The Prague Rules on conduct of the taking of evidence: an alternative to the IBA rules?

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Issue	IBA Rules	Prague Rules	Conclusion
Scope and Manner of Application	**Who can decide to apply the Rules?** **Art. 1 [Scope of Application]** "Whenever the Parties have agreed or the Arbitral Tribunal has determined to apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence…" **Manner of application** **+ Preamble** "Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration"	**Who can decide to apply the Rules?** **Art. 1 [Application of the Rules]** "The Arbitral Tribunal may apply the Rules either by virtue of the Parties' agreement or by its own initiative upon consultation with the Parties…" **Manner of application** **+ Preamble** "Parties and Arbitral Tribunals may decide to apply the Rules as a binding document or as guidelines. They may also exclude the application of any part of the Rules or decide to apply only part of them. Arbitral Tribunals and Parties may also modify the provisions of the Rules by taking into account the particular circumstances of the case"	**No significant difference**

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Case Management Conference	**What should be decided?** **Art. 2 [Consultation on Evidentiary Issues]** "The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including: (a) the preparation and submission of Witness Statements and Expert Reports; (b) the taking of oral testimony at any Evidentiary Hearing; (c) the requirements, procedure and format applicable to the production of Documents; (d) the level of confidentiality protection to be afforded to evidence in the arbitration; and (e) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence. (…) The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or (b) for which a preliminary determination may be appropriate.	**What should be decided?** **Art. 2 [Proactive Role of the Tribunal]** „During the case management conference, to the extent possible and appropriate (taking into account the earlier stage of proceedings and the position voiced by the Parties), the Arbitral Tribunal shall: a. clarify with the Parties their respective positions with regard to: i. the relief sought by the Parties; ii. the facts which are not in dispute between the Parties and the facts which are disputed; iii. the legal grounds on which the Parties base their position; and b. fix a procedural timetable. 2.4. The Arbitral Tribunal may at the case management conference or at the later stage, if it deems appropriate, indicate to the Parties: i. with regard to the disputed facts – the evidence the Arbitral Tribunal would consider to be appropriate to prove the Parties' positions; ii. the actions which could be taken by the Parties and the Arbitral Tribunal to ascertain the factual and legal basis of the claim and the defense; and	**Consultation focused on evidentiary matters solely v. more proactive role in general** (e.g. under the Prague Rules the Tribunal shall "clarify … the facts that are not in dispute"; "indicate to the Parties … the evidence the Arbitral Tribunal would consider to be appropriate to prove the Parties' positions"; and "the Arbitral Tribunal or any of the arbitrators are free to share with the Parties its/ their preliminary views with regard to the relief sought") **Ar. 2.2 of the IBA Rules somewhat more focuses on evidentiary matters** (e.g. Witness Statements and Expert Reports, Evidentiary Hearing), but do not touch upon the burden of proof

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Case Management Conference		iii. its preliminary view on allocation of the burden of proof between Parties. 2.5. The Tribunal may also, if it deems appropriate, order the Parties to produce evidence (including making available fact witnesses or expert reports). 2.6. When establishing the procedural timetable, the Arbitral Tribunal may limit the number of rounds for exchange of submissions, and the length of submissions, as well as fix strict time limits for the filing thereof, while always bearing in mind the requirement to ensure fair and equal treatment of the Parties and to provide them with a reasonable opportunity to present their respective cases. 2.7. During the case management conference as well as at any other stage of the proceedings, the Arbitral Tribunal or any of the arbitrators are free to share with the Parties its (their) preliminary views with regard to the relief sought, the disputed issues, and the weight and relevance of evidence submitted by Parties. Expressing such preliminary views shall not by itself be considered as evidence of the Arbitral Tribunal's or arbitrator's lack of independence or impartiality, and cannot constitute a ground for disqualification."	

