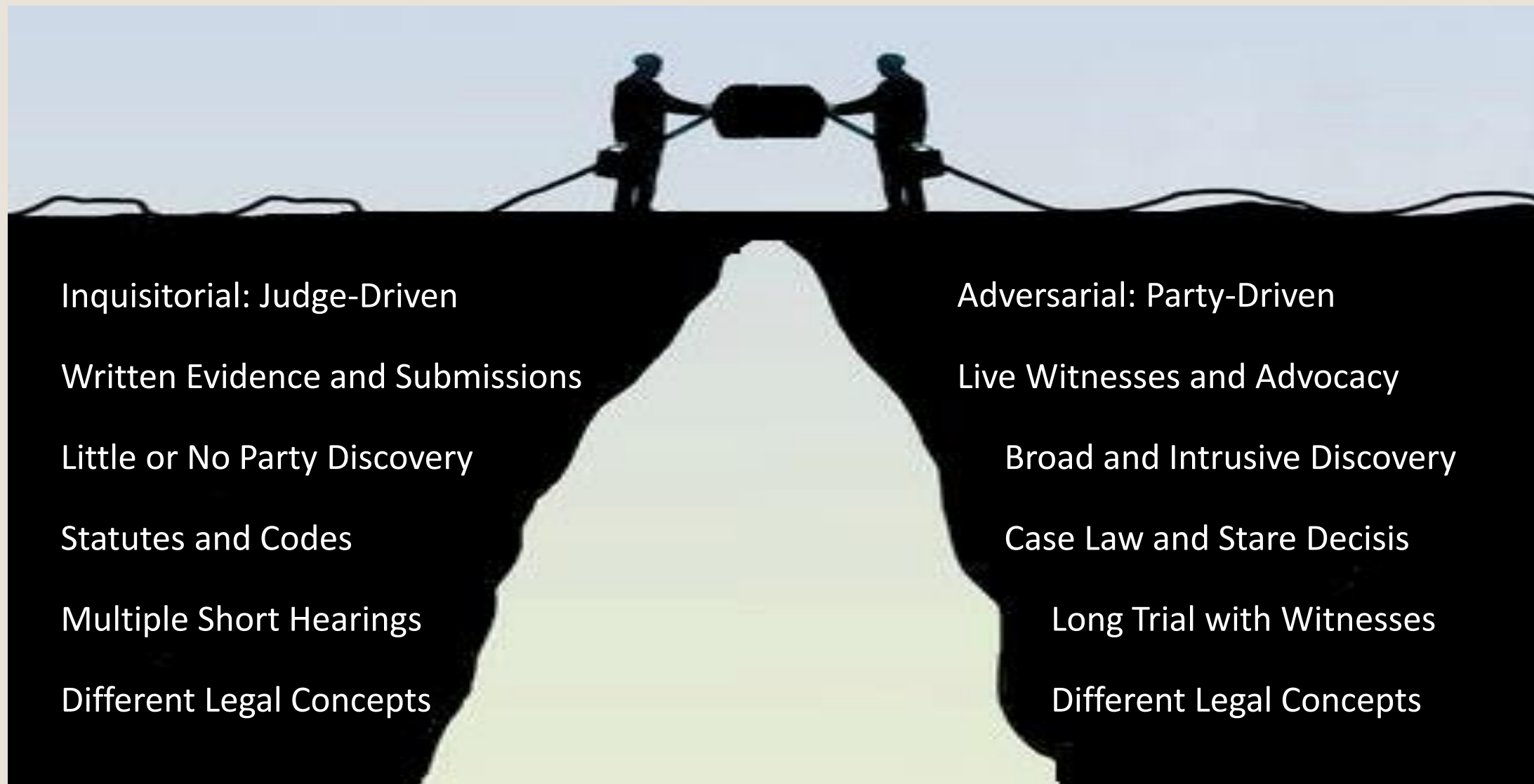


Sunyoung Kim
Lee & Ko
Seoul



Nicolas Wiegand
CMS
Hong Kong/San Francisco

Civil v. Common Law: *How Do They Differ?*



Civil v. Common Law: *Why Does It Matter?*

Strong Impact on All Phases of the Arbitration

- Selecting Arbitrators
- Initial Hearing and Case Schedule
- Disclosure and Discovery
- Pre-Hearing Submissions on Facts and Evidence
- Pre-Hearing Submissions on Law
- Merits Hearing: Witnesses and Advocacy Style

Civil v. Common Law: *Selecting Arbitrators*

Prefer Civil or Common Law Arbitrator?

- Prefer broad or limited discovery (IBA Rules are de facto standard, but may be applied differently)?
- Prefer expert in governing substantive law?
- Prefer strict or flexible interpretation of contract?
- Prefer strict or flexible interpretation of procedural requirements?
- Other considerations?

Civil v. Common Law: *Initial Hearing/Case Schedule*

Typical approach combines written submission of evidence (civil) with live hearing with witnesses (common law)

- Are civil/common law arbitrators likely to adopt different approaches?
- Who is likely to take a more active approach to case management?
- Are common law arbitrators more likely to consider dispositive motions?
- What is the role, if any, of the arbitrator in facilitating settlement?
- Any other differences in case management style?

Civil v. Common Law: *Disclosure/Discovery*

IBA Rules are standard, but may be applied differently

- How different are civil and common law arbitrators likely to be?
- What is “material to the outcome”?
- What is a “narrow and specific category”?
- Timing: before or after first round of merits submissions?
- Are depositions ever allowed?
- Remedial measures for failure to disclose?

Prehearing Submissions on Facts: *Evidence*

Civil law emphasizes documents rather than testimony

- Does this matter in international arbitration?
- What evidence is most likely to be persuasive?
- What is the most effective way to present the facts and evidence?
- How much weight do civil law arbitrators give to party witness statements?
- Civil law judges may appoint their own experts; what about arbitrators?

Prehearing Submissions on Law: *Style and Substance*

Some convergence, but different mindset

- Common law uses codes and civil law judges issue reasoned decisions, but:
- **Different Style:** Civil law decisions usually cited for general principles only; common law cases are longer and cited for application of law to similar facts
- **Different Legal Concepts:** Hard to “translate” because different conceptual framework (e.g., “declaration of intent,” “juridical act,” statute of limitations)
- How do you argue civil law to common law arbitrators and vice versa?
- Are common/civil law arbitrators likely to view the same law differently?
- Mixed civil/common law team helpful when tribunal is also mixed

Merits Hearing: *Witnesses and Advocacy Style*

Multiple short hearings v. Long intense trial

- International arbitration merits hearing usually shorter than common law (no direct, begin with cross) but longer than civil law
- How important is witness examination to civil law arbitrators?
- What is the best approach to cross-examination?
- Do common law arbitrators ask more questions?
- What is the best approach to opening statements and closing arguments?
- Are closing arguments in writing only or held at a later time?

Thank you – 감사합니다 – Danke schön!



Ara Cho
Peter & Kim
Seoul



Grant Kim
LimNexus
San Francisco



Steve Kim
KCAB
International
Seoul



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Lee & Ko
Seoul



Nicolas Wiegand
CMS
Hong Kong/San Francisco