

YCAP 2019 SPRING SYMPOSIUM: Post Event Report

On 2 April 2019, YCAP held its Spring Symposium as part of Paris Arbitration Week, in conjunction with ICDR Young & International and CFA-40. Hosted at the Paris offices of Shearman & Sterling, the panel presentation and networking breakfast that followed was a full house event with standing room only.

YCAP Vice-President of Technology, Vasuda Sinha (Freshfields Bruckhaus Deringer, Paris), kicked off the event with opening remarks alongside YCAP Secretary, Jessica Crow (Vinson & Elkins, London) and CFA-40 representative, Benjamin Siino (Shearman & Sterling, Paris). Margaret Clare Ryan (Shearman & Sterling, London) acted as moderator throughout the panel discussions and introduced the panelists: Philippe Boisvert (White & Case, Paris), Eléonore Caroit (Lalive, Geneva), and Sarah Ganz (Wilmer Hale, London).

Overview of the IBA Rules and the Prague Rules

As an introduction to the topic of comparative approaches to witness evidence in international arbitration, Philippe Boisvert provided background on two competing approaches: (i) the IBA Rules on the Taking of Evidence in International Arbitration (2010) (the *IBA Rules*); and (ii) the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) (2018) (the *Prague Rules*).

The Prague Rules, which were signed only months ago on 14 December 2018, were drafted with the intention of redressing what is perceived as the mounting costs and inefficiencies of evidence in international arbitration. Drafted by a working group comprised primarily of civil law practitioners, the Prague Rules may be regarded as more reflective of civil law approaches to evidence than the IBA Rules.

One particular point of comparison considered in the presentation was the necessity of testing witness evidence at an evidentiary hearing – with the starting position under the IBA Rules (and perhaps, more broadly, in international arbitration) being that witnesses shall appear at the hearing so that their evidence may be tested (Article 8, IBA Rules). The Prague Rules, however, provide that the tribunal and the parties “*should seek to resolve the dispute on a documents-only basis*” (Article 8, Prague Rules) in order to promote cost-efficiency.

A further point of divergence was the evidentiary weight a tribunal should attach to a witness statement where a witness has not appeared at the hearing. Under the IBA Rules, if a witness (whose presence has been requested) fails to appear without a valid reason, the tribunal “*shall disregard*” that witness evidence unless it decides otherwise (Article 4, IBA Rules). Contrastingly, the Prague Rules state that a decision not to call a witness “*does not limit*” the tribunal’s authority to “*give as much evidential value*” as it deems appropriate (Article 5, Prague Rules).

Panel discussions on witness evidence

The moderator, Margaret Clare Ryan, directed the panel’s attention to five key issues: (i) the role of witness statements; (ii) party representatives as witnesses; (iii) witness preparation; (iv) cross-examination; and (v) the role of the tribunal.

The crux of the debate concerned which rules framework is most appropriate to apply in international arbitration? With the speakers' experience straddling both common law and civil law jurisdictions, they noted that the question of what standard to apply to witness evidence should not necessarily be a binary assessment of civil versus common law approaches. Rather, evidence should be assessed in a more nuanced manner, since even across common law jurisdictions there is a wide variety of approaches.

The panel regarded witness statements as a useful tool – an effective means of conveying a narrative to the tribunal. As to the question of whether the tribunal should have greater powers to exclude witness evidence it regarded as unnecessary or insufficiently relevant to the dispute, some panelists accepted the need for more case management and acknowledged that the tribunal's exclusion may be an indication of weakness in the case strategy. However, the panel also affirmed that, although the utility or relevance of a particular witness' evidence may not be readily apparent to a tribunal, that witness may be a skilled communicator who leaves the tribunal with a strong impression of the case. Therefore, there is concern where a tribunal may decide to exclude witness evidence on grounds of efficiency alone.

With respect to witness preparation, the panelists considered the potential inequality of arms faced by practitioners from jurisdictions where hands-on preparation of witnesses is either non-existent in practice or is not permitted under ethical rules. The example was given of German or English practitioners who may be severely limited in the amount of contact and preparation of witnesses as compared to say an American practitioner who may arguably actively "coach" a witness. The possibility of using third parties with specific expertise in witness preparation or conducting a mock trial in advance of the hearing were discussed as potential solutions. However, it was noted that neither option addressed the imbalance in practitioners' ability to engage with a witness – a problem that may also extend to how active a role counsel may play in the drafting of the witness statement. This unresolved issue is certainly ripe for further discussion and debate.

The panelists noted that they had yet to see the Prague Rules applied in practice (as the Prague Rules had very recently been adopted), but regarded them as a means of questioning the IBA Rules as the default position. International arbitration should begin evaluating whether there are more efficient procedural rules or strategies to achieve a balanced medium of cost and time efficiency while permitting sufficient opportunity to put forward witness evidence. One audience member explained that although the Prague Rules had not yet gained much traction, they were perhaps intended to provide a simplified approach for lower-value disputes and were drafted primarily by Eastern European civil law practitioners to address their particular concerns. Although the Prague Rules are in the early stages of adoption, they have acted as an impetus for the international arbitration community to examine its traditional thinking when it comes to evidence – a prospect welcomed by both the panel and the audience.

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