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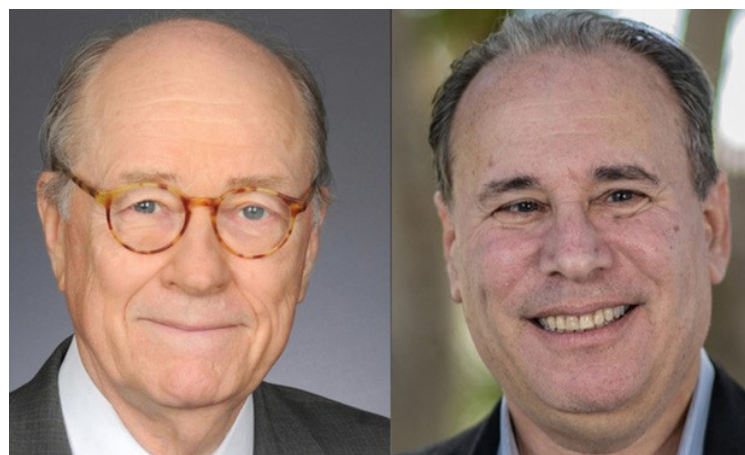
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The Russians Are Coming, and They Want to Change How We Conduct International Arbitration

In their column on international litigation, Lawrence W. Newman and David Zaslowsky discuss the Rules on the Taking of Evidence in International Arbitration, also known as the Prague Rules.

By **Lawrence W. Newman and David Zaslowsky** | мая 23, 2018

Many international arbitrations are conducted in reliance on all or a portion of the IBA Rules on the Taking of Evidence in International Arbitration. First promulgated in 1983 and amended in 1999 and again in 2010, this text, although not comprising rules in the ordinary sense of the word, has become a widely accepted foundation for the procedures by which evidence is gathered and presented. Recently, however, there has emerged a challenge to the IBA Rules based on the perception that they have failed to respond to the increased complexity and costs of international arbitration.



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Such complexity as exists can be understood as the logical outgrowth of the increased use of international arbitration, particularly for disputes involving large amounts of money where the parties are unwilling to entrust resolution of their cases to national courts. In addition, there has been growth in the number of international investment disputes, which are heard only in arbitration and in which significant amounts of money are often at stake.

Some have described this growth in complexity and costs as part of the “Americanization” of international arbitration, a pejorative reference to the presumed inspiration for such increased procedural complexity. These critics place much of the blame on the way the IBA Rules broke through the civil-law/common-law barrier with respect to disclosure of documents by providing for a process by which the parties may seek orders from the arbitral tribunal for the production of documents. Although the IBA Rules restrict the documents that one party may obtain from another, the disclosure process that they authorize can result in the production of many documents.

Moreover, in the eyes of some in the international arbitration community, the process is too adversarial and gives too much autonomy to parties and their counsel, when it should be more “inquisitorial,” meaning more power to the arbitrators and less to the parties with respect to the process by which disputes are resolved.

One response, unveiled in March and intended to be effective at the end of this year, is the antidote to the IBA Rules, originally called the Inquisitorial Rules on the Taking of Evidence in International Arbitration, but amended last month to the less provocative title of the Rules on the Taking of Evidence in International Arbitration, known for short as the Prague Rules. The evils that the Prague Rules address are described by its Working Group as follows:

The drafters of the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) bridge a gap between the common law and civil law traditions of taking evidence. ... However, from a civil-law perspective, the IBA Rules are still closer to the common-law traditions, as they follow a more adversarial approach with document production, fact witnesses and party-appointed experts. In addition, the party’s entitlement to cross-examine witnesses is almost being taken for granted.

In addition, the Working Group says, “many arbitrators are reluctant to actively manage arbitration proceedings.” These factors, the Prague Rule drafters go on to say, “contribute greatly to the costs of arbitration, while their efficiency is sometimes rather questionable.” More specifically, they say that it is rare that a “smoking gun” is brought to light through document production and that doubts have been expressed “as to the usefulness of fact witnesses or the impartiality of party-appointed experts.”

The solution that the Working Group has presented for these perceived procedural deficiencies—the Prague Rules—is the product of a Working Group and drafting committee that were dominated by lawyers from Russia and countries from the former Soviet Union. The remainder consists of civilian lawyers. Common law lawyers, we have been informed, were deliberately omitted from the project.

The drafters’ answer to the problems they identify—(1) document production, (2) fact witnesses, (3) party-appointed experts, and (4) cross-examination—lies generally in a more proactive role for the arbitral tribunal. Thus, the Prague Rules require that the tribunal hold a case management conference with the parties “without any unjustified delay after receiving the case file.” Article 2.1. That file is assumed to be sufficiently informative to provide a basis for the tribunal, among other things, to indicate to the parties the evidence that it would “consider to be appropriate to prove the parties’ positions,” as well as the “actions which could be taken by the parties and the arbitral tribunal to ascertain the factual and legal basis of the claim and the defense” and its “preliminary view on the allocation of the burden of proof between the parties.” Article 2.3.

