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Commentary

Prague Rules: Common Law And Civil Law Advocates Talking Past Each Other

By
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We are so misunderstood! Common law lawyers, I mean. At an excellent conference, "The Psychology of the Arbitration Hearing," in Milan last November, sponsored by Arbit (Italian Forum for Arbitration and ADR), the Milan Chamber of Arbitration and ArbitralWomen, I was out of my element as one of the few common law-trained lawyers in a room full of civil law-trained lawyers. An articulate young lawyer was railing against the common law bias of the International Bar Association Rules of Evidence (IBA Rules), which have been the standard procedural rules for international arbitrations. He instead favored the new Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), which are more in the civil law tradition. When I listened to the discussions of arbitration rules and procedures – there and elsewhere – I came away with the feeling that the differences between the common law and civil law systems are not well-understood.

Usually, civil law advocates focus their ire at the current arbitration system on excessive disclosure requirements and cross-examination, which they view as grandstanding and a waste of time. For a long time, I had assumed

their annoyance was due to a lack of understanding of cross-examination's purpose and its difficulty – it is the hardest skill of an advocate to master. However, the heart of the differences between the two legal systems lies elsewhere – in the differing views of the role of facts in the decision-making process.

The Prague Rules identify an almost universally accepted proposition: "It has become almost commonplace these days that users of arbitration are dissatisfied with the time and costs involved in the proceedings." The Prague Rules attribute these excesses to document production, fact witnesses, party-appointed experts and cross-examination. Each of these criticisms is directly related to the fact-finding process. Common law lawyers seek broad disclosure to aid in the fact-gathering process. They use fact witnesses to present facts, experts to explain the significance of the facts, and cross-examination aids to reach an accurate view of facts.

At the Milan conference, civil lawyers were highly skeptical of the truthfulness of witnesses – they always lie, I heard – and more trusting of documents. But I am less cynical about witnesses who are subject to cross-examination and more dubious of documents that can tell self-serving stories. Since steadfast common law and civil law lawyers are unlikely to convince each other, a better understanding of how decisions are made in the two legal systems may assist in finding procedures that are fair and efficient in cross-border, cross-cultural disputes.

As a common law advocate, I start each case with the belief that facts win cases. A better understanding of the facts helps shape the most convincing arguments

and informs concrete responses to the opponent's case. Civil law-trained attorneys instead tell me that they focus on the meaning of the civil codes and statutes and framing legal arguments that can best serve the clients. When I venture into civil law jurisdictions, our local counsel typically asks us to conduct the factual investigation because they are not trained in investigations. In many civil law jurisdictions, investigating magistrates, and not party counsel, conduct the factual investigation.

One of my colleagues had an interesting theory for the differing views of the value of facts in the two legal systems. He posited that the common law is based on precedent – parties in similar positions should be treated in a similar manner. The focus on precedent means that lawyers must immediately direct their attention to the facts to align their case with a precedent. Civil law is based on a code system that arguably leaves less room for factual diversity. His theory may or may not be correct, but the differences between the IBA Rules and the Prague Rules can be explained by the differing views on the importance of facts to a case's outcome.

The fundamental difference between the two sets of rules can be found in the way the rules define the arbitral tribunal's role in collecting and hearing the facts of a case. The Prague Rules have adopted an inquisitorial system, with control by the tribunal over almost all aspects of the process and with minimal intervention by counsel. The IBA Rules lean toward the adversarial system, with more responsibility exercised by party counsel. At each stage of the proceedings, the Prague Rules imply that a robust factual record will be less important to the decision-making process than would be the case under the parallel IBA Rules.

The two sets of rules have only subtle differences in wording that are more a reflection of an attitude toward evidence than they are concrete prohibitions. The Prague Rules put the responsibility for identifying and collecting relevant facts firmly in the hands of the tribunal. Prague Rules Article 3.1 states: "The arbitral tribunal is entitled and encouraged to take a *proactive role* in establishing the facts of the case which it considers relevant to the resolution of the dispute." (Emphasis added.) Both sets of rules encourage the tribunal to identify relevant issues early in the proceedings and order the exchange of documents on which the parties intend to rely. The Prague Rules, however, discourage any formal investigation of the facts

through the proceedings. Prague Rules Article 4.2 states: "Generally, the arbitral tribunal and the parties *are encouraged to avoid any form of document production, including e-discovery.*" (Emphasis added.) When the parties agree, or one party can convince the tribunal, document production can be ordered under both sets of rules, with an identical standard for production; the documents should be "relevant and material to the outcome of the case." Prague Rules Article 4.5(a); IBA Rule 3. The Prague Rules acknowledge that witness testimony may be relevant. Prague Rules Article 3.2(a). However, those rules make no provision for seeking testimony from third-party witnesses. By contrast, the IBA Rule 4.9 specifically provides that a party or the tribunal can obtain third-party testimony using "whatever steps are legally available." Both sets of rules authorize the use of tribunal-appointed experts, although the Prague Rules give them preference over party-appointed experts. Tribunal-appointed experts are rare in IBA Rule arbitration. Both sets of rules require experts to meet and limit their differences.