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Fact Finding	**What is the role for the Tribunal?** **Art. 3.10 [Documents]** "At any time before the arbitration is concluded, the Arbitral Tribunal may (i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation" **Art. 4.10 [Witnesses of fact]** "At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered" etc. **Art. 6 [Tribunal-Appointed Experts]** **Art. 7 [Inspections]** **Art. 8.2 [Evidentiary Hearing]** "The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing"	**What is the role for the Tribunal?** **Art. 3 [Fact Finding]** "3.1. The Arbitral Tribunal is entitled and encouraged to take an active role in establishing the facts of the case which it finds relevant for resolution of the dispute. This Arbitral Tribunal's role, however, shall not release the Parties from their burden of proof. 3.2. The Arbitral Tribunal may, upon consultation with the Parties, at any stage of arbitration and on its own motion: i. request any of the Parties to produce relevant documentary evidence or make fact witnesses identified by the Arbitral Tribunal available for testimony during the hearing; ii. appoint one or more experts or instruct any of the Parties to appoint an expert, including on legal issues; iii. order site inspections; iv. take other actions, which it deems appropriate, for the purposes of fact finding"	**In theory, more subsidiary role under the IBA Rules v. more active/ leading role under the Prague Rules which encourage the Tribunal to take an active role in establishing facts** **All provisions of the IBA Rules re the role of the Tribunal come after regulations concerning the Parties which are offered in the first place** **However, please note that under the IBA Rules "the Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing" – this clearly shows that the IBA Rules also allow for a more proactive approach in many aspects (if preferred by arbitrators)**

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	Is there confidentiality envisaged under the IBA Rules?	Is there confidentiality envisaged under the Prague Rules?	Voluntary under the IBA Rules v. mandatory confidentiality under the Prague Rules
Confidentiality	**Art. 2.2 (see above)** The level of confidentiality protection to be afforded to evidence in the arbitration shall be discussed	**Art. 4.8 [Documentary evidence]** "Any document produced by a Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Party, and may only be used in connection with the arbitration, save where and to the extent that disclosure may be required of a Party by legal duty"	

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Documentary Evidence available to a Party	**What about documentary evidence offered by Parties?** **Art. 3.1 [Documents]** "Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies (…)" **What about a cut-off date?** **Not expressly regulated (left for PO1)**	**What about documentary evidence offered by Parties?** No specific regulation as Art. 4 relates rather to the Tribunal than to the Parties **What about a cut-off date?** **Art. 4.6 [Documentary Evidence]** "The Arbitral Tribunal should consider imposing a cut-off date for the production of documents and should not allow such production after that date, save for exceptional circumstances"	**No significant difference (neither regulates technicalities of exhibits, document management details shall be specified in PO1)** **Cut-off date not expressly regulated under the IBA Rules**

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Document Production (Documentary Evidence not available to a Party)

How extensively is document production regulated?

Art. 3.2 et seq. [Documents – twelve subsections of that Article altogether – this regulation lies in the heart of the IBA Rules]
2. Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.
3. A Request to Produce shall contain:
(a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
(b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and , and
(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party (…)"

Some easily noticeable differences:

- **The Request to Produce is addressed principally to the other Party**
- **Possible to request for a category of Documents (if narrow and specific)**
- **Statement that the Documents requested are not in the possession, custody or control of the requesting Party required" Possession, custody or control" as a potential key to targeting subsidiaries of the other Party**
- **Merit-based reasons for objections regulated in 9.2 of the IBA Rules (Admissibility of Evidence)**

How extensively is document production regulated?

Art. 3.2 [Fact Finding]

"The Arbitral Tribunal may, upon consultation with the Parties, at any stage of arbitration and on its own motion: i. request any of the Parties to produce relevant documentary evidence (…)"

Art. 4 [Documentary Evidence]
4.1. Generally, the Arbitral Tribunal shall avoid extensive production of documents, including any form of e-discovery.
4.2. The Party, however, may request the Arbitral Tribunal to order the other Party to produce (a) specific document(s) which:
a. is relevant and material to the outcome of the case;
b. is not in the public domain; and
c. is in the possession of the other Party.
4.3. The Arbitral Tribunal, after hearing the other Party, may order the Party to produce the requested document(s)"

