Kluwer Arbitration Blog

Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills – Part I

Guilherme Rizzo Amaral (Souto, Correa, Cesa, Lummertz & Amaral Advogados) · Thursday, July 5th, 2018

On May 29, 2010, the International Bar Association ("IBA") adopted the *IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules")*, a revised version of the original 1999 version which, in turn, had replaced the *IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*of 1983.

Even though the IBA Rules were drafted as a "resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration", their main goal was to bridge the gap between different legal systems and their respective procedures on the taking of evidence, which is "particularly useful when the parties come from different legal cultures" (IBA Rules, Foreword).

The IBA Rules have successfully influenced the practice of international arbitration, as arbitral tribunals formed by members from different legal traditions have been applying them, be it on their own motion or at the request of the parties,regardless of an express choice for the IBA Rules in the terms of reference.

However, such success has not prevented a reaction from members of the arbitral community concerned by what they see as a dominance of the common law tradition over the IBA Rules. For instance, the denunciation of a "Creeping Americanisation of international arbitration" set the tone at the IV Russian Arbitration Association Annual Conferencethat took place in in Moscow on April 20, 2017. The outcry gave rise to the proposal of a different set of rules, the so-called *Inquisitorial Rules on the Taking of Evidence in International Arbitration*, or *The Prague Rules*, as their drafters intend to launch them in Prague in December 2018.

In a preliminary draft of the Prague Rules, dated March 2018, it is easy to see that while they share one of the goals of the IBA Rules, which is to improve the efficiency of international arbitration, their focus is entirely different when it comes to bridging the gap between different legal traditions.

The Prague Rules are a *manifesto*in favour of the civil law tradition and of an inquisitorial approach in international arbitration, as well as an attack on the inefficiencies of the adversarial approach. If their official name was not enough evidence of that – *Inquisitorial**Rules on the Taking of Evidence in International Arbitration* –, the note from the Prague Rules' working group leaves no room for doubt. It criticises the IBA Rules "from a civil law perspective" for following "a more

adversarial approach". It goes on to say that many of the procedural features of the IBA Rules "are not known or used to the same extent in non-common law jurisdictions, such as continental Europe, Latin America, [the] Middle East and Asia". It then states that the adoption of an "inquisitorial model of procedure" would contribute to the efficiency in international arbitration, "reducing time and costs of arbitrations".

Regardless of any assessment on the efficiency of the Prague Rules' procedural mechanisms to reduce the time and costs of arbitrations, some questions can immediately be raised: Is it true that the IBA Rules are dominated by the common law tradition – that is to say by an adversarial approach? How much do the IBA Rules differ from the Prague Rules? Furthermore, if the problem with the IBA Rules is really the fact that many of their features are uncommon to civil law practitioners, would the Prague Rules not suffer from the same problem in reverse? Considering the existence of domestic arbitration statutes and institutional rules that already reflect different traditions, what would be the purpose of a *soft law*on the taking of evidence in international arbitration if not to bridge the gap between different legal traditions?

The Prague Rules and the proactive role of the arbitral tribunal

The classic distinction between the inquisitorial approach and the adversarial approach rests on the distribution of burdens and powers between parties and adjudicators (whether judges or arbitrators). An inquisitorial proceeding relies on an active role of the adjudicator, who may take initiative both in fact-finding (production of evidence) and in the ascertainment of the law. The adversarial approach, on the other hand, burdens the parties with those activities and confers upon the adjudicator the duty to preside over the proceeding and to rule on the dispute as an umpire; definitely a more passive stance for the adjudicator.

That said, the Prague Rules contain many provisions bestowing a proactive role upon the arbitral tribunal. And yet many of such provisions have no direct connection – and sometimes not even an indirect connection – with the taking of evidence, as can be seen in the provisions of article 2 (e.g., holding a case management conference through electronic communication, clarifying the legal grounds on which parties base their position, fixing a procedural timetable, limiting the number of submissions or their length, the tribunal being allowed to share with the parties – during the proceeding – its views regarding the relief sought), article 9 (assistance in amicable settlement), or article 11 (allocation of costs).

These provisions in particular may be useful in *ad hoc*arbitrations, yet their usefulness in institutional arbitrations is questionable as most institutional rules or terms of reference usually address those issues. The Prague Rules themselves concede that due regard should be given not only to the mandatory provisions of the *lex arbitri*but also to the applicable arbitration rules (article 1.3).

Yet, what about the rules strictly concerning the taking of evidence? How do the Prague Rules differ from the IBA Rules? Are the Prague Rules capable of delivering a better result than the IBA Rules in terms of arbitration efficiency?

These questions will be addressed in the second and final part of this post.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Thursday, July 5th, 2018 at 12:14 am and is filed under Arbitration Proceedings, Discovery, Evidence, Procedure
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.