ARIZONA ADR FORUM

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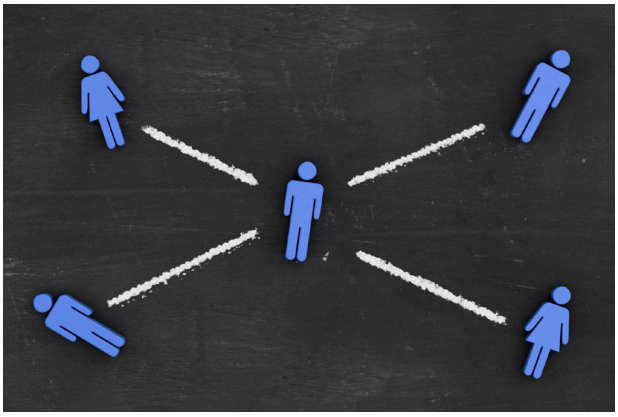
FROM THE CHAIR

STEVEN P. KRAMER

This is my final *Letter From the Chair*. In June, Alona Gottfried will become your new ADR Section Chair. The Section will be in talented, capable hands. I thank the members of the ADR Executive Council for making 2019-20 a successful, enjoyable year, and for not throwing things at me when I told my corny Dad jokes.

It's March 27, 2020, and I am pondering what to write about during these strange, unsettling days. Our families and children are experiencing things we have never experienced before. We are learning to interact in new ways. Last evening, I had my 23-year old son over for dinner. First, my wife and I had to negotiate how to do that safely. To protect my wife and in-laws (and us), I set a 5-foot table under my grape arbor, wiped the surfaces down, and we ate about 6 feet apart. As it turned out, we had a wonderful time, enjoying the perfect weather and the setting sun, eating great food, and sharing our recent experiences.



This Coronavirus pandemic is a time to remember that, when resolving disputes, the best negotiators use their intelligence, generosity and understanding to create win-win resolutions. Now is not the time to panic, hoard toilet paper, or ignore the need to protect and share with others. This is not an all-or-nothing game. Smart negotiators use resourceful thinking to expand the pie, and often find ways to help others in a way that costs them little or nothing.

Numerous studies have shown that the most successful negotiators place a lot of focus on their opponent's success and goals. See De Dreu, C. K. W., Weingart, L. R., & Kwon, S. (2000), **Influence of social motives on integrative negotiation: A meta-analytic review and test of two theories**, *Journal of Personality and Social Psychology*, 78(5), 889–905 (examining 28 different studies).

Journal of Personality and Social Psychology

Approaching a negotiation as the carving up of a fixed pie limits the size of everyone's slice. If we encourage a "me first" attitude, there will be less of everything for everyone. If we engage our impulses to help, to share, to create joy where we can, there will be more for everyone. We need to pay attention to the needs of those around us – to understand

STATE BAR OF ARIZONA

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We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration. Email the Editor, Jeremy Goodman at jeremy@goodmanlawpllc.com.

FROM THE CHAIR

STEVEN P. KRAMER

their fears, their concerns, their goals. The best negotiation strategy is to begin by listening to the other party and trying to understand their needs. Often, meeting those needs can create a better outcome for both sides. When I first proposed having my son come to the side entrance of my yard, and eat outside, 6 feet apart, he seemed hurt and disappointed, reluctant to come. But when I pointed out that we are doing the same with my 78-year old in-laws, and agreed to cook his favorite dish, he agreed. The result was the most enjoyable meal we have enjoyed together in a long time.

What does this have to do with ADR? In this time – when businesses are struggling to keep open, or facing orders to suspend operations; when workers are getting laid off, changing roles, or staying home; when we may start straining (or exceeding) the limits of our healthcare system; when ex-spouses with joint custody are needing to shuttle children between two households that may have different social distancing practices – we will all need to engage in thoughtful negotiations, to work together to resolve many issues, and meet many needs. Now, more than ever, this is a time when listening and trying to understand the needs of others will be the most important part of all our negotiation strategies. Keep safe. I wish you all the best.

