

Introducing the Young Contender — The Prague Rules



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The importance of international arbitration in resolving international commercial disputes is evidenced by its wide use and popularity. The cornerstone of success for international commercial arbitration is the consensual nature of such proceedings. When it comes to the conduct of arbitration proceedings, the procedure can be customised to fit the intricacies of every single case. At least that is the theory. In reality, in many of the cases, the procedure has become standardised to the extent that there is very little variation even if both parties are represented by skilled arbitration practitioners and the arbitral tribunal is robust and experienced. The institutional rules provide a solid framework and intentionally do not go into the details of procedure that could be customised. This is left to parties to agree once a dispute is started and usually results in a reference to the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules")².

The IBA Rules, which were first adopted in 1989 and updated last in 2010, have become the widely accepted foundation for procedures for the taking of evidence in international commercial arbitrations. The 2015 QMUL Survey³ confirmed that the IBA Rules were the most "widely known, the most frequently used and highly rated". A report⁴ by the IBA of September 2016 shows that the IBA Rules are regularly referenced in both common law and civil law jurisdictions (with 72% of arbitrations in England, 62% in France, and 56%

in the USA). The parties and tribunals now widely use the IBA Rules as the default. The key reason for this is a lack of any viable alternative set of rules or guidance for parties or tribunals to choose from. The IBA Rules are a great tool in arbitration proceedings, and definitely fill a gap, but they are not necessarily appropriate in every single dispute.

In circumstances of such a lack of viable alternatives, the idea for an alternative set of rules was born following an arbitration event which took place in Prague a few years ago. A working group was established to see if an alternative set of rules was viable. The working group carried out a survey of respondents from 30 different countries and a study of 14 sets of leading institutional rules. The results of the survey confirmed the viability of an alternative set of rules and the study served as the basis for the first draft of the new rules, which were called "*The Prague Rules*" to commemorate the place where the idea for the rules was first discussed. The draft of the Prague Rules has been updated a number of times by the working group (which has also increased in size over time) with the aim of formally launching the first official version of the Prague Rules at an upcoming arbitration event in Prague on 14 December 2018.

Only time will tell whether The Prague Rules will prove successful and will be seen to be used by the arbitration community in appropriate cases. However, it is essential to understand the proposition offered by The Prague Rules and the ways in which they are offering an alternative before reaching any conclusions. This article aims to provide an overview of the current offering proposed by The Prague Rules.

The Prague Rules — what is on offer?

The preamble to The Prague Rules provides an important insight into the inten-

tions of the authors of these new rules. It clearly states that the rules are not there to replace the various institutional rules but are designed to supplement the procedure to be agreed by parties and/or applied by arbitral tribunals. Parties and arbitral tribunals are free to decide whether to apply The Prague Rules as a binding document or as guidelines and may pick and choose the parts of the rules they wish to apply and the stage/s of the proceedings that they wish to apply the rules to. The rules can also be modified, if so desired.

A key aim of the authors, which can be tracked throughout the various provisions of the rules, is the desire to encourage and provide the power for tribunals to take a more active role in procedural management of disputes with the aim of reducing the time and costs of proceedings. Passive tribunals have been an aspect of arbitration that has been subject to criticism in recent years as a reason for arbitral proceedings being expensive and taking a long time. Parties, when faced with a dispute usually ask "*how much will it cost*" and "*how long will it take*". Often, particularly in lower value disputes, the question of the costs involved becomes determinative of whether a party proceeds.

If parties chose to refer to The Prague Rules in their dispute and the arbitral tribunal felt empowered by these rules to take a more proactive and more robust role, the costs of an arbitration could be reduced. An obvious question that arises is "*what is preventing arbitral tribunals from being more proactive without reference to The Prague Rules?*". There may be a number of reasons for this, but one such reason could be the arbitrators' fear of challenge. Perhaps, being able to refer to a specific set of rules that parties have agreed upon would assist the arbitrators in being more proactive.

¹ This article is based on the draft of the Prague Rules dated 1 September 2018.

² <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>

³ http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf

⁴ <https://www.ibanet.org/Document/Default.aspx?DocumentUid=105d29a3-6261-4437-84e2-ic8637844beb>

Early comments on some of the draft rules

Currently, The Prague Rules have twelve articles, which address various aspects of the conduct of arbitration proceedings, such as fact-finding; documentary evidence; fact witnesses; experts; *iura novit curia*; the hearing; and assistance in amicable settlement.

The Prague Rules empower and encourage arbitral tribunals to get actively involved in the process of investigating facts, evaluating the evidence of a case and its management. There are two features of The Prague Rules that clearly differentiate them from IBA Rules: 1) a focus on "avoid[ing] extensive production of documents, including any form of e-discovery"; 2) an opportunity for the tribunal to play a role in the parties' efforts aimed at reaching an amicable settlement.

Proactive tribunal

Article 2 of The Prague Rules addresses the tribunal's proactive role. The tribunal has to hold a case management conference as soon as possible after receiving the case file. The tribunal is expected to clarify with the parties their respective positions with regard to: the facts that are in dispute and those that are undisputed; the relief sought by the parties; and the legal grounds on which the parties base their positions. The tribunal is free to share with the parties the tribunal's preliminary views about any of the following: "*the burden of proof or the relief sought, the disputed issues, and the weight and relevance of evidence submitted by the Parties*". It is stated in The Prague Rules that such an expression of preliminary views is not to be considered as evidence of the tribunal's lack of independence or impartiality, or constitute a ground for disqualification.

It is clear that this section of The Prague Rules is phrased in such a way so as to be able to provide a willing tribunal a legitimate basis for acting in a more proactive way. However, it is interesting to note that The Prague Rules do not go further and require the tribunal to be more proactive.

Document production

Document production or some form of 'discovery' has become a significