

Why Civil Law Lawyers Do Not Need the Prague Rules

By Michal Kocur

This season the draft Rules on Conduct of the Taking of Evidence in International Arbitration (the Prague Rules) are a regularly occurring topic at European arbitration events. Barely a week passes without receiving an invitation to a presentation or a debate on the Prague Rules. So what are these Rules? In a nutshell, the Prague Rules are a set of rules, that are closer to civil law systems, intended to replace the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules). The final text of the Prague Rules is to be released in December 2018. To understand the reasoning on which the Prague Rules are based, it is best to quote from the “Note of the Working Group” preceding the text of the Rules:

(...) from a civil law perspective, the IBA Rules are still closer to the common law traditions, as they follow a more adversarial approach with document production, fact witnesses and party-appointed experts. In addition, the party’s entitlement to cross-examine witnesses is almost being taken for granted.

In addition to that many arbitrators are reluctant to actively manage arbitration proceedings, including earlier determination of issues in dispute and the disposal of such issues, to avoid the risk of a challenge.

These factors contribute greatly to the costs of arbitration, while their efficiency is sometimes rather questionable. For example, most commentators admit that it is very rare, if ever, that document production brings a smoking gun to light. Likewise, many commentators express doubts as to the usefulness of fact witnesses and the impartiality of party-appointed experts. Many of these procedural features are not known or used to the same extent in non-common law jurisdictions, such as continental Europe, Latin America, Middle East and Asia.

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 and would enhance more active role of the tribunals, would contribute to increasing efficiency in international arbitration.

By adopting a more inquisitorial approach, the new rules will help the parties and tribunals to reduce the time and costs of arbitrations.

In short, the aim of the Prague Rules is to increase efficiency in international arbitration, i.e., to reduce the time and cost implications of arbitration. The main obstacles to attaining this goal, as identified by the drafters of the Rules, are, on the one hand, the features taken from common law such as document production, the cross-examination of witnesses and the opinions of party-appointed experts, and, on the other hand, the reluctance of arbitrators to actively manage the arbitration proceedings. The proposed means to achieve the goal of increased efficiency is a limitation of the common law features and the introduction of an inquisitorial model of procedure.

Wrong premises, wrong conclusions

There are a number of issues with this reasoning. When properly used, document production, the cross-examination of witnesses and evidence in the form of opinions by party-appointed experts, as well as other common law features, are not the causes of inefficiency in international arbitration. It is the lack of robust case management that is the main culprit behind delayed proceedings and inflated

costs. If the tribunal, for example, mismanages document production or cross-examination, this may certainly increase the cost and time of arbitration, but this is not reason enough to abolish these mechanisms, or to significantly limit them. The drafters of the Prague Rules overlook the fact that the common law features that they hold in low esteem generally lead to the tribunals making better decisions. The solution proposed in the Prague Rules to empower the tribunals to take an active role in establishing facts is a highly controversial one. Such an active role played by tribunals is not even a common feature of civil law procedures. It is unlikely to increase the speed or decrease the cost of arbitration, and will, most likely, merely result in lower quality of arbitral awards.

Document production, witnesses and party-appointed experts

Expansive document production may delay arbitral proceedings for months, and may significantly increase the cost of arbitration. The IBA Rules address this problem by stipulating, inter alia, that parties may request the production of only “narrow and specific” categories of documents (Article 3.3.a.ii. of the IBA Rules), as well as providing other safeguards against full-blown American- or English-style discovery.

Under Article 4 of the Prague Rules:

4.1 Generally, the Arbitral Tribunal shall avoid extensive production of documents, including any form of e-discovery.

4.2. A Party, however, may request the Arbitral Tribunal to order the other Party to produce (a) specific document(s) which:

a. Is/are relevant and material to the outcome of the case;

b. Is/are not in the public domain; and

c. Is/ are in the possession of the other Party.

The Prague Rules throw out the baby with the bathwater. Although ambiguously worded, they seem to abolish document production with the exception of requests for the production of specific documents. The problem is that the party requesting documents that it does not possess will rarely be able to identify them beyond indicating the category to which the documents belong.

There are good reasons why the IBA Rules allow the request to produce documents. A party requesting the production of documents may need them to discharge its burden of proof, or to counter any false allegations from the other party. The mere fact that document production may be used can induce the party holding the documents to refrain from making false statements. Document production, therefore, does not need to bring a smoking gun to light in order to be beneficial. The drafters of the Prague Rules appear to see only a possible dark side of document production, while overlooking the fact that it may lead to better decisions on the merits, which is the ultimate goal of any arbitration proceeding.

