# One Size Fits All? Comparing Civil Law and Common Law Approaches to Evidence and Its Application in International Arbitration

Rekha Rangachari* Kabir Duggal† Adam Masurovsky‡

## I. Introduction

"Arbitrators are not turkeys,"[1] but they do come from particular legal traditions and backgrounds. Those legal traditions have influenced the development of the laws and rules governing evidentiary procedure in international arbitration, as well as the practice of both arbitrators and advocates. Thus while each proceeding will vary depending on the nature of the case, these legal traditions are inescapably brought to bear in the decision-making by tribunals and counsel, and the rules that seek to guide them.

With the publication of the Prague Rules in 2018, and an update to the IBA Rules in 2020, the arbitration world has seen a recent flurry of attempts to harmonize procedures for the taking of evidence, in which long-standing philosophical differences between common law and civil law traditions have played a central role. The Prague Rules, for example, emerged from a growing frustration with the costs and delays associated with what was perceived to be the common-law–style adversarial bent to

*Rekha Rangachari is the Executive Director of the New York International Arbitration Center (NYIAC) and is an adjunct Professor at Seton Hall Law School.

†Dr. Kabir A.N. Duggal is an attorney with Arnold & Porter's International Arbitration Team in its New York office, a Lecturer-in-Law at Columbia Law School, and Managing Editor for the *American Review of International Arbitration*.

‡Adam Masurovsky is an attorney with Arnold & Porter's International Arbitration Team in its Washington, DC office. The views expressed herein are personal and do not reflect the views of NYIAC, Arnold & Porter or its clients. The authors reserve the right to change the positions stated herein.

[1]V.V. Veeder, *Evidence: The Practitioner in International Commercial Arbitration*, 1 Int'l L. Forum du Droit Int'l 231 (1999).

Reprinted by Permission, American Arbitration Association and the International Center for Dispute Resolution in the Dispute Resolution Journal, Volume 76, Issue 1, Jun 2022, p. 53.

the IBA Rules. As such, the Prague Rules have been characterized as the civil law tradition's response to the IBA Rules. The IBA Rules themselves, however, were developed to provide for more efficient and economical procedures for the taking of evidence, and were drafted primarily by civil law lawyers. That both sets of rules attempt to harmonize arbitral procedures on the taking of evidence in the most efficient and economical way, but are perceived to have widely disparate impacts on actual proceedings, reflects the broader differences in approach and perspective between the civil law and common law practitioners.

Arbitration seeks to take disputes outside of the formality of courts and provide more flexible procedures, but those who practice arbitration bring their legal traditions with them. As will be explored in this article, the two major legal traditions brought to bear in arbitral proceedings are the common law and civil law. Key among the differences between the two are the inquisitorial nature of the civil law tradition and the adversarial nature of the common law tradition, as well as the role of document production, written versus oral testimony, and the burdens of proof.

Because these differences influence the domestic laws governing arbitral proceedings, the attempts to harmonize rules on the taking of evidence in international arbitration, and the daily practice of advocates and arbitrators, it is important to understand how these legal traditions have played a role in the development of procedural rules and how they may play out in decision-making in practice. This article will first provide a broader comparative view of the historical differences between the common law and civil law traditions, and then will discuss how these two traditions influence evidentiary procedure in international arbitration, focusing in particular on: (i) witness testimony, (ii) document production, and (iii) the role of the tribunal. In each instance, this article will explore the key differences and overlap between the two major attempts to harmonize evidentiary procedure—the IBA Rules and the Prague Rules.

## II. A Comparative Perspective on Evidence

### A. Approaches to Evidence—Common Law Versus Civil Law

The classic distinction between the inquisitorial and the adversarial approach lies in the distribution of burdens and powers between parties and adjudicators. An inquisitorial proceeding relies on the adjudicator having an active role, both in fact-finding 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.[2]

However, the heart of the differences between the two legal systems lies in the differing views on the development of facts in the decision-making process.[3] Civil law lawyers focus their ire on excessive disclosure requirements and cross-examination, which they tend to view as a colossal waste of time.[4] They are more trusting of documents and skeptical of truthfulness of witnesses. Civil law jurisdictions also follow an inquisitorial approach that seeks to empower the tribunal to control the process of taking evidence and carry out its independent investigation of facts and applicable law.[5] In contrast, common law jurisdictions follow a party-initiated adversarial approach for the disclosure process and engage in extensive cross-examination of witnesses, both of which are considered pivotal to the development of the facts.[6]

---

[2]Guilherme Rizzo Amaral, *Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills Part I* (Kluwer Arbitration Blog, July 5, 2018), http://arbitrationblog.kluwerarbitration.com/2018/07/05/prague-rules-v-iba-rules-taking-evidence-international-arbitration-tilting-windmills-part/, accessed Dec. 12, 2020.

[3]Mark A. Cymrot, *Prague Rules: Common Law and Civil Law Advocates Talking Past Each Other*, 34 Mealey's Int'l Arb. R.1 (Feb. 2019).