— Steve Kramer
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STEVE KRAMER currently serves as chair of the State Bar of Arizona Civil Jury Instructions Committee, and chair of the Executive Counsel of the Alternative Dispute Resolution Section fo the State Bar.

He has brought and defended civil lawsuits involving catastrophic injuries and commercial disputes since 1986 and has been mediating civil disputes since 2009. He earned his B.A. in Economics from Grinnell College in 1979. In 1986, Steve earned his J.D. from The College of William & Mary, where he received American Jurisprudence Book Awards in Evidence and Torts.

In 2016, 2017 and 2018, Steve chaired Bar Convention CLE programs, and received President's Awards in 2016 and 2018.

UNITED PARCEL SERVICE DEFERRAL STANDARDS

On On December 23, 2019, in *United Parcel Service, Inc.*, 369 NLRB 1 (2019), the National Labor Relations Board returned to prior post-arbitral and pre-arbitral standards for deferring charges, In doing so, the Board overruled *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB 1127 (2014). This appears to signal a greater deference to arbitration decisions by the post-Obama Board.

Under *Babcock* post-arbitral deferral standards, the Board refused to defer to an arbitral decision unless three conditions were met: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permitted the award. The party requesting deferral (and wanting to arbitrate) had the burden of proof of all three elements. In *United Parcel Service*, the Board returned to the prior *Spielberg/Olin* standards for post-arbitral deferrals.

Now for post-arbitral deferral of cases alleging discipline and discharge under Section 8(a)(3) and (1) of the National Labor Relations Act, the Board will defer to an arbitration award in cases where:

(1) *The arbitration proceedings were fair and regular,*
(2) *The parties agreed to be bound,*
(3) *The contractual issue was factually parallel to the unfair labor practice issue,*
(4) *The arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and*
(5) *The decision was not clearly repugnant to the purposes and policies of the Act.*

369 NLRB at 9.

The Board also returned to the prior standard and placed the burden of proof on the party opposing deferral – essentially placing the burden on the party who thought arbitration inappropriate. *Id.* at 9–10. Finally, the Board reinstated the standards for pre-arbitral deferrals under *United Technologies Corp.*, 268 557 (1984) and *Alpha Beta Co.*, 273 NLRB 1546 (1985). 369 NLRB at 10 n. 31.

Returning to the prior standards for deferral may increase deference to arbitration awards, given the more deferential review by the Board and the burden placed on the party opposing deferral. This policy may also lead to more issues being arbitrated, as the now overruled *Babcock* standard could have been seen by some as inviting duplicative litigation if the Board pursued issues already-arbitrated issues, resulting in less willingness to arbitrate. The Board's decision in *United Parcel Service* also aligns with recent Supreme Court jurisprudence giving heavy deference to the validity and enforceability of arbitration agreements generally.

Due to various deferral standards, depending on the stage of litigation and arbitration, the Board's deferral policy is still far from clear. For example, although the Board returned to the post-arbitral standards under *United Technologies Corp.*, it is unclear whether this also affects deferrals at the pre-arbitral stage, such as charging party appeal rights (referred to as *Dubo* and *Collyer* standards).

Before the Board's return to the deferential standards in *United Parcel Service*, the General Counsel issued guidance in 2018 in GC Memorandum 19-03. It is probable that the General Counsel will issue further guidance on the appropriate post (and possibly pre) arbitral deferral policies.

In sum, expect more deference to arbitration decisions and Board deferrals and dismissals based on those arbitrations.

PRAGUE rules

JEREMY GOODMAN is a neutral mediator and arbitrator of complex disputes worldwide. Jeremy is a panelist on the American Arbitration Association National Rosters of Commercial and Consumer Arbitrators, as well as other noted national and international panels. Jeremy is presently completing his LL.M. in International Commercial Arbitration at the prestigious Straus Institute for Dispute Resolution at the Pepperdine University Caruso School of Law.

The Prague Rules: An Attack on Perceived Common Law or "American" Discovery Excesses?