Obviously, the ability of the tribunal to provide such indications to the parties depends heavily on its having available, at an early stage, information on the issues in the case and on the parties’ positions on them. It also depends on the tribunal’s being composed of highly experienced arbitrators of unquestionable integrity and considerable organizational and leadership qualities—a combination of qualities not all international arbitrators possess.

These qualities are especially important since the tribunal is expected to be able, at the case management conference, or soon thereafter, to establish a provisional timetable

for the arbitration pursuant to which the tribunal may limit the number of submissions and fix “strict time limits,” as well as even share with the parties their “preliminary views with regard to the relief sought, the disputed issues and the weight and relevance of the evidence submitted by the parties” (Articles 2.5 and 2.6), as well as “decide to consider certain issues of fact or law as a preliminary matter.” Article 2.5.

Thereafter, the tribunal is “entitled to and encouraged” to take an active role in “establishing the facts of the case which it finds relevant for its resolution of the dispute.” Article 3.1. Generally, this active role means that the tribunal is to issue orders regarding fact witnesses that it wants to hear and documents that it wants to consider. Articles 3, 4 and 5 *passim*.

Under the Prague Rules, if a party wants to present a fact witness, it must “first seek permission from the arbitral tribunal to present the fact witness” (Article 5.1), through an application explaining to the tribunal “how the fact witness testimony can contribute to proving the circumstances relevant to the disputed issues.” Article 5.2.

The tribunal, after permitting the other party to make a presentation regarding the proposed fact witness, may allow the proposing party to “make the fact witness available for the hearing” and it may also “offer the party to present a written witness statement before the hearing,” after receipt of which the tribunal may or may not actually decide to hear the testimony of the witness at the hearing. Articles 5.4 and 5.5. At the hearing, the tribunal is to direct and control the questioning of the fact witness and may even “not allow the parties to ask questions if it finds them not relevant to the disputed issues” and may order other restrictions on, for example, the time for questions or the type of question. Article 5.6. Thus, although the Rules make no specific mention of cross-examination—one of the ills that they are intended to cure—they do so indirectly. They provide that the tribunal may refuse to allow the parties to ask questions if it finds them “not relevant to the disputed issues” and may also restrict “the time for examination or type of questions as it deems appropriate.” Article 5.6.

It may be observed that the process under the Rules by which a fact witness is cleared to testify through an application and response (possibly in writing) could be more complex and time-consuming than if the witness were simply presented and heard. Similarly, one

can anticipate that the parties may want to be heard before the tribunal imposes limitations on the examination of witnesses

Document Production

The Prague Rules also envision an application process under which the requesting party must seek permission from the tribunal to have it “order the other party to produce specific documents that are relevant and material to the outcome of the case, not in the public domain and in the possession of the other party. Article 4.2. Requiring requests to be of specific documents differs from the IBA Rules which permit requests to produce a “narrow and specific ... *category* of [d]ocuments.” Article 3(a)(ii). (Emphasis added.)

Experts

Whereas the IBA Rules provide for two kinds of experts, party-appointed and tribunal-appointed, the Prague Rules contemplate only tribunal-appointed experts, paid for by the parties. Under the Rules, should a party not pay, the other party will have to pay, and the tribunal is permitted to respond to the first party’s resistance by making “an adverse inference regarding [the] Party’s position.” Article 6.3. It is not readily apparent how there is a correlation between the failure to pay an expert’s costs and, for example, the quantum of damages to be awarded if an expert’s report does not directly concern a resistant party’s position on the merits. Therefore, one may wonder whether the drawing of an adverse inference is, in this context, something of an empty threat.

Consistent with the skepticism with which they regard the testimony of witnesses, the Prague Rules discourage the holding of hearings altogether, providing for the holding of a hearing only “[i]f one of the parties insists or ... or the Arbitral Tribunal finds it appropriate on its own initiative,” and providing, in any event, that the hearing “should be conducted in a cost-effective manner.” Article 8.1.

The Rules encourage the tribunal to assist the parties in settling, allowing the tribunal, with the consent of the parties, to “express its preliminary views with regard to the parties’ respective positions.” Article 9.2. This provision repeats what is set forth in an earlier rule permitting “any of the arbitrators” to “share with the parties its (their) preliminary views with regard to the relief sought, the disputed issues, and the weight

and relevance of evidence submitted by the parties.” Article 2.7.

In these provisions, and generally, the Rules echo the admonitions and encouragement given elsewhere in the international arbitration world for arbitrators to manage the proceedings before them more proactively, particularly through the initial case management conference. In doing so, however, the Prague Rules replace the adversarial approach with what they originally termed the “inquisitorial model of procedure” in order to “contribute to increasing efficiency in international arbitration.” Note from the Working Group.

The Prague Rules model, whether or not inquisitorial, also depends heavily for its application on the skill, good intentions and probity of a tribunal that the Rules entrust with great discretionary power. Commentators on arbitration have regularly hailed as one of its valued attributes that it affords greater autonomy to the parties than do national courts. Moreover, consciously and deliberately undercutting the adversary system as the Prague Rules do, is counter to what most of the world, not just the common-law world, regards as of great value. The Prague Rules would replace the adversary system with a more paternalistic or authoritarian approach with which the drafters, most of them from Central and Eastern Europe, may be comfortable, but others may not.

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