

THE PRAGUE RULES — AN ALTERNATIVE WAY OF CONDUCTING INTERNATIONAL ARBITRATION?



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It became a common place in arbitration world that clients are not happy about the way arbitration procedure evolved over the past few decades. From a flexible and commercially-oriented process it turned into the lawyers-driven and overly judicialized one, with many written and unwritten rules of the game. Arbitration suffers from lawyers always trying to play safe and use any opportunity (no matter how unrealistic) to improve their clients' case.



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Arbitration equally suffers from arbitrators sometimes being overly cautious to allow parties as full an opportunity to present their cases as requested by the lawyers (so called due process paranoia) and prone to replicating their usual procedural orders no. 1 instead of trying to proactively manage the cases from the beginning.

Naturally this shift brought about the increase of costs and duration of the proceedings. And not surprisingly the clients are less and less satisfied with how the mainstream international arbitration looks like at the moment. However, the arbitration community, while being perfectly aware of the level of users' dissatisfaction, does not seem to be doing enough to keep its Golden Goose alive.

At the same time, in reality, there is no such thing as universally accepted arbitration process. In fact, international arbitration in England would in many instances look very different from international arbitration in Frankfurt, which in turn would differ a lot from international arbitration in New York, Tokyo or Moscow. The influence of local procedural traditions on the lawyers and arbitra-

tors appears to be somewhat stronger than one would expect. At the same time the reception of “best practices” represented by various soft law rules differs in different parts of the world.

Finally, the arbitration cases themselves differ from one to another. There are cases which warrant extensive use of document production or witness testimonies with lengthy hearings. Not surprisingly, many larger cases tend to fall into this category. But there are (probably even more) cases which may be decided on the basis of documents only (without a hearing), without resorting to witness testimonies or any document production requests. Those cases usually tend to be smaller, but can also have significant amounts in dispute. The difference being that such cases do not require some of the “mainstream” arbitration procedures for their proper resolution. And while the “mainstream” international arbitration may rely on the IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules), parties and tribunals facing with second category of cases would not have any procedural guidance or rules to help them structure and manage their particular case.

The Prague Rules

The idea to develop the Prague Rules was born out of the desire to fill the gaps and address the needs of arbitration users identified above. In particular, the intention was to provide alternative ways to structure and manage the proceedings for cases, where applicable of the IBA Rules would be inappropriate for some reasons. In addition to that, the Prague Rules intend to spell out the tribunal powers to manage arbitral proceedings efficiently and to impose on the tribunal an obligation manage the proceedings proactively as early as possible. If the parties agreed to empower the tribunal in a manner provided in the Prague Rules, the tribunal should hopefully be less prone to due process paranoia.

To develop the Prague Rules, a Working Group was created composed of prominent arbitration practitioners from across the globe (though predominantly with civil law background)³. The Working Group conducted a survey on procedural practices in 30 countries (including Continental Europe, Latin America and Asia), the results of which have been published on the Prague Rules website www.praguerules.com

Following the completion of the survey, the Working Group formed the Drafting Committee which prepared the draft Prague Rules.⁴ It is important to note that the Prague Rules is still a work in progress and the Working Group continues to receive criticism and suggestions from the members of the arbitration community.⁵ This article discusses the provisions as they stand in the latest draft Prague Rules (the “Draft”), but it is expected that the wording may somewhat change.

The Draft will also be discussed at various conferences and events⁶ and will be approved in its final form in Prague on 14 December 2018 (hence, the “Prague Rules”).

While the initial plan was to address more or less the same topics as already addressed by the IBA Rules (albeit differently), the Draft in fact goes beyond purely evidentiary matters and addresses certain other aspects of case management, including the conduct of case management conference, asserting the contents of applicable law, facilitating settlement between the parties and apportioning the costs of arbitration.

Application of the Prague Rules

Arbitration is based on the parties’ consent. Accordingly, it is expected that the Prague Rules apply if the parties to arbitration agreed to their application. Im-

³Special thanks to Karyna Loban, Hanna Shalbanova and Elina Akhmetzianova for their assistance from the beginning of this project

⁴The latest version of the draft can be found at: www.praguerules.com

⁵The comments and suggestions should be sent to: info@praguerules.com

⁶The schedule of event is available at: www.praguerules.com

portantly, the parties may decide to apply the rules in their entirety or only certain provisions of the rules. They may be applied as the binding rules of the procedure or guidelines (cf. Article 1 of the **Draft**).

This flexibility is similar to what the IBA Rules offer and allows the parties to adapt the proceedings to the needs of their particular case. In fact, one of the intended functions of the Prague Rules is to remind the parties that there are different ways to structure their arbitration and that there is no golden standard of one-size-fits-all kind of approach.

Proactive role of the tribunal

Proactive role of the tribunal in structuring the proceedings to the need of a particular case as well as in fact-finding is at the core of the Prague Rules.