BY JEREMY M. GOODMAN

The Rules on the Efficient Conduct of Proceedings in International Arbitration (the "Prague Rules") were signed in Prague in December, 2018.[1] While they bear many similarities to other international arbitration rule sets, they differ in important ways that arbitral parties should consider. In particular, some view the Prague Rules as a direct attack on perceived "discovery" excesses. It remains to be seen whether the Prague Rules will have that effect, or even obtain widespread adoption by international parties. But, either way, it is worth the time for neutrals and parties to understand them and, more importantly, the reason some parties think they are necessary.

Arbitration is by design a voluntary party-driven process. Parties agree, mostly in advance and before a dispute arises, exactly how an eventual dispute will be resolved. This is typically done with an eye towards ensuring that the resolution of disputes will be as fair, cost-effective, and expeditious as possible. How the parties will exchange information, or conduct "discovery" in U.S. terms, is a critical consideration—especially in international arbitration when parties are from different countries and may have very different norms for information exchange.

There is a perception among many international parties that U.S. or "American-style" discovery, with its common law origins, has permeated international arbitration and contributed to significant and unnecessary cost and delays.[2] While there are certainly counterpoints, and arguments that the parties themselves rather than the rules create this problem, this perception has at least some merit. In fact, setting aside arbitration, civil litigators have long complained about this very problem in U.S. courts themselves. In 2015, the U.S. amended its Federal Rules of Civil Procedure to ensure greater "proportionality" in civil discovery to address these very concerns (to what actual effect, if any, is a subject for another article).

This perception is especially worrisome for parties from many civil law backgrounds where "discovery" is often much more limited and where judges regularly exercise much greater control. Enter the Prague Rules, which some authors cleverly coined "'Civil' War On The Evidence In International Arbitration."[3]

The Prague Rules were drafted by a working group made up of formed of representatives from predominantly civil law jurisdictions.[4] There were forty-six members of the group, representing thirty-one countries.[5] Notably absent from the list of representative jurisdictions was the U.S. While perhaps not an intentional slight, it seems abundantly clear what the intended outcome was: something different and very non-U.S.

Ultimately, there are many similarities between the Prague Rules and other international arbitral rules frequently used, including the commonly used IBA Rules on the Taking of Evidence in International Arbitration. There are also important differences, primarily those actively encouraging the arbitral tribunal to take a more proactive role in fact finding and limitation of discovery. Article 4.2 even goes so far as encouraging parties and tribunals to "avoid any form of document production, including e-discovery."[6]

This author believes it unlikely that the Prague Rules will receive widespread use and acceptance. However, it is a mistake to ignore the reasons they were designed. Parties are dissatisfied. They have told us time and time again that the exchange of information in arbitration, or "discovery", needs to be quicker, more efficient, more tailored, and more proportional—or the arbitral goals of fair, cost-effective, and expeditious proceedings may pass us by. So far, enough parties have felt sufficiently ignored that they thought the Prague Rules were necessary. If we are to give the parties what they bargained for, we need to keep those concerns in mind, regardless of whether we are operating under the Prague Rules or some other rules construct.

Plus, the Prague Rules are not the only way to accomplish something better. Decisive neutrals, with effective case management skills, unconstrained by the occasionally irrational fear of offending parties for denying some piece of discovery or vacatur for denying the introduction of some evidence, are entirely capable of accomplishing the same thing that the Prague Rules envision. And they can do it under already existing international arbitral rule sets. Perhaps what we really need is more neutrals like that and not a wholesale change of the rules. ADR

ENDNOTES

1. https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (English version)(last visited April 11, 2020.
2. For a discussion regarding perceived "Americanization" of international arbitration, see, George M. von Mehrem and Alana C. Jochum, *Is International Arbitration Becoming Too American?*, 2 Global Bus. L. Rev. 47 (2011), available at https://engagedscholarship.csuohio.edu/gblr/vol2/iss1/6 (last visited April 11, 2020).
3. https://www.dlapiper.com/en/europe/insights/publications/2019/01/the-prague-rules/ (last visited April 11, 2020).
4. https://praguerules.com/working_group/ (last visited April 11, 2020).
5. Id.
6. https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (last visited April 11, 2020).