A very significant difference between the rules comes with the manner in which the hearing will be conducted. Prague Rules Article 8.1 provides that "the arbitral tribunal and the parties should *seek to resolve the dispute on a documents-only basis.*" (Emphasis added.) If a hearing is held, the Prague Rules put the tribunal in charge and diminish the role of counsel. Prague Rules Article 5.9 says that "the examination of any fact witness shall be conducted under the direction and control of the arbitral tribunal . . ." After having heard the parties, the arbitral tribunal may also impose other restrictions, which could include setting the order of examination of the witnesses, establishing time limits for those examinations, or limiting the subject matter of questions to be allowed.

The IBA Rules presume a merits hearing will be held, although arbitral institution rules are being amended to encourage use of preliminary motions to narrow or decide cases where practicable. IBA Rule 8.2 also gives the tribunal control over the hearing, providing that: "The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing." The rules presume witness testimony will be important by providing for an order of witnesses and cross-examination. IBA Rule 8.3. In practice, counsel is responsible for witness examinations, although the tribunal may intervene to limit the witnesses or their examinations.

The biggest change in the Prague Rules is the emphasis on written presentations in lieu of an in-person hearing. At the Milan conference, I was surprised when the young civil law advocate suggested that more direct examination would improve the system. I have previously written about the limited psychological evidence suggesting that an in-person hearing has greater impact on the decision-makers than does writing alone. See “Going First Makes a Difference: Decision-Making Dynamics in International Arbitration,” *The Roles of Psychology in International Arbitration*, edited by Tony Cole, Kluwer Law International (April 2017) (P.M. Levine, co-author). In an effort to be efficient, many IBA Rules tribunals bar direct examination of witnesses. But that approach has a problem. By limiting the parties to written witness statements in lieu of direct examination, the tribunal unintentionally tilts the hearing against the party with the burden of persuasion, my article argues. I question whether the Prague Rules, by discouraging in-person hearings, are creating a similar bias against the party that has the burden of presenting facts.

There is little debate that the Prague Rules’ criticism of the current arbitration process has some merit. The fact-gathering process has led to excesses. In high-stakes disputes, counsel want to pursue every factual angle and make every argument. Arbitral institutions generally have adopted many of the efficiency solutions incorporated into the Prague Rules: more limited document production, stricter adherence to evidence deadlines, more openness to preliminary motions to narrow or decide a dispute, and efficiencies in hearing testimony from party-appointed experts. Tribunals also are right to establish limits. However, the practice under the IBA Rules of two rounds of briefing before and one or two after an in-person hearing can be wasteful and excessive, one of the culprits in making arbitration too expensive. The process may be more cost-effective and fairer in some cases with fewer rounds of briefing and more direct examination and cross-examination at the hearing.

Since international commerce often crosses legal cultures, lawyers must decide how to advise their clients about which procedural rules to use. Lawyers can simply opt for the legal culture they are comfortable with, but that does not give the client the best service. If there are negotiations over procedural rules at the time of contracting, the parties and their counsel are guessing about the extent to which facts will matter in resolving a dispute. The applicable law may give a hint – if the applicable law is from a civil law jurisdiction, perhaps factual development will be less important. However, several of my civil law colleagues do not necessarily agree. While they agreed that facts were rarely discussed in their law schools, they have found that facts and how they are presented have been important in their practices. When I asked a prominent Peruvian arbitrator about the Prague Rules, he opined that facts and the role of counsel are always important, even in civil law jurisdictions. He asked the rhetorical questions: “Who knows better the case? Of course, the parties. Who knows better what evidence has to be produced? The parties.”

Procedural rules are often not included in disputes clauses, and thus, the decision might be postponed until important factors are known, including the nature of the dispute, the need for information, which side the client will be on (claimant or respondent) and perhaps even the identity of the arbitrators. As both sets of rules require, it is important to identify the nature of the dispute and the relevant facts necessary for a decision early in the process. When there are fundamental disputes about the facts, the Prague Rules will give the parties less leeway to collect significant information. The Prague Rules, by giving additional control to the tribunal, appear to take away party autonomy about how the hearing is structured, how the witnesses, if any, will be questioned, and how each case will be presented. Perhaps the answer is to use the rules as advisory guidelines and frame the procedure that most efficiently resolves the dispute. ■

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