Despite the dismissive remark in the “Note of the Working Group” that, under the IBA Rules “the party’s entitlement to cross-examine witnesses is almost being taken for granted,” the Prague Rules do not abolish the cross-examination of witnesses. Article 5.6 of the Prague Rules provides that the examination of fact witness should be conducted under the direction and control of the arbitral tribunal. The tribunal can reject a question posed to the witness if it finds it to be irrelevant or duplicative, or for other reasons immaterial to the outcome of the case. The arbitral tribunal may also impose other restrictions, for example regarding the duration of the examination or the type of

questions, as it deems appropriate. These are common sense proposals. However, the same norms stem from the IBA Rules:

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. Questions to a witness during direct and re-direct testimony may not be unreasonably leading. (Article 8.2 of the IBA Rules).

To be fair, there are differences between the IBA Rules and the Prague Rules relating to cross-examination. Indeed, Article 5.5 of the Prague Rules contains a worrying provision:

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.

It is hard to accept that the tribunal will ordinarily rely on the testimony of a witness without giving the other party the opportunity to question that testimony.

As far as experts are concerned, it is unclear how the Prague Rules improve upon the language of the IBA Rules. Both provide for party-appointed experts, as well as for tribunal-appointed experts. The difference is that the IBA Rules regulate the taking of evidence of both party-appointed and tribunal-appointed experts in detail, while the Prague Rules dwell on tribunal-appointed experts and mention party-appointed experts only incidentally (Article 6.5 and 6.6 of the Prague Rules). Compared with the IBA Rules, the Prague Rules leave more questions unanswered.

Case management and the proactive role of the tribunals in fact-gathering

The Prague Rules set out that the arbitral tribunal will hold a case management conference without any unjustified delay after receiving the case file (Article 2.1 of the Prague Rules). They go on to describe what issues are to be discussed at this management conference, including the relief sought by the parties, the facts that are not in dispute between the parties and the facts that are disputed, as well as the legal grounds on which the parties base their position. They also oblige the tribunal to fix a procedural timetable (Article 2.2 of the Prague Rules). These norms are uncontroversial and do not warrant any new set of rules. There is nothing in this respect that would contradict the IBA Rules. In fact, the Prague Rules have little to say on the issue of case management, and anyone looking for guidance in this regard would do better to consult the ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, rather than the Prague Rules.

The Prague Rules contain some controversial provisions with regard to the role of the tribunal in finding facts. Article 2.3 of the Prague Rules reads:

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

iii. its preliminary view on allocation of the burden of proof between the Parties.

Article 3.1 of the Prague Rules reads:

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.

These provisions are based on the premise that the tribunals taking an active role in fact-gathering will increase efficiency in arbitration. This is a false premise. One has to distinguish between the active role of arbitrators in case management, and their active role in establishing the facts of the case. The former is desirable, while the latter is not. Disputes resolved in international arbitration are usually complex. The parties themselves know the facts much better than tribunals. However, the Prague Rules are based on a paternalistic assumption that it is the other way around, or that at least the tribunals know better how to establish facts.

Having the tribunal actively looking for evidence is likely to distort the outcome of the case. The tribunal's active role in fact-gathering may result in helping one party and hurting the other's case. In terms of the time and cost of arbitrations, such an active role is not helpful. For the timely running of proceedings, it is enough that the tribunals identify contentious issues, set out cut-off dates for providing evidence regarding these issues, and then to enforce them. If a party that bears the burden of proof does not provide evidence, it will be unsuccessful on that point. Admittedly, in the adversarial system there is a possibility that parties may provide too much evidence, and thereby incur unnecessary costs, but this is a fair price to pay for party autonomy, and the Prague Rules offer no solution to this problem.

The drafters of the Prague Rules argue that civil law trained lawyers need rules that are closer to their system than the IBA Rules. However, even in civil law jurisdictions, such an active role of the judges in civil cases is not standard practice. Take the example of my jurisdiction – Poland: it is the parties that are responsible for providing the evidence to the court, and the court will only very rarely admit evidence on its own initiative. During Communist times, judges were obliged to gather evidence, though this system was finally abolished in 1996. There are probably very few Polish lawyers who would like to travel back in time and use the socialist principles of civil procedure in international arbitration.

Let's stick to the IBA Rules

The Prague Rules will not increase efficiency in international arbitration. The solutions proposed by the drafters are misguided. The active role of the tribunals in establishing the facts has obvious drawbacks and is no substitute for active case management. The IBA Rules codify the procedures developed in international arbitration over the years. They provide clear standards for arbitration proceedings and unify diverging practices. The Prague Rules are intended to undermine the uniform character of arbitration practices by setting out different standards for “intra-civil law” disputes. This is unfortunate because the convergence of arbitration practices leads to the increased predictability of the tribunals' behaviour, and ultimately to the success of international arbitration. This is deplorable also because the common law features of international arbitration, if used properly, help to make the arbitral process fairer and assist the arbitrators in reaching better decisions.

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