Thus, the tribunal is encouraged to conduct case management conference soon after receipt of the case file. While this may be a requirement and common practice in Western arbitrations, this is not necessarily the case, for example in Eastern Europe. Therefore, the Draft aims at filling this gap (Article 2.1 of the Draft). At the case management conference the tribunal is encouraged to take steps to clarify the case before it, and specifically:

- the relief sought by the parties;
- the disputed and undisputed facts, as well as
- legal grounds for the parties' respective positions (Article 2.2 of the Draft).

The tribunal also may inform the parties of its views as to:

- the evidence the tribunal might want to see with respect to the disputed facts;
- actions which may need to be taken to ascertain the factual and legal grounds for the claim or defence; and
- allocation of the burden of proof as between the parties.

Notably, these issues are not dealt with by the IBA Rules because the underlying principle there is that the parties should drive the proceedings, as they know more about their respective case. While it is certainly true that the parties are usually better informed about their cases than any tribunal can possibly be, it is also true that some parties (or their counsel) are

driven by their respective interests in the proceedings which often go beyond effective and cost-efficient resolution of the dispute in question. The tribunal, on the contrary, is intended to be neutral and impartial and thus may be in better position to structure the proceedings fairly and effectively. Of course, to do that the tribunal needs to familiarize itself with the case, in particular the factual and legal grounds for reliefs sought by the parties. And the Prague Rules empower and in fact encourage the tribunal to do so.

Jura Novit Curia

An active role of the tribunal also can be found in determining the rules of law applicable to the dispute (so called principle of **jura novit curia**).

While the Draft takes a traditional approach that each Party has to prove a legal position on which it relies, at the same time, the arbitral tribunal can apply legal provisions not pleaded by the parties if it finds them relevant. However, this could be done only after consultation with the parties. In such cases, the arbitral tribunal shall seek the Parties' views on the legal provisions it intends to apply (Article 7.2 of the Draft).

While this rule may be considered anathema in many common law jurisdictions (as it arguably goes against the basics of the adversarial system), even more strict approach applies in other countries. For example, in Switzerland the tribunal can apply relevant legal provisions even without consultations with the parties. The only limit for a Swiss-seated tribunal is that the provision applied should not be so surprising that it could not have been envisaged by the parties (i.e. the bar is high).

The Prague Rules adopt somewhat more balanced approach which ensures both proper applications of the law by the tribunal and the parties' rights to be heard on the points of law and to correct the potential tribunal's mistakes.

Evidentiary matters

The tribunal is also encouraged to play more active role in **fact finding**. Importantly, the tribunal's active role should not substitute the parties' efforts in es-

establishing the relevant facts. The Draft makes it clear that the parties still bear the burden of proof.

While the Prague Rules do not exclude document production altogether, they encourage parties and the tribunal to avoid unnecessarily broad production exercises, including any form of e-discovery, i.e. production of large volumes of electronically stored information.

While Article 3.3 of the IBA Rules allows the parties to request production of specific category of documents, the Prague Rules require that the requesting party must identify a specific document (or documents). The requesting party will also need to show the relevance to the subject-matter of the dispute, materiality, impossibility to obtain the requested documents on its own.

Procedurally, while under the IBA Rules the request for production of documents must be addressed to the other party (with the tribunal resolving the remaining disagreements), under the Prague Rules the request has to be addressed directly to the tribunal. This ensures that the tribunal is in position to control the process of production of evidence at all times to manage it properly and avoid disclosure of the documents which the tribunal finds irrelevant for the purposes of the dispute.

One of the most common grounds for objecting to production of the requested documents under the IBA Rules is based on the confidentiality of the requested documents. The Prague Rules seek to address this concern by imposing a duty of confidentiality with respect to the documents produced in the course of arbitration (Article 4.8 of the Draft).

Another area where the tribunal has greater control over the evidentiary matters is the use of fact witnesses. Under the IBA Rules the parties are generally free to produce any witnesses they wish. Not infrequently, this would result in one of the parties trying to drive the costs up or delay the proceedings by producing witnesses which would testify on the matters of limited or no relevance. Under the Prague Rules the tribunal should have greater control over presentation of the witnesses.

According to Article 5.1 of the Draft, the parties need to inform the tribunal of their wish to call specific witnesses and on the matters with respect to which the witness will testify. The Draft still contains two options as to what happens following such

an application.

- (Variant A) The Arbitral Tribunal, after receiving comments from the other Party, will take decision on witnesses to be called for examination during the hearing.
- (Variant B) The Arbitral Tribunal, after receiving comments from the other Party, may express its preliminary view whether an oral testimony of a particular witness proposed by the Parties can assist the Tribunal in resolving the issues in dispute. This would not, by itself, prevent the Party from calling for the hearing the factual witness(es) proposed by it.

Variant B is a softer version where the tribunal allows the witness to be called to the hearing even when arbitrators do not see that this particular witness will be helpful. The Working Group is still to decide which option to keep in the final version of the Prague Rules.

Under the IBA Rules (Article 4.4) it is presumed that the written witness statements will be used in lieu of direct testimony at the hearing. And indeed this became a somewhat standard procedure for witness testimony in international arbitration. The downside of it is that the written witness statements will almost inevitably be prepared by the lawyers and will not necessarily account for the true and accurate picture the witness has in his or her mind.