[4]*Id.*

[5]Kabir A.N. Duggal & Rekha Rangachari, *A Challenger Approaches: An Assessment of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration*, 37(1) J. of Int'l Arb. 27 (2020).

[6]Gary Born, *International Commercial Arbitration* 1984 (2009).

### *1. Historical Underpinnings*

A legal system is largely defined as a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity; about the proper organization and operation of a legal system; and about the way law is or should be made, applied, studied, perfected, and taught.[7] A corollary of this system is the emergence of legal tradition. A legal tradition therefore can be understood as the general culture underlying a family of similar legal systems.[8] Legal systems worldwide primarily follow two legal traditions: civil law (i.e., the law usually modelled on Roman law) and common law (i.e., the legal system usually derived from the English common law).[9] This section traces the development of these two legal traditions and their relevance in present age.

### *2. Civil Law*

The civil law tradition is the oldest and most widely distributed legal system in the world. Civil Law is believed to have started to develop around 450 B.C. with the emergence of the "Twelve Tables,"[10] which formalized customary law on issues ranging from trials, debts, and land rights, to torts and sacred law, which used to be enforced by magistrates.[11] Later, the "Justinian Code," which codified Roman law,[12] the Canon Law of the Catholic Church, and the development of commercial law in Italy, together provided a foundation for the emergence of a common legal framework throughout the European continent. In the eighteenth century, the reformatory ambitions of Enlightenment rulers coalesced with jurists' as-

[7] J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* I (2d ed. 1985).

[8] William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified),* 60 La. L. Rev. 677 (2000).

[9] Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation,* 65 La. L. Rev. 775, 779 (2005).

[10] *Id.*

[11] Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (1995).

[12] *Id.*

pirations to codify the existing laws to produce comprehensive, systematic legal codes. This resulted in the development of national codes of several European states, including Austria's 1786 Code of Joseph II and Complete Civil Code of 1811, Prussia's Complete Territorial Code of 1794, and France's Civil Code (known as the Napoleonic Code) of 1804.[13] Through colonization, European nations extended the civil law tradition to colonies in South America, Africa, the Middle East, and Asia.[14]

The primary source of civil law is legal codes, which may be in the form of parliamentary legislation such as statutes or legal instruments that substantiate other legal texts. Civil law prioritizes legal codes over jurisprudence. As such, case law traditionally was not relied upon as a source of law because there was an underlying assumption that the code contained all necessary information for arriving at a decision. However, in recent times, case law has received greater appreciation and is now considered as authority to ensure consistency in the application of the law.[15] Another important source of law, which sets the civil law system apart from common law, is the reliance on scholarly commentaries. Civil law systems rely heavily on "doctrines" or writings of prominent legal scholars, especially in cases where the law is unsettled.

### *3. Common Law*

The common law system owes its origin to the feudal system in England.[16] Emanating from feudalism was the system of settlement of disputes at a local level, where each region independently decided cases on its own and the rights of each individual flowed from their personal status within the system.[17] The King, in his capacity as the sovereign judge, established moving courts with judges who would go around the country to judge

[13]4 H. Patrick Glenn, *Legal Traditions of the World* (2d ed. 2004).

[14]Vivienne O'Connor, *Practitioner's Guide—Common Law and Civil Law Traditions* (Feb. 17, 2012), available from International Network to Promote the Rule of Law.

[15]*Id.*

[16]Theodore F.T. Plucknett, *A Concise History of the Common Law* (2010).

[17]Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 Am. J. of Comp. L. 419 (1966).

disputes (*circuit courts)*, thereby creating the first set of uniform rules and legal order, which were followed throughout the country.[18] These general norms, which were common to all parts of the country without distinction, provided the system with its name "common law."[19] Through the years, the general norms and the court system in England evolved, with the establishment of Parliament as a legislative body.[20]

In contrast to civil law, common law developed in its initial years through case law, making judicial opinions a primary source of law from the outset. Judges would not merely apply the law, as is the case with civil law tradition, but often would also declare the law.[21] The judicial opinions in each case served as an authoritative source of law, developing the system of *stare decisis*, which dictates adherence to legal precedents from a higher judicial authority in order to endure certainty, fairness, and consistency in the common law system.[22] Judicially created rules were favored over statutes principally because the latter was considered to be a secondary source of law. However, this changed in the 20th and 21st Centuries,[23] when statutes came to prominence and extensively codified the rules created by judicial decisions, leading to the development of the common law system of today.[24]

### *4. Distinctions Between the Two Legal Systems in the Taking of Evidence*

In common law jurisdictions, in general, a party-initiated adversarial approach for the disclosure process is considered pivotal to dispute resolution.[25] Therefore, the parties play a more active role as the adversarial

[18]George Burton Adams, *The Origin of the Common Law*, 34 Yale L.J. 115 (1934).

[19]Dainow, *supra* note 17.

