Kluwer Arbitration Blog

Arbitration, Jurisdiction and Culture: Apropos the Rules of Prague

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On the occasion of the German-Portuguese International Arbitration Symposium experienced practitioners in international arbitration described what is going on in their national systems and, to some extent, what is going on in the world.

Following Duarte's introduction and as announced in this conference's program, Klaus Peter Berger, in his brilliant keynote speech on *Civil vs Common Law in International Arbitration – The Beginning or the End?* gave a complete and exhaustive overview of the possible impact of the Rules of Prague. On this same blog, Guilherme Rizzo Amaral, a Colleague from Brazil, when comparing the IBA and the Prague Rules, states: "The Prague Rules and the IBA Rules are examples of soft law." Borrowing the expression from Bryan H. DRUZIN, Why does Soft Law have any Power Anyway?, Asian Journal of International Law, vol. 7/no. 2, (2017), pp. 362-363, Guilherme goes on saying that, in order to succeed, soft law needs to bridge gaps, not burn bridges. Its strength rests upon its network effects: the more agents rely upon the soft law, the more it acquires power.

Aware of these facts, I have chosen to address some topics I brought together under the title Arbitration, Jurisdiction and Culture.

First, arbitration must observe the fundamental principles of jurisdiction, under the clause of the principle of *due process of law: the right to be heard and the right to a fair trial*. Without diminishing the relevance of international civil procedure, arbitration was beyond reasonable doubt the *longa manus* of international trade, the instrument that enabled the rational allocation of financial resources, notably in countries where State courts are said to be ineffective and/or partial. The civil procedure was, by its nature, so straightly attached to the concept of sovereignty (let us remind the dominance, in Europe and for centuries, of the canon law procedure) that it was of little use in resolving the conflicts involving huge corporations that traded in foreign markets.

Secondly, having observed and studied for 30 years the evolution of arbitration, mainly international arbitration, civil procedure in Europe (the publication of the CPR, the constant amendment of the regulations on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters as the political and economic Europe became larger in its frontiers) arbitration became the *cosmopolis* for justice in a substantial way.

If there is an institute where the differences between legal traditions are substantial, it is the

institute of liability; here one cannot even find a unique civil law tradition, opposed to a common law one. And what can be noted in arbitral awards deciding on damage, imputation, causation and causation tests, liability? If I'm not mistaken and despite the tribunals refer to the applicable law, considered as a fact, as is typical in civil law systems (art. 7 RofP), tort law, here taken in a broad sense, becomes a sort of supranational liability law. With the advantages and risks such an approach bears in itself. And when we look at the proceedings, the phenomenon is even more striking: proceedings are all very much alike, no matter where the arbitrators come from. Arbitration is the *cosmopolis* for Justice, English became its mother tongue and its terms the new legal Esperanto; Arbitration is the new level playing field for jurisdiction.

Recently, I was asked to gather the experience of the world's key arbitrators from different legal cultures on some of the most sensitive IBA Rules on the taking of evidence, my findings where that: the interviewed practitioners gave me almost the same answers whatever their legal background was.

Thirdly, arbitration is culture. As a species of adjudication, arbitration must comply with the clause of due process, I cannot forget that this clause is the result of a cultural evolution and the reflex of a given cultural subsystem. As we all know, even nowadays the due process clause does not have common contents; and for that we politely never refer to the unspoken *dissensus* under an imaginary consensus when invoking this clause. Furthermore, we cannot forget that the rights to be heard and to a fair trial are superseded in legal cultures where the access to the reality doesn't depend on the confrontation of the parties' versions on the facts, but from revelation. And although, as Taruffo explained in his so interesting paper *Cultura e Processo*, I couldn't say what the word *culture* accurately means, one thing can be taken for granted: the evolution of a culture, here understood as the set of philosophical, political and moral beliefs and ideas existant in a society. As Max Planck once said, a new idea will not impose itself by virtue of its correctness but when the generation who defended the one that is being overruled dies.