Under the Prague Rules (Article 5.4 of the Draft) the presumption is that no witness statements are produced, but the witness will give direct testimony at the hearing. Prior to the hearing the party calling the witness will need to identify the matters on which the witness will testify. The Prague Rules say nothing about the procedure for examining the witness, and in particular on who should be conducting direct examination.

At the same time, the tribunal may allow the witness to produce a written witness statement. In this case, this will be up to the tribunal whether the witness should eventually be called to the hearing (Article 5.4 of the Draft). This allows the tribunal to control the relevance of the witness testimony at the hearing.

These provisions are not intended to be considered a general rule and an exception. Rather, the purpose is to encourage free and open discussion be-

tween the parties and the tribunal as to the witnesses to testify, the subject-matter of their testimony and form in which the testimony is given. It is expected that having such discussion in the first place would allow the parties and the tribunal to structure the evidence taking procedure more efficiently.

The Prague Rules are also somewhat silent as to whether the cross-examination of the witnesses will be allowed during the hearing. It leaves the tribunal to decide on the procedure and to control it (Article 5.6 of the Draft). At the same time, unlike the IBA Rules, the Prague Rules do not provide for an unconditional right of a party to cross-examine the opposing party's witnesses.

As for the experts, the Prague Rules do not contain any restriction on the party-appointed experts. Instead, it deals with the tribunal's powers to appoint its own expert, while recognizing that each party may appoint its experts too (Article 6.5 of the Draft). However, the procedure for engaging a tribunal-appointed expert is more detailed.

Importantly, the tribunal may appoint an expert on its own motion. In this case:

- The expert's terms of reference will be prepared by the arbitral tribunal in consultation with the parties.
- The tribunal-appointed expert will have the right to request any relevant information directly from the parties or through the arbitral tribunal.
- The parties will need to provide the advance on costs (in equal parts) to cover the tribunal-appointed expert's fees.

It is expected that having a tribunal-appointed experts in appropriate cases will help the tribunal to narrow the gap between conflicting opinions of the party-appointed experts. In certain cases, where the parties may not wish to appoint their own experts, the tribunal-appointed expert may also help keeping costs of the proceedings down.

Settlement facilitation

While this goes beyond evidentiary matters, under

the Prague Rules the arbitral tribunal shall also be required to actively assist the parties in reaching the settlement. It shall not be improper for the arbitral tribunal to express its early views with respect to the parties' respective cases for the purposes of assisting the early settlement, provided that both parties agreed to this (Article 9.2 of the Draft). Expressing provisional views if properly applied may encourage settlement after the commencement of the proceedings. This technique is widely used in Germany, Switzerland and Middle East Countries, whereas many other jurisdictions may consider this absolutely inappropriate.

The Prague Rules also allow the member of the tribunal to act as a mediator in the course of arbitration provided that both parties agreed to it in writing (Article 9.3 of the Draft). This technique is rather uncommon in Europe, while it is relatively popular in Asia. Obviously, if mediation is successful, the parties' settlement may be recorded in the award on agreed terms. However, if the settlement is not successful, the parties need to decide for themselves whether they consider it appropriate for the arbitrator continue with the case. The reason for this is, of course, that mediators are entrusted by the parties with confidential information which may also influence their views as to the merits of the case. Accordingly, for the arbitrator to continue his (her) mandate the parties will need to agree to it in writing following the failure of mediation. By then, each party will be well aware of confidential information the arbitrator has received from it and will be in position to make an informed decision as to the suitability of such an arbitrator to future proceedings.

Conclusion

While the Prague Rules are still in the draft form, the main ideas will likely remain the same. At the same time, the discussion as to whether they are needed at all and whether the provisions included in the Draft are appropriate for arbitration is very much underway.⁷

It is certainly will be seen to what extent the

⁷All of the publications discussing the Prague Rules both favorably and critically are available at: www.pragerules.com

Prague Rules become popular among the users alike. It is hoped that the parties will rely on them in appropriate cases where application of IBA Rules would not be appropriate and efficient, including the cases where the parties do not expect to rely on

extensive document production or use of witness statements. In any event the Prague Rules to provide an alternative view on how an international arbitration can be organized and run by the tribunals and the parties and this in itself should be a welcome change.



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RUSSIAN
ARBITRATION
ASSOCIATION

**Official Launch of Prague Rules on
Taking of Evidence in cooperation
with Global Arbitration Review**

Date: 14 December 2018
Venue: Prague, the Czech Republic
Time: 09.30–18.00
Language: English

Discussion topics:

- Horses for courses: common law vs. civil law procedure in international arbitration
- Is the sky the only limit? Discovery and e-discovery in arbitration
- Lie to me. Fact witnesses vs. documentary evidence: can a paper lie?
- How much loaded guns contribute to the truth? Party appointed vs. tribunal appointed experts
- Showing a sphinx face. Limits of the tribunal's role in fact findings
- No place for old men? Jura Novit Curia in international arbitration

NB. The Conference will be concluded by a signing ceremony of the Prague Rules, a group photo of the delegates in a historical place in Prague and the Reception

For sponsorship opportunities and RSVP, please contact to
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