[20]*Id.*

[21]*Id.*

[22]Merryman, *supra* note 7.

[23]Christie S. Warren, *Introduction to the Major Legal Systems of the World* (2006).

[24]*Id.*

[25]J.A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 Int'l & Comp. L.Q. 281 (2003).

system is viewed as necessary and a fair way of ensuring due process in a proceeding. One of the key distinct facets of evidentiary procedure in the common law tradition includes the presentation of evidence via live witnesses, who prepare with counsel prior to a hearing, and are subject to extensive direct examination and cross-examination. Further, parties can engage in extensive discovery and cast a wide net in terms of document production.

On the other hand, in civil law jurisdictions, the court largely controls the proceedings, taking the more active role in the development of evidence and in conducting investigations.[26] Documentary evidence, including written witness statements, is presented for the judge to review prior to the hearing, at which a witness may appear and be questioned by the judge.[27] The judge is expected to have read the dossiers of documents submitted by each party in advance of the hearing. Lawyers do not prepare witnesses and generally have a limited role in their examination at trial.[28] Further, document production (not referred to as "discovery") is generally limited to specific documents that the opposing party can already identify.[29]

### B. Significance of the Two Legal Systems in International Arbitration

The outcome of most international arbitrations is determined by the facts of the case or at least by some combination of factual and legal issues.[30] This makes the fact-finding process particularly significant in all jurisdictions where arbitration is the robustly preferred dispute resolution mechanism. While arbitration is meant to be a flexible and more efficient alternative to court proceedings, and thus less adherent to rigid evidentiary procedures, the parties and the tribunals bring their legal traditions to the table in these proceedings. This is especially so in international arbi-

[26] *Id.*

[27] Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law Civil Law Divide in Arbitration*, 18(1) Arb. Int'l 59, 62-63 (2002).

[28] *Id.*

[29] *Id.*

[30] Martin Hunter et al., *Redfern and Hunter on International Arbitration* 384 (2009).

tration and its deference to agreement among the parties. In this setting, clashes of legal cultures can occur between parties and counsel of differing legal backgrounds; for example, parties from common law jurisdictions like the U.S. or U.K. may prepare for and expect some form of mandatory disclosure while a German party may be accustomed to doing so only by consent. Further, tribunals can play a significant role not only in deciding on various rules of evidentiary procedure that can shape the nature of the arbitration, but also in partaking in the investigation of the facts through the questioning of witnesses and the use of experts. It is therefore important to understand how the legal traditions from which the arbitrators or the parties' counsel hail might influence their approach to the taking of evidence.

To facilitate this understanding, the analysis that follows compares key evidentiary practices across different common law and civil law jurisdictions, as well as between the two most prominent attempts to synthesize and streamline evidentiary procedure: the IBA Rules and the Prague Rules. This section will first introduce the IBA Rules and the Prague Rules and how the common and civil law traditions influenced the development and perception of these rules. It will then provide a comparative analysis of a sampling of rules governing key issues in the taking of evidence, including: (1) document production; (2) witness examination; (3) the role of the arbitrators; and (4) the burden and standards of proof.

### *1. The Move Toward Uniform Rules on Taking of Evidence in International Arbitration: the IBA Rules and the Prague Rules*

#### *a. The IBA Rules*

The IBA Rules were created with the express intent of providing common ground among parties and practitioners from different legal systems.[31] For many years, the IBA Rules were the only accepted guidelines on evidentiary procedure in international arbitration to supplement the agreement

[31]Duggal & Rangachari, *supra* note 5, at 32.

of the parties and the applicable institutional or ad hoc rules.[32] For some commentators, the IBA Rules represented a sensible middle ground between the common law and civil law traditions with regard to several otherwise contentious issues, such as document production, the authentication and presentation of documentary evidence at a hearing, and the approach to live witness testimony by the parties and the tribunal.[33]

*b. The Prague Rules*

Of course, not all have found the IBA Rules to sufficiently provide such common ground, and there has been growing discontent in the arbitration community due to the increase in length and costs of arbitration proceedings. In response to the view that the IBA Rules gave effect to common law assumptions underlying evidence, The Rules on the Efficient Conduct of Proceedings in International Arbitration, more commonly known as the "Prague Rules" were introduced to combat what was seen as the increasing inefficiency of that approach. This is despite the fact that most of the drafters of IBA Rules came from civil law jurisdictions. In contrast, only three out of 48 of the Prague Rules Working Group members are based in a common law country.[34] The Prague Rules promote a more efficient proceeding by setting deadlines[35] and a procedure for cost management. The rules embody civil law traditions as opposed to common law traditions, particularly in the areas of: (1) the extent of the role of the tribunal in both procedure and fact-finding, (2) the use of witnesses (both fact and expert), and (3) the extent of document production.[36] The development of the Prague Rules signals that the clash between the common law and

[32] *Id.*

[33] *See generally* Siegfried H. Elsing & John M. Townsend, *supra* note 27.