Some easily noticeable differences:

- **The Request is addressed rather to the Tribunal than to the other Party**
- **Requests for categories of documents not regulated (just as under the 1999 IBA Rules)**
- **Nothing re the statement that the Documents requested are not in the possession, custody or control of the requesting Party**
- **The Request should directly concern the other Party ("possession of the other Party" – nothing about "control" or "custody")**
- **Merit-based reasons for objection unclear**

Much more extensive regulation under the IBA Rules v. scarce regulation under the Prague Rules (but neither regulates technicalities such as the use of Redfern Schedule)

Note from the Working Group (The Prague Rules) criticizes document production as it rarely "brings a smoking gun to light" and Art. 4.1 of the Prague Rules submits that "the Arbitral Tribunal shall avoid extensive production of documents"

However, please note that the IBA Commentary states that "Expansive American- or English-style discovery is generally inappropriate in international arbitration" (Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration) – is there really a significant difference?

Much depends on the Arbitral Tribunal (not on the IBA Rules per se)

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Witnesses	**Who identifies fact witness?** **Art. 4.1 [Witnesses of Fact]** "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." **But also Art. 4.9 [rarely used, comes as a subsidiary provision]** "At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered (…)" **Who can be a witness?** Art. 4.2 "Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative." **What about witness statements?** Art. 4.4 "The Arbitral Tribunal may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely, except for those witnesses whose testimony is sought pursuant to Articles 4.9 or 4.10 [evidence from a person who will not appear voluntarily,	**Who identifies fact witness?** **Art. 5.1-5.3 [Fact Witnesses]** "5.1. When filing a statement of claim and a statement of defence, or at other stage of the proceedings which the Arbitral Tribunal finds appropriate, each Party shall identify (a) factual witness(es), on which the Party intends to rely in support of its position, as well as the factual circumstances on which the respective factual witness(es) intends to testify. 5.2. **(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. 5.3. **(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.	**Preference for witness statements under the IBA Rules (and their extensive regulation, including additional statements) v. regulation which makes witness statements somewhat less important (the Prague Rules)** **More active role envisaged for the Tribunal under the Prague Rules (i.e. Arts. 5.1-5.3)**

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Witnesses	appearance for testimony at an Evidentiary Hearing of a person whose testimony has not yet been offered - NO WITNESS STATEMENTS HERE]" + additional witness statements possible under Art. 4.6 of the IBA Rules "If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration". **+ content of Witness Statements regulated in Art. 4.5 of the IBA Rules** Each Witness Statement shall contain: (a) the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement; (b) a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;	In case the Tribunal finds that the Party manifestly abuses its right for calling factual witnesses, the Tribunal may limit the number of the witnesses named by the Party to testify at the hearing". **Who can be a witness?** Not specified under the Prague Rules **What about witness statements?** Art. 5.2 "The Arbitral Tribunal may also, if it deems necessary, offer the Party to present a written witness statement before the hearing" – so witness statements allowed but details of statements not regulated **What happens if a witness fails to appear?** Art. 5.5 "If a written witness statement is filed, the Arbitral Tribunal, after hearing the Parties, may decide not to call a fact witness for the hearing, retaining its authority to give evidential value to his/her written witness statement as it finds appropriate"	

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Witnesses	(c) a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing; (d) an affirmation of the truth of the Witness Statement; and (e) the signature of the witness and its date and place **What happens if a witness fails to appear?** Art. 4.7-4.8 "7. If a witness whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise. 8. If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement."		

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Party-Appointed Experts

What is the role of Party-Appointed Experts?

Art. 5 [Party-Appointed Experts]

"1. A Party may rely on a Party-Appointed Expert as a means of evidence on specific issues. Within the time ordered by the Arbitral Tribunal, (i) each Party shall identify any Party-Appointed Expert on whose testimony it intends to rely and the subject-matter of such testimony; and (ii) the Party-Appointed Expert shall submit an Expert Report.
2. The Expert Report shall contain:
(a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
(f) if the Expert Report has been translated, a statement as to the language in which it was

Are Party-Appointed experts allowed?

