THE "TABULA RASA" ILLUSION: PROCEDURAL NORMS AND PROCEDURAL FLEXIBILITY IN COMMERCIAL ARBITRATIONS

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"Tabula Rasa" - a situation in which nothing has yet been planned or decided, so that someone is free to decide what should happen or be done.[1]

"norm" - an accepted standard or a way of behaving or doing things that most people agree with.[2]

"flexibility" - (1) the ability to change or be changed easily according to the situation; (2) the ability to bend or be bent without breaking.[3]

Procedural flexibility is a hallmark of commercial arbitration, linked to the concept of party autonomy. Parties not only have the freedom to choose arbitration as the dispute resolution process, but also have the freedom, by agreement, to tailor the process to reflect their priorities. Given the volume of ink and exposition devoted to extolling the virtues of procedural

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[1] *Cambridge Dictionary* (Cambridge: Cambridge University Press, 2022), sub verdo "tabula rasa" <https://dictionary.cambridge.org/dictionary/english/tabula-rasa?q=tabula>.

[2] *Cambridge Dictionary*, (Cambridge: Cambridge University Press, 2022), sub verdo "norm" <https://dictionary.cambridge.org/dictionary/english/norm>.

[3] *Cambridge Dictionary*, (Cambridge: Cambridge University Press, 2022), sub verdo "flexibility" <https://dictionary.cambridge.org/dictionary/english/flexibility>.

flexibility and party autonomy, a person with limited experience in the arbitration process could be forgiven for imagining that the development of the detailed pre-hearing and hearing procedures for an arbitration begins with a tabula rasa; that is, that the parties and the arbitrators arrive at the first procedural conference with no specific expectations as to what the procedural steps will be. This is, of course, incorrect. The reality is that each of the participants arrives with their own expectations, based on myriad factors, including the legal cultures in which they were trained and their past experience with arbitration and other forms of dispute resolution.

Procedural "norms" are essential to resolving disputes arising from differing expectations about procedural matters. Indeed, inherent in the concept of procedural flexibility is the premise that there are procedural norms. Procedural flexibility is the ability to depart from procedural norms in appropriate circumstances, without unduly compromising the ultimate objectives of the process. So, for example, if there is a procedural norm that pre-hearing examinations of witnesses[4] are not permitted in arbitration, procedural flexibility will allow a departure from that norm if good cause is shown for doing so and if goals such as time and cost efficiency are not unduly compromised.

Before deploying the notion of procedural norms, however, one must be mindful that "norms" differ from one arbitral community[5] to another, even though within each such community, once a critical level of shared experience is reached,

[4] Variously called "depositions", witness "questioning", and "examinations for discovery" depending on the proponent's legal tradition.

[5] I confess that "arbitral community" is an uncertain phrase, and that the notion of "community norms" is circular. The shared belief in a set of norms may define the community. As I use the phrase "arbitral community" I refer to a group of arbitration practitioners with shared experiences, sometimes connected by geography, but more often by training and experience, who share a belief in a set of procedural norms and objectives for commercial arbitration.

there are many common expectations. This means that, just as one may be called upon to identify an applicable law, one should have regard to which set of procedural norms is most relevant to the proceeding. For example, in a domestic arbitration seated in Ontario, should the procedures emulate those most familiar to a tribunal comprised of arbitrators with vast experience in international arbitration, or should they emulate those familiar to the parties and their counsel whose experience is largely limited to Ontario court proceedings?

Detailed procedures to be used in arbitrations generally are not legislated.[6] The purpose of arbitration legislation, and of legislative reform initiatives, is to establish the legal framework within which arbitrations are to be conducted. Legislation cannot, and should not attempt to, replicate or limit the results of the chemistry involved in developing a procedural schedule for a case through exchanges among the parties and the tribunal. For the same reason, while they are very specific about how arbitrations are to be commenced and how tribunals are to be constituted, even widely-used institutional arbitration rules tend to provide parties and tribunals broad discretion to shape pre-hearing procedures and the conduct of any hearings. This approach is best exemplified by the exhortation in article 25 of the ICC Rules that "[t]he arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means".[7] The flexibility that results from this

[6] See e.g., article 19(1) of the *UNCITRAL Model Law on International Commercial Arbitration (1985, with 2006 amendments)* (which is the basis for international arbitration legislation in Canada, states "[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". Under article 19(2), failing agreement, "the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.")

[7] *ICC Arbitration Rules 2021,* Public Source Materials, pp 1—104, in Force 1 January 2021. Article 22 states: "1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. 2) In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it

approach is essential to the effectiveness of the arbitral process, but leaves open the question of norms or defaults that should apply if there is not good reason to depart from them.