[34] Duggal & Rangachari, *supra* note 5, at 24.

[35] Trinidad Alonso & Georg Scherpf, *Are the Prague Rules Suitable for Investment Arbitration?* (Kluwer Arbitration Blog Aug. 11, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/11/are-the-prague-rules-suitable-for-investment-arbitration/, accessed Jan. 10, 2021.

[36] Duggal & Rangachari, *supra* note 5, at 34.

| Country | Witness Testimony |
|---|---|
| France | Arbitrators can order necessary inquiry measures and compel any person to appear for questioning.[40]<br><br>As far as international arbitration is concerned, procedures conducted in France apply internationally recognized procedures, including the use of witness statements and cross-examination. In this respect, it is noteworthy that the Paris Bar recently clarified that it is not contrary to French lawyers' ethical duties to prepare witnesses according to established arbitral practice. Whether arbitrators would allow the direct examination or questioning of witnesses depends on the parties' agreement and the legal background of the arbitrators. There is no specific practice or provision in French law with respect to this issue. |
| Spain | Witness testimony usually is presented through direct oral examinations, but the use of witness statements with cross-examination is becoming increasingly common in domestic arbitration.[41]<br><br>Arbitrators can question witnesses after they have been cross-examined by the parties.[42] |
| Germany | Written witness statements are increasingly common. Common-law style cross-examination and direct examination, although they are not known as such in German litigation, are usually permitted.<br><br>Arbitrators regularly question witnesses and, in domestic arbitrations, witnesses are questioned by the tribunal first and later by the parties.[43] |

Table 1: Witness Examination in Civil Law Jurisdictions

civil law traditions remained unresolved despite the attempt with the IBA Rules to bridge these gaps.[37]

## III. Witness Examination

As noted above, a civil law system believes that documents are the best source of evidence. It is the tribunal that decides which witnesses are to be heard and is primarily in charge of their interrogation. Usually, the parties' attorneys are not supposed to talk to the witnesses before trial and witness preparation is regarded as uncomfortably close to manipulation of evidence.[38] On the other hand, the common law tends to be skeptical of a fact unless a witness can be found to testify under oath of its truth.[39] Further, the preparation of witness statements and the concept of cross-examination are very important in the common law tradition. Tables 1 and 2 draw out the key differences between arbitral rules in common law and civil law jurisdictions with respect to witness examination.

[37] *Id.*

[38] Siegfried H. Elsing & John M. Townsend, *supra* note 27.

[39] *Id.*

| Country | Witness Testimony |
|---|---|
| India | The principles of conducting trials under the CPC and Evidence Act are part of arbitral proceedings and cannot be departed from "completely." ablefootnote*Mun. Corp. of Delhi v. Int'l Sec. & Intelligence Agency*, AIR 2002 SC 2308.<br><br>Examination and cross-examination of witnesses have become a norm *in pari materia* to that of a trial procedure in a civil court. ablefootnote*Sukhbir Singh v. M/S Hindustan Petroleum Corp.*; Gopika Nambiar & Kumar Karan, *Examination and Cross-Examination of Witnesses in Arbitral Proceedings via Video Conferencing: Challenges and the Road Ahead*, Bar & Bench, Oct. 5, 2020, https://www.barandbench.com/columns/examination-and-cross-examination-of-witnesses-in-arbitral-proceedings-via-video-conferencing, accessed Jan. 5, 2020. |
| United Kingdom | The tribunal has powers to decide all procedural and evidentiary matters. ablefootnoteArbitration Act 1996 c. 23, § 4 (Eng.).<br><br>It has the power to direct that a witness be examined under oath. ablefootnoteArbitration Act 1996 c. 23, § 8 (Eng.). A party may apply for a court order requiring attendance of a witness to give oral testimony. ablefootnoteArbitration Act 1996 c. 23, § 3(1) (Eng.). |
| United States | There is reluctance to use written witness statements regularly in domestic arbitration; litigators are more comfortable with presenting live witness testimony. ablefootnoteEdna Sussman, *A General Overview of the Conduct of International Arbitration Proceedings in the United States, in International Arbitration in the U.S.* (Wolters Kluwer 2017), https://sussmanadr.com/wp-content/uploads/2018/12/Sussman-International-arbitration-un-the-US-NO-TOC-2017.pdf, accessed Jan. 7, 2020. |

Table 2: Witness Examination in Common Law Jurisdictions

## A. Comparing the IBA Rules and the Prague Rules on the Taking of Witness Testimony

Witnesses can be fact witness or expert witness. The purpose of direct examination and witness statements is to convince the arbitral tribunal that the position of the party presenting the witness is correct. Hence, the testimony must be clear, coherent, and consistent with other means of evidence on record.[44] As Table 3 demonstrates, the IBA Rules tend to provide a more permissive approach to witness testimony that more reflects the common law tradition: The centrality of witness participation is presumed, as is cross-examination and a hearing on the merits. The Prague Rules, alternatively, provide a more limited approach to witness testimony. Tribunal retains a high degree of discretion with regards to witness participation and controls the examination. Further, as opposed to presuming the centrality of witness participation, the Prague Rules call