Art. 6.5 [Experts]

"Appointment of experts by the Arbitral Tribunal does not preclude a Party from submitting its own expert report. At the request of the other Party or the Arbitral Tribunal, such expert shall be made available for examination during the hearing".

What happens if a Party-Appointed Expert fails to appear for testimony?

No specific regulation

What about the so-called "meet and confer" approach?

Art. 6.6

"After consulting with the parties, the Arbitral Tribunal could instruct the Party-appointed or the Arbitral Tribunal appointed experts to have a conference in order to provide the Arbitral Tribunal with:
i. a list of issues on which the experts agree;
ii. a list of issues on which the experts disagree;
iii. reasons why the experts disagree."

Less extensively regulated under the Prague Rules which seem to opt for Tribunal-Appointed Experts (the latter are regulated in the first place in the Prague Rules)

Content of expert reports not regulated under the Prague Rules

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Party-Appointed Experts	originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing; (g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report; (h) the signature of the Party-Appointed Expert and its date and place; and (i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author." + additional/ supplementary reports regulated What happens if a Party-Appointed Expert fails to appear for testimony? Art. 5.5 "If a Party-Appointed Expert whose appearance has been requested pursuant to Article 8.1 fails without a valid reason to appear for testimony at an Evidentiary Hearing, the Arbitral Tribunal shall disregard any Expert Report by that Party-Appointed Expert related to that Evidentiary Hearing unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise" **What about the so-called "meet and confer" approach?** Art. 5.4 "The Arbitral Tribunal in its discretion may order that any Party-Appointed Experts who will submit or who have submitted Expert Reports on the same or related issues meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore"		

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Tribunal-Appointed Experts	**When appointed/ does it has to be consulted with the Parties?** **Art. 6.1-6.2 [Tribunal-Appointed Experts]** "The Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal. The Arbitral Tribunal shall establish the terms of reference for any Tribunal-Appointed Expert Report after consulting with the Parties. A copy of the final terms of reference shall be sent by the Arbitral Tribunal to the Parties(…) the Parties shall inform the Arbitral Tribunal whether they have any objections as to the Tribunal-Appointed Expert's qualifications and independence. The Arbitral Tribunal shall decide promptly whether to accept any such objection. After the appointment of a Tribunal-Appointed Expert, a Party may object to the expert's qualifications or independence only if the objection is for reasons of which the Party becomes aware after the appointment has been made. The Arbitral Tribunal shall decide promptly what, if any, action to take" **How does an expert report look like?** Art. 6.4 "The Tribunal-Appointed Expert shall report in writing to the Arbitral Tribunal in an Expert Report. The Expert Report shall contain:	**When appointed?** **Art. 6 [Experts]** "6.1. At the request of the Party or on its own initiative and upon consultation with the Parties, the Arbitral Tribunal may appoint one or more experts to present a report on disputed matters requiring a special knowledge" **Does the Arbitral Tribunal need to consult with the Parties?** Art. 6.2 If the Arbitral Tribunal decides to appoint an expert, the Arbitral Tribunal should: i. seek suggestions from the Parties as to who should be appointed as an expert. For this purpose, the Arbitral Tribunal may establish the requirements for potential experts, such as qualification, availability, costs, etc., and communicate them to the Parties. The Arbitral Tribunal shall not be bound by the candidates proposed by the Parties and may: a) appoint a candidate proposed by one of the Parties; b) compose a joint expert commission from the candidates proposed by the Parties; or c) seek a proposal for a suitable expert from a neutral organization, such as a chamber of commerce or other professional association"	**The Prague Rules are silent on the opportunity to respond to the Tribunal-Appointed Expert's Report/ opportunity to examine any information, goods, samples etc. that the Tribunal-Appointed Expert has examined and "any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert" (sic!)**

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Tribunal-Appointed Experts

(a) the full name and address of the Tribunal-Appointed Expert, and a description of his or her background, qualifications, training and experience;
(b) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
(c) his or her expert opinions and conclusions, including a description of the methods, evidenceand information used in arriving at the conclusions. Documents on which the Tribunal-Appointed Expert relies that have not already been submitted shall be provided;
(d) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Tribunal-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
(e) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;
(f) the signature of the Tribunal-Appointed Expert and its date and place; and
(g) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author."