Even so, there has been a broad consensus among international practitioners concerning procedural norms for international commercial arbitrations. The *IBA Rules for Taking of Evidence in International Arbitration* ("IBA Rules"), first published in 1999,[8] sought to identify some of these norms of procedure based on the vast experience of its working group members and their consultations with members of the international arbitral community. In international commercial arbitrations, even when they come from very different domestic legal cultures, experienced counsel and arbitrators typically arrive with common expectations as to what steps the process should include, and in what sequence, unless good cause is shown to depart from them.[9]

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considers appropriate, provided that they are not contrary to any agreement of the parties;" Article 20 of the "Canadian Dispute Resolution Procedures," *ICDR Canada,* states "[subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case;" The *UNCITRAL Arbitration Rules, 2021* state, at article 17(1) "1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute".

[8] *IBA Rules on the Taking of Evidence in International Arbitration*, 17 December 2020. Even the IBA Rules, however, do not specify a sequence of pre-hearing steps or prescribe detailed hearing procedures.

[9] See Jennifer Kirby, "In International Arbitration, There Are No Tribes," in Julie Bédard & Patrick W Pearsall, *Reflections on International Arbitration – Essays in Honour of Professor of George Bermann,* (The Juris Arbitration Law Online Library, 2022), pp 285—291. ("[t]he IBA Rules effectively described in words the bridge that parties and arbitrators had built in practice – case by case, tribal clash by tribal clash – to span the divide that separated

In 2018, a Working Group of civil law trained arbitration practitioners developed the *Inquisitorial Rules of Taking Evidence in International Arbitration* ("Prague Rules").[10] The development of the Prague Rules was both a recognition of the widespread acceptance of the IBA Rules as exemplifying existing procedural norms, and an effort to provide an alternative. The impetus for the Prague Rules, as explained by the Working Group, was the perception that procedures based on the IBA Rules involved an adversarial approach—characterized by more passive case management by arbitrators, extensive document production, fact witnesses, party appointed experts and cross-examination—associated with common law traditions. The Working Group said:

> In light of all of this, the drafters of the Prague Rules believe that developing the rules on taking evidence, which are based on the inquisitorial model of procedure … would contribute to increasing efficiency in international arbitration. By adopting a more inquisitorial approach of the Arbitral Tribunal, the new rules will help the Parties and Arbitral Tribunals reduce the duration and costs of arbitrations.[11]

It lies outside the scope of this article to discuss the specific differences between the IBA Rules and the Prague Rules, but

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common-law and civil-law Lawyers. That bridge incorporated elements of both legal cultures and also left elements of both behind…. Becoming a member of the international arbitration community does not mean renouncing our tribes of origin. On the contrary, it means embodying our tribe's principles of fairness and justice and using them to enrich the arbitral process.")

[10] *Rules of Taking Evidence in International Arbitration* (Prague Rules), Draft of 1 September 2018, www.praguerules.com, p 2.

[11] *Ibid*.

much has been written on the subject.[12] It is significant, however, that both sides of the debate concerning the Prague Rules accept that there are, indeed, well entrenched norms of procedure for international commercial arbitrations that differ in important respects from national legal cultures.

While Canadian international arbitration practitioners generally subscribe to the procedural norms described in the IBA Rules, there is no apparent consensus among Canadian practitioners about norms of procedure for domestic commercial arbitrations. Some practitioners prefer a series and sequence of pre-hearing steps similar to those used in court proceedings, culminating in an oral hearing resembling a trial. Other practitioners are convinced that the norms of procedure for international arbitrations should also be used in Canadian domestic arbitrations. A third group favours an intermediate approach, in which what are thought to be the best features of Canadian court procedures and international arbitration procedures are attempted to be combined. As a consequence of this disparity of views, and the absence of a widely accepted set of procedural norms, within Canada there is not yet a fully coalesced community of like-thinking domestic commercial arbitration practitioners. In practice, these differences in the procedural expectations of participants can give rise to concerns, often unjustified but nonetheless genuinely felt, about the fairness and integrity of the arbitral process.

Parties with different expectations often frame the discussion about appropriate procedures as a choice between achieving procedural fairness and achieving time and cost

[12] See e.g., Duarte G. Henriques, "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?", (2018), 36, ASA Bulletin, Issue 2, pp 351—363, <https://kluwerlawonline-com.proxy.queensu.ca/JournalArticle/ASA+Bulletin/36.2/ASAB2018030>; Charles Tian, "The Prague Rules and the IBA Rules on Taking of Evidence in International Arbitration: Friends or Foes?" (6 February 2019), online (blog): *Transnational Notes* <blogs.law.nyu.edu/transnational/2019/02/the-prague-rules-and-the-iba-rules-on-taking-of-evidence-in-international-arbitration-friends-or-foes/>.

efficiency. Experienced arbitration practitioners, having seen that both goals are achieved by a properly structured process, would consider this a false dichotomy. A counsel whose training and experience leads them to consider that a "normal" process involves an exhaustive exploration of the facts over three or four years, with expansive appeal rights thereafter, may understandably hold a different view. One should not underestimate the influence that the disappointed expectations of counsel have on the perceptions of the parties themselves. If there were widely accepted norms for the procedural steps in a domestic arbitration, which the parties could fairly be taken to have accepted when agreeing to arbitration, there should be less room for disappointed expectations.