But what is the relevance of this bunch of reflections?

Let me go back to the beginning: the Rules of Prague in its relation to the IBA Rules. When considered per se, the Prague Rules on the taking of evidence it is easy to understand them and to accept the main political option underlying: the way powers and burdens are allocated to the parties and the decision maker is exactly the same than in certain civil procedure systems. And let me unravel one of the most gnawing misunderstandings. When those, stemming from the civil procedure, speak about the similarities between adjudication by an arbitrator and adjudication by a state court, they are not talking about certain provisions of a specific civil procedure code. The argument is much more complex than that; what is being referred to, is the legal theory on adjudication construed after the analyses of the legal system considered.

Why are the Prague Rules familiar to me? Simply because they have different rules that underline the powers of the arbitrators. First, in Article 2, the proactive nature of the role of the tribunal. In addition, Article 3, launches a bridge to the *Untersuchungsmaxime*, one of the most relevant instrumental principles characterizing an adjudication system. Article 7, unties the tribunal from the *Dispositionsmaxime* in what concerns the law, a *maxime* that is applied in such an awkward manner in international arbitration that I have caught myself thinking lately whether or not the arbitrators, while deciding a case, should feel themselves bound to the excerpts of the legal authorities submitted to them, considering they are barred from reading the whole book or other books!

In this digression we will get to a hot topic in international arbitration: the statute of foreign law in connection to the principle *iura novit arbiter*. The Rules of Prague explicitly affirm its validity. But one cannot forget that the foreign law, the one that is applicable to the merits by *neutral* arbitrators (wherefore *third parties* to legal system they will have to apply), must be proven by the parties. Let us underline this topic again: in international arbitration, the applicable law isn't international law; the applicable law is typically national law to, at least, one of the parties and foreign law at least to the president, if not to the majority or all the arbitrators.

Under the Rules of Prague, the arbitrator, as the judge, explicitly plays the game; he is not a simple onlooker. Can we really say that the arbitrator is a simple onlooker when playing the game by the IBA Rules? I think we cannot draw this conclusion solely from the text of the rules. However, one thing can be said: the IBA Rules on the taking of evidence seem more agnostic than the Prague Rules. The Prague Rules are fitted to conflicts involving adjudicators from, at least, similar civil law systems that have to apply substantive civil law. The IBA Rules on the taking of evidence, just one piece of the puzzle that is adjudication, will probably be considered more adequate if the conflict involves different legal traditions.

In his paper, which I have already mentioned, Guilherme Amaral has a critical approach to what he considers a climate of confrontation between different legal cultures that the IBA Rules tried successfully to supersede. At this level, his words are harsh and one can understand his reasons: as the IBA Rules are agnostic, one could have considered introducing any changes considered necessary thereto instead of creating a new set of them. This was not the choice of the group who proposed the Rules of Prague: in their initial version they were presented as Inquisitorial Rules on the taking of evidence. The opposition to the so said Adversarial Rules on the taking of evidence is explicit; the opposition between legal traditions is emphasized.

From a methodological point of view, I suppose the Prague Rules must be evaluated from the angle of the rules themselves, of their ability to solve problems in the best way one can idealize; the political statements or intentions that justify or determine their enactment must be placed in second. Law is politics and politics can lead both to war and to peace. So let us never forget that *leges silent inter arma*. And let us look at the Prague Rules as a set of dispositions on the taking of evidence bearing in mind that they will prove to be intelligent if they prove capacity of adaptation. Their starting point is very clear: they were set up to correct the excessive Americanization of the IBA Rules, the one that I could not trace in the answers I got to the questionnaire. The Prague Rules are the newcomers in arbitration; and they entered the ballroom with noise. Dealing with the new is always defying. Albeit their historical roots, resistance and confrontation will be part of their history. Let them tread their path under the sign of Saint Augustine: "Patience is the companion of wisdom."

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