What happens next?

Arts. 6.5-6.6

"5. The Arbitral Tribunal shall send a copy of such Expert Report to the Parties. The Parties may examine any information, Documents, goods, samples, property, machinery, systems, processes or site for inspection that the Tribunal-Appointed Expert has examined and any correspondence between the Arbitral Tribunal and the Tribunal-Appointed Expert. Within the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert. The Arbitral Tribunal shall send the submission, Witness Statement or Expert Report to the Tribunal-Appointed Expert and to the other Parties.
6. At the request of a Party or of the Arbitral Tribunal, the Tribunal-Appointed Expert shall be present at an Evidentiary Hearing. The Arbitral Tribunal may question the Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert on issues raised in his or her Expert Report, the Parties' submissions or Witness Statement or the Expert Reports made by the Party-Appointed Experts pursuant to Article 6.5."

What happens next/ what else should be done?

Art. 6.2
"Arbitral Tribunal should…
ii. after consulting with the Parties, approve the terms of reference for the Arbitral Tribunal-appointed expert;
iii. request the Parties to pay an advance on costs to cover expert's work in equal proportion. If a Party refrains from advancing its part of the costs, this part shall be paid by the other Party;
iv. request the Parties to provide the expert appointed by the Arbitral Tribunal with access to the subject matter of the expert examination, as well as with any documents and information he or she may require to perform his or her duties;
v. monitor the expert work, keeping the Parties informed about all communications between the Arbitral Tribunal and the expert."

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Inspection	**How should it work?** **Art. 7 [Inspections]** "Subject to the provisions of Article 9.2, the Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate. The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection. The Parties and their representatives shall have the right to attend any such inspection."	**How should it work?** **Art. 3.2 [Fact finding]** "3.2. The Arbitral Tribunal may, upon consultation with the Parties, at any stage of arbitration and on its own motion: (…) iii. order site inspections;" **Remarks:** **Nothing re the right to attend** **Are only "site" inspections possible under the Prague Rules? What about inspections of goods, samples, and systems, documents etc?** **What about inspections carried by experts?**	**Scarce regulation under the Prague Rules v. more comprehensive regulation in a separate provision under the IBA Rules (both instruments, however, must be supplemented by a procedural order in this respect)** **Under the IBA Rules inspections do not need to be carried personally by arbitrators**

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Hearing	**When organized and how extensively regulated?** **Art. 8 [Evidentiary Hearing]** "1. Within the time ordered by the Arbitral Tribunal, each Party shall inform the Arbitral Tribunal and the other Parties of the witnesses whose appearance it requests. Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.2, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party or by the Arbitral Tribunal. Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness. (…) 3. With respect to oral testimony at an Evidentiary Hearing: (a) the Claimant shall ordinarily first present the testimony of its witnesses, followed by the Respondent presenting the testimony of its witnesses; (b) following direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning;	**When organized and how extensively** regulated? **Art. 8 [Hearing]** "If one of the Parties requests to hold a hearing or the Arbitral Tribunal finds it appropriate on its own initiative, the hearing should be conducted in a cost-effective manner, including by means of electronic communication" **Who has a final say?** **5.6 [Fact witnesses]** "At the hearing, the examination of the fact witness shall be conducted under the direction and control of the Arbitral Tribunal. The Tribunal can reject a question posed to the witness if the Tribunal finds it not relevant or duplicative or for other reasons not material to the outcome of the case. The Arbitral Tribunal may also impose other restrictions, eg regarding the time for examination or type of questions, as it deems appropriate."	**Much more extensively regulated under the IBA Rules** **The IBA Rules offer a clear structure for the Evidentiary Hearing and clear merit-based grounds for excluding questions (Art. 9.2)** **Under both sets of rules the Tribunal has an ultimate control over the evidentiary hearing (and both require to be supplemented by an additional procedural order)**