[44] Anne Véronique Schlaepfer & Vanessa Alarcón, *Direct and Redirect Examination,* Global Arb. Rev. (Oct. 1, 2019), https://globalarbitrationreview.com/guide/the-guide-advocacy/fourth-edition/article/direct-and-re-direct-examination, accessed Jan. 5, 2020.

for the tribunal and parties to *seek to dissolve a dispute on a documents-only basis.*

## IV. Document Production

Some practitioners consider document production "an essential element of justice," whereas some others consider it as "a waste of time and money."[62] These two extremes denote the stereotypical attitudes of a lawyer trained in common or civil law respectively. The rationale for discovery in common law countries is that justice can only be established if both parties have access to the same material. Thus, a party must not only produce documents that it intends to rely upon but also those which might have an adverse effect on its case. On the other hand, in civil law countries, the parties only present documents that they wish to rely on. As large document productions can be costly, most civil lawyers would typically claim that discovery significantly delays and increases the costs of a proceeding without contributing effectively to its outcome.[63] Tables 4 and 5 detail the key differences between common and civil law jurisdictions with respect to document production.

---

[62]Pelin Baysal & Bilge Kağan Çevik, *Document Production in International Arbitration: The Good or the Evil?* (Kluwer Arbitration Blog Dec. 9, 2018), http://arbitrationblog.kluwerarbitration.com/&\#8204;2018/&\#8204;12/09/&\#8204;document-production-in-international-arbitration-the-good-or-the-evil/, accessed Jan. 7, 2020.

[63]*Id.*

[64]Code de Procédure Civile [C.P.C.] [Civil Procedure Code] art. 1460(3) (Fr. 1981).

[65]Michael Bühler & Pierre Heitzmann, Jones Day, *France* (PLC Arbitration 2009/10).

[66]Alfonso Iglesia et al., *Commercial Arbitration: Spain,* Global Arb Rev. (Apr.1.12, 2020), https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/spain, accessed Jan. 8, 2020.

[67]*Id.*

[68]Gustav Flecke-Giammarco & Gebhard Bücheler, Seven Summits Arbitration, *Arbitration procedures and Practice in Germany: Overview*, Prac. L. (Feb. 1, 2020), https://uk.practicallaw.thomsonreuters.com/4-385-8191, accessed Jan. 7, 2020.

[69]Zivlprozessordnung [ZPO] [Code of Civil Procedure] § 42 (Ger.).

| **IBA Rules** | **Prague Rules** |
|---|---|
| The burden to identify the witness lies with the parties. Each party shall submit the witness statement within the time stipulated by the tribunal.[45] A party or its representatives may interview the witnesses to discuss their prospective testimonies. The IBA Rules also provide room for submitting revised or additional witness statements.[46] Parties have fairly broad latitude to call fact witnesses,[47] but the tribunal may limit or exclude questioning, or even the appearance of a witness, if it is irrelevant, immaterial, unreasonably burdensome, duplicative, or covered by another enumerated objection.[48] | The tribunal can decide which witnesses are to be called after hearing from the parties. The tribunal may decide not to call a certain witness for examination during the hearing.[49] The examination of the witnesses is conducted under the control of the tribunal.[50] The tribunal has the power to reject a question that it considers to be irrelevant, redundant, not material to the outcome of the case, or otherwise inappropriate.[51] The arbitral tribunal may itself invite a party to submit a written witness statement of a particular witness before the hearing.[52] |
| Cross-examination: There exists a presumption of cross-examination of fact witnesses.[53] | Cross-examination: The tribunal may permit cross-examination after having "heard the parties,"[54] but it must be conducted under the direction and control of the tribunal.[55] |
| Third-party witnesses: The IBA Rule 4.9 specifically provides that a party or the tribunal can obtain third-party testimony using "whatever steps are legally available."[56] | Third-party witnesses: The Prague Rules acknowledge that witness testimony may be relevant, but they make no provision for seeking testimony from third-party witnesses. |
| Experts: Both the parties and the tribunal may call expert witnesses.[57] Parties may rely on experts as a means of evidence on specific issues, and produce an expert report,[58] which the tribunal may disregard if the expert fails to appear for testimony. In the case of more than one expert, the tribunal may order them to meet and confer. The tribunal may appoint an expert, but only with regard to specific issues. Doing so confers authority on the expert to request relevant documents. | Expert: The responsibility for appointment of experts rests primarily on the tribunal.[59] Notwithstanding the appointment of an expert by the arbitral tribunal, the parties are free to submit an expert report given by an expert witness of their own choice. Such party-appointed experts may also be called for examination during the hearing. Moreover, a party-appointed expert may be instructed by the tribunal to issue a joint report with the tribunal-appointed experts on certain listed matters such as the points of agreement or disagreement and reasons for a difference in opinion.[60] With regard to appointments, the arbitral tribunal is not bound by the choice of candidates proposed by the parties for the appointment of an expert.[61] It may appoint an expert on its own initiative even when not requested. |