Sometimes, the procedural expectations of the parties differ from those of the arbitrator, resulting in clashes between the principle of party autonomy and the principle that the arbitrator is to manage the process in a fair and efficient manner. The parties, of course, can trump the authority of the arbitrator by agreement. In some instances, this results in the parties negotiating a detailed arbitration agreement to tie the arbitrator's hands and build-in processes that one would normally associate with a domestic court action. As they do so, however, parties and their counsel may lose sight of the fact that the process to which they are agreeing inevitably undermines any prospect of achieving time and cost efficiency. The existence of a widely recognized set of procedural norms for domestic commercial arbitrations would assist in moderating differences in the expectations between the parties and tribunals.

The lack of consensus about procedural norms can also expose awards to judicial second-guessing of decisions which, although they may be dressed-up as errors of law, are in fact rooted in concerns about arbitrators' procedural decision-

making.[13] Some judges are naturally imbued with the sense that the procedural checks and balances in the rules of court reflect what parties are entitled to expect from any fair dispute resolution process, and cannot help but harbour genuine concerns about the impact on fairness of structures with which they are not familiar. An identifiable set of procedural norms for domestic commercial arbitrations which could be cited in such cases would provide comfort to courts that, despite differences between court and arbitration procedures, the arbitral process is fair.

In Canada, geography and political boundaries have contributed to differences of perspective about procedural norms for domestic arbitration. Domestic arbitration practices vary from province to province to reflect the experiences and traditions of the local arbitration communities. Factors such as the level of international experience of local counsel and arbitrators, the extent to which arbitration work is concentrated among specialists or shared among generalists, local judicial interpretation and application of domestic arbitration legislation, whether or not there is a strong local arbitral institution, the number of arbitrators who are retired judges or retired senior counsel with vast experience in court processes and limited experience in arbitration practice, the availability of specialized training in arbitration procedures, and a host of other factors explain these regional differences of expectation.

As mentioned above, there are good reasons for arbitration legislation not to be too prescriptive about the conduct of arbitral proceedings, so as to preserve procedural flexibility. Initiatives to reform Canada's domestic arbitration laws should be supplemented by the development of some form of protocol, statement of principles, or other soft law instrument, akin to the IBA Rules and Prague Rules, but informed by Canadian domestic arbitration practice. The process of developing such a protocol

[13] See discussion of this phenomenon in, Gerald W. Ghikas, "Costs in Domestic Arbitrations: Who Decides How to Decide What Is 'Reasonable?," 78 Advocate (Vancouver) 29—38 (2020).

would allow for a fulsome discussion of best practices across the country, and its publication would lead to better informed procedural expectations. This project could be undertaken by one or more of our national arbitral organizations, or by an *ad hoc* group. Key to its success, however, would be meaningful consultation and representation with all relevant arbitral communities.

Such a statement might include a description of norms regarding:

- When and how the procedural schedule is established;
- The use and form of intermediate, court-like pleadings such as statements of claim, statements of defence, counterclaims, and replies;
- The use and form of statements of case or memorials, and what they include;
- The number and sequence of statements of case or memorials;
- Amendments to claims and defences;
- The scope and sequence of document production requests;
- How disputes about document production are to be resolved;
- The form in which documents are to be produced;
- The form of direct evidence, the content of witness statements and their evidentiary status;
- The content of expert reports and their evidentiary status;
- The identification of documents tendered as exhibits and the timing and sequence for their delivery;
- Any presumptions that might apply to documents tendered as exhibits to obviate individual proof, and when they achieve evidentiary status;
- The timing of delivery of pre-hearing written arguments of fact and law;
- Objections to the admissibility of evidence, when they are made and when they are decided;
- Pre-hearing witness questioning;

- How procedural applications are made and decided;
- The scope of oral witness evidence (on direct, cross, and re-direct) at the evidentiary hearing;
- The use at the hearing of documents that have not been tendered as exhibits;
- Exclusion of witnesses at the evidentiary hearing;
- Protocols for virtual hearings; and
- When, how, and on what evidentiary basis costs are decided.

While there is value to "codifying" procedural norms in a soft law instrument, it is important to repeat that such an instrument should serve only to provide a common starting place for discussions about the procedures to be used in a particular case. Such discussions should focus on whether there is a good reason to depart from the normal way of doing things. If not, the normal process would apply. The parties would have greater certainty about what they are bargaining for when they agree to arbitrate rather than litigate in the Canadian courts. Counsel would be able to present the case for a departure from procedural norms in a reasoned and persuasive manner. Arbitrators would have a better framework for making procedural choices and could be more confident in their decisions. Perhaps most importantly, courts might be less likely to second-guess arbitral decisions based on perceived deficiencies in processes that actually accord with widely accepted procedural norms.