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Hearing	(c) thereafter, the Claimant shall ordinarily first 17present the testimony of its Party-Appointed Experts, followed by the Respondent presenting the testimony of its Party-Appointed Experts. The Party who initially presented the Party-Appointed Expert shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties' questioning; (d) the Arbitral Tribunal may question a Tribunal-Appointed Expert, and he or she may be questioned by the Parties or by any Party-Appointed Expert, on issues raised in the Tribunal-Appointed Expert Report, in the Parties' submissions or in the Expert Reports made by the Party-Appointed Experts; (e) if the arbitration is organised into separate issues or phases (such as jurisdiction, preliminary determinations, liability and damages), the Parties may agree or the Arbitral Tribunal may order the scheduling of testimony separately for each issue or phase; (f) the Arbitral Tribunal, upon request of a Party or on its own motion, may vary this order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses be questioned at the same time and in confrontation with each other (witness conferencing); (g) the Arbitral Tribunal may ask questions to a witness at any time" **Who has a final say?** Art. 8.2 "The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2 [SEE BELOW]. Questions to a witness during direct and re-direct testimony may not be unreasonably leading."		

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Adverse Inference	**When is it possible?** **Art. 9.5-9.6 [Admissibility and Assessment of Evidence]** "5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party. 6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party".	**When is it possible?** **Art. 10 [Adverse Inference]** "If one of the Parties does not follow instructions from the Arbitral Tribunal without a valid reason, it would be entitled to make, where appropriate, an adverse inference with regard to the Party's respective case"	**Appears more likely but also somewhat discretionary under the Prague Rules (i.e. not following "instructions")** **More specific under the IBA Rules as it clearly regards evidence as such (i.e. documents, testimony) + clear and well-established doctrine on prerequisites of adverse inferences (Jeremy K. Sharpe)**

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What else?

Admissibility of Evidence

Art. 9 [Admissibility and Assessment of Evidence]
Especially important sec. 2:

"The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
(a) lack of sufficient relevance to the case or materiality to its outcome;
(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
(c) unreasonable burden to produce the requested evidence;
(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;
(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."

Jura Novit Curia

Art. 7 [Jura Novit Curia]
"7.1. Generally, a Party has a burden to prove a legal position on which it relies. 7.2. However, after consultation with the Parties the Arbitral Tribunal can apply legal provisions not pleaded by the Parties if it finds it necessary. In such cases, the Arbitral Tribunal shall seek the Parties' views on the legal provisions it intends to apply. 7.3. The same rule applies where the Arbitral Tribunal, by virtue of public policy considerations, finds it necessary to apply legal provisions not pleaded by the Parties"

Amicable Settlement

Art. 9 [Assistance in Amicable Settlement]

"9.1 At all stages of the proceedings, the Arbitral Tribunal shall assist the Parties in reaching an amicable settlement of the dispute, unless one of the Parties objects.
9.2 To the extent permissible under lex arbitri, in order to assist in an amicable settlement of the dispute, the Arbitral Tribunal, upon obtaining consent from all of the Parties, shall be entitled to express its preliminary views with regard to the Parties' respective positions. The expression of such preliminary views should not be considered as pre-judgment or serve as a ground for disqualification of any member of the Arbitral Tribunal.
9.3 To the extent permissible under lex arbitri and upon the written consent of all Parties, the Arbitral Tribunal or any of its members may also act as a mediator. With the written consent of all Parties the Arbitral Tribunal or the member of the Tribunal involved in mediation can continue arbitration proceedings if the mediation does not result in settlement"

Jura novit curia not regulated under the IBA Rules, however not groundbreaking The Prague Rules appear not to cover the admissibility and assessment of evidence (at least not in a comprehensive manner)

Assistance in Amicable Settlement (superfluous?)

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