Table 3: The IBA Rules and Prague Rules on Taking Witness Testimony

| Country | Document Production |
|---|---|
| France | A party can request that documents be produced by the opposing party. Arbitrators can direct a party to produce a document.[64]<br><br>In case of non-compliance, the arbitrators can draw the conclusions that they consider appropriate, including an adverse inference against the party refusing to produce the documents that were ordered to be produced.[65] |
| Spain | Not allowing a broad discovery is embedded in the Spanish due process system. Accordingly, in domestic arbitration, document production is limited to request for documents from the parties to the dispute. It requires that the document requested be identified and its relevance justified.[66] |
| Germany | There is no specific provision on production of documents to the other party in the German Arbitration Act. However, tribunals have an inherent power to order a party to produce documents requested by the other party.[67]<br><br>The arbitral tribunal can also draw adverse inferences from a party's refusal to follow orders on document production.[68] The admissibility and scope of a request for document production is limited.[69] |

Table 4: Document Production in Civil Law Jurisdictions

| Country | Document Production |
|---|---|
| India | The courts have interpreted the Arbitration Act in a manner that provides the tribunal to make orders for production of documents against parties as well as third parties.[70] |
| United Kingdom | The tribunal decides the scope of document production.[71] Parties produce those documents on which they rely and "if necessary" request production of certain documents from the opposite party.[72]<br><br>The tribunal may draw adverse inferences or make an order as to costs if a party fails to comply with a peremptory order regarding document production.[73]<br><br>The tribunal or the party may seek a court order for document production.[74] |
| United States | Arbitrators can also order a party to produce documents.[75] If the tribunal's orders are disregarded, the tribunal may seek judicial assistance to compel discovery.[76] |

Table 5: Document Production in Common Law Jurisdictions

### A. Comparing the IBA and the Prague Rules on Document Production

A survey conducted in 2018 by White & Case LLP and Queen Mary University of London revealed that the document production phase is a predominant cause of delay in arbitration proceedings.[77] A primary source of the criticism of the IBA Rules as too common law-oriented, and what may contribute to excessive delay, is that the IBA Rules favor document production. The IBA Rules allow a party to request a document or a "narrow and specific" category, and the tribunal can deny requests that lack relevance or materiality, or create an unreasonably high burden.[78] In practice, however, the parties are seen to exchange requests for exceedingly broad categories of documents. These categories would also include e-discovery. Consequently, document production from the parties concerned often leads to high cost and excessive time consumption. The Prague Rules, on the other hand, limit the ability of the parties to produce various documents. The Rules expressly state that "the Arbitral Tribunal shall avoid extensive production of documents, including any form of e-discovery."[79] This results in a limitation of document production, although it is not entirely precluded. Further, unlike the IBA Rules, the Prague Rules limit document production requests to specific documents, rather than categories, and within a limited timeframe. Table 6 compares the IBA Rules and Prague Rules with regard to document production.

[70]Delta Distilleries Ltd. v. United Sprits Ltd., AIR 2014 SCC 13.

[71]Arbitration Act 1996 c. 23, § 4(2)(d) (Eng.).

[72]Nigel Rawding, *Commercial Arbitration: United Kingdom—England and Wales*, Global Arb. Rev. (May 18, 2021), https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/united-kingdom, accessed Jan. 8, 2020.

[73]Arbitration Act 1996 c. 23, § 1(7) (Eng.).

[74]Arbitration Act 1996 c. 23, § 2(1) (Eng.).

[75]9 U.S.C. § 7 (Federal Arbitration Act).

[76]*Id.*

[77]*Id.*

[78]IBA Rules, art. 9.2 (a).

[79]Prague Rules, art. 4.2.

| IBA Rules | Prague Rules |
|---|---|
| The burden to come forward with the documents supporting their case lies with the parties.[80] However, the deadline for production of such documents and for other incidental requirements is decided by the tribunal depending on the circumstances of the case. A party may submit a Request to Produce to the tribunal and the other parties, and the party so requested is obliged to produce the documents subject to any reasonable objection to such Request to Produce.[81] | The Prague Rules seek to minimize any form of document production, including e-discovery.[82] Any request for the production of documents shall be indicated at the case management conference.[83] A request to order document production at a later stage of arbitration is entertained only where the tribunal is satisfied that such a request could not have been made earlier at the case management conference. Furthermore, parties can only request specific documents, not a "category of documents," which must be "relevant and material to the outcome of the case . . . not in the public domain; and . . . in the possession of the other Party."[84] The burden to decide the procedure of document production lies with the tribunal.[85] The rules explicitly provide for the confidentiality of such a document submitted to the tribunal that is not in the public domain.[86] |

Table 6: The IBA Rules and Prague Rules on Document Production

## V. Role of the Tribunal

Though arbitration is generally a more party-driven process than a court proceeding, there are key differences in the common law and civil law traditions regarding the role of judges versus the role of the parties that can affect the evidentiary dynamics of an arbitral proceeding. In civil law procedures, the judge or the tribunal decide which witnesses are to be heard. The bench or the tribunal will be primarily in charge of their interrogation. Witnesses typically have no contact with the parties' attorneys prior to the submission of oral evidence. Civil lawyers are hence more accustomed to active management of the presentation of evidence by a tribunal. On the other hand, in the common law system, tribunals still dictate procedure and serve as the ultimate arbiter on the admissibility of evidence, but take a back seat to the parties in determining the issues and witnesses to be

[80]IBA Rules, art. 3.1.

[81]IBA Rules, art. 3.2.

[82]Prague Rules, art. 4.2.

[83]Prague Rules, art. 4.3.

[84]Prague Rules, art. 4.2.

[85]Prague Rules, art. 4.3.

[86]Prague Rules, art. 4.8.

| Country | Document Production |
|---|---|
| France | The arbitrators play a rather active role; they can take "all measures necessary" for fact-finding.[88] |
| Spain | The arbitrators may conduct the proceeding "in such manner as they deem appropriate." The power of the arbitrators includes determining the taking and evaluation of the evidence.[89]<br><br>The arbitrators will decide whether to hold oral hearings for the presentation of the statements of evidence and issuance of conclusions or whether proceedings will only be conducted in written form.[90] |
| Germany | The tribunal has broad discretion to conduct the arbitration as it deems appropriate.[91]<br><br>The tribunal can decide all matters relating to an arbitration and take evidence on its own initiative. |

Table 7: Role of the Tribunal in Civil Law Jurisdictions

presented in the proceedings. Parties are more accustomed to a judicial system in which matters, questions, and objections not raised by the parties will not be taken into consideration by the judges.[87] Judges in the common law system typically will not engage in extensive witness questioning as a means of developing the testimony. Further, parties tend to prep key witnesses extensively for their direct examination and cross-examinations ahead of hearings. As Tables 7 and 8 demonstrate, arbitration rules in civil and common law jurisdictions do not differ significantly in the power granted to tribunals to dictate procedure, including the ability to call and question witnesses. The differences between the two traditions, as such, are more likely to bear out in how a tribunal chooses to use its discretion in practice.

[87]Laurent Vercauteren, *The Taking of Documentary Evidence in International Arbitration*, 23 Am. Rev. of Int'l Arb. 341 (2012).

[88]Code de Procédure Civile [C.P.C.] [Civil Procedure Code] art. 1467 (Fr. 1981).

[89]Arbitration Act 2003 art. 25.2 (Spain).

[90]Luis Cordon & Jose Pineiro, *International Arbitration 2020: Spain* (Global Legal Insights), https://www.globallegalinsights.com/practice-areas/international-arbitration-laws-and-regulations/spain, accessed Dec. 13, 2020.

[91]Zivlprozessordnung [ZPO] [Code of Civil Procedure] § 1043(4), 1042(4).

[92]Arbitration Act 1996 c. 23, § 4(1) (Eng.).

[93]Arbitration Act 1996 c. 23, § 4(1) (Eng.).

[94]9 U.S.C. § 7 (Federal Arbitration Act).

| Country | Document Production |
|---|---|
| India | The tribunal has the power to decide all procedural and evidentiary matters. This includes the manner of taking evidence and whether there will be oral or written submissions, the relevance and weight of evidence, and the extent to which the tribunal will take an active role in ascertaining the facts and the law.[92] |
| United Kingdom | The tribunal has the power to decide all procedural and evidentiary matters. This includes the manner of taking evidence and whether there will be oral or written submissions, the relevance and weight of evidence, and the extent to which the tribunal will take an active role in ascertaining the facts and the law.[93] |
| United States | The tribunal has broad discretion regarding conduct of proceedings, so long as it does not refuse to hear pertinent and material evidence.[94] |

Table 8: The Role of the Tribunal in Common Law Jurisdictions

### A. Comparing the IBA Rules and the Prague Rules on the Role of the Tribunal

The IBA Rules lean towards an adversarial system in that the parties have greater freedom to direct the proceedings in accordance with their case strategy.[95] The IBA Rules rely, to a large extent, on the agreement of the parties as to the "*efficient, economical and fair process for the taking of evidence*,"[96] and the tribunal assumes a relatively passive role and facilitates the proceedings in a limited way.[97] The Prague Rules, expressly a civil law response to the perceived common law bent of the IBA Rules, grant broader powers to the tribunal to conduct the case and take a proactive role in the proceedings.[98] In general, the Prague Rules provide the tribunal with tools to take a more hands-on approach to a proceeding at an early stage and to allow the arbitrators to closely consider from the outset of a proceeding whether they can give directions that will make it more efficient and cost effective for the parties to resolve the dispute.[99]

[95]Mark A. Cymrot, *Prague Rules: Common Law and Civil Law Advocates Talking Past Each Other,* 34 Mealey's Int'l Arb. R. 1 (Feb. 2019).

[96]IBA Rules, art. 2.1.

[97]*Id.*

[98]Prague Rules, art. 2.1.

[99]Caroline Simpson, *Prague Rules Launched But Jury Still Out on Usability*, Law360 (2019), https://www.law360.com/articles/1120251/print?section=internationalarbitration, accessed Oct. 30, 2020.

| IBA Rules | Prague Rules |
|---|---|
| The IBA Rules, although encouraging the tribunal to be proactive, do not contain a provision that expressly confers a more proactive role on the tribunal.<br><br>In the provisions that relate to determining evidentiary procedure, document production, and identification of witnesses and experts, the IBA Rules make clear that all determinations will be party-driven.[100] | The Prague Rules envisage a more proactive role of the tribunal to the extent that they vest the tribunal with powers to actively engage in the arbitration than act as an observer to an essentially party-driven conduct of proceeding.[101] The tribunal is also encouraged to take a proactive role in ascertaining the facts of the case.[102] For example, the arbitral tribunal, under Article 2.1 is obliged to hold a case management conference with the parties after receiving the case files without any delay. After hearing the parties' discussion regarding the procedural timetable, the arbitral tribunal may "*determine certain issues of fact or law as preliminary matters, limit the number of rounds for exchange of submissions, the length of submissions, as well as fix strict time limits for the filing thereof, the form and extent of document production (if any).*"[103]<br><br>The Prague Rules also recognize *jura novit curia* according to which the tribunal may invoke applicable law *suo motu* even if it is not pleaded by the parties. |

Table 9: The IBA Rules and Prague Rules on the Role of the Tribunal

## VI. Takeaways

A comparison of common law and civil law rules for the taking of evidence, alongside the two major attempts at uniform practice in the IBA Rules and Prague Rules, reveals that while the goals of each are very similar—balancing efficiency and thoroughness in the presentation of each party's evidence and the resolution of disputes—each has unique tendencies that are important to bear in mind in practice. Thus, while each arbitrator is unique, and party strategy will vary depending on the circumstances of the case, their legal backgrounds may have a bearing on the practice of taking evidence that they tend to prefer. For example, parties seeking to resolve an arbitration on a documents-only basis, rather than live witness testimony at a hearing, may find opposing counsel and a tribunal from

[100] *See, e.g.*, IBA Rules, art. 4.1 ("Within the time ordered by the Arbitral Tribunal, each party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony").

[101] Prague Rules, art. 2.

[102] Prague Rules, art. 3.1.

[103] Prague Rules, art. 2.5.

civil law backgrounds more receptive. Conversely, counsel and arbitrators from common law backgrounds may be more inclined to broader and more extensive cross-examination of witnesses. Further, advocates should be prepared for advocates from the common law tradition may be more inclined to seek extensive document production, and a tribunal trained with that same background may similarly be inclined to grant such requests. The influence of the legal tradition of the arbitrators and the parties may play out most significantly in the initiative the tribunal takes in determining the facts and applicable law. Again, the degree to which the tribunal takes an active role may simply depend on the nature of the case and the nature of the arbitrator, but those from a civil law/inquisitorial background may be inclined toward more extensive questioning of witnesses and experts, calling experts in the first place, and dictating the nature of the proceedings. Certainly, parties electing to apply the Prague Rules should expect tribunals to take a more active role in all aspects of the taking of evidence.

## VII. Conclusion

Evidence plays a crucial role in determining the outcome of an arbitration. The difference between the two legal traditions may give rise to conflicting procedural approaches in relation to how evidence is obtained, analyzed, and ultimately used to determine the outcome of the case. In practice, such conflicts are resolved by the arbitral tribunal in the exercise of their inherent powers or discretion. Modern arbitration statutes and rules typically include a provision giving freedom to the parties to agree on the evidentiary rules that would be applicable to their dispute. In the absence of such an agreement, the provision grants the arbitral tribunal wide discretion to determine all procedural matters.[104]The introduction of the Prague Rules should be welcomed as a way to increase the efficiency of arbitration proceedings by limiting the ways in which evidence can be in-

[104]Rolf Trittman & Boris Kasolowsky, *Taking Evidence in Arbitration Proceedings Between Common Law and Civil Law Traditions—The Development of a European Hybrid Standard for Arbitration Proceedings*, 31(1) U.S.N.W. L.J. 330 (2017), http://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/31-1-3.pdf.

troduced and relied upon. However, there is no "one-size-fits-all" approach, and there are legitimate grounds for parties to prefer the flexibility provided by the IBA Rules as well as the wider scope to introduce and rely on evidence. It remains to be seen whether the parties will depart from the well-known and established evidentiary practices under the IBA Rules and elect to conduct their dispute in accordance with the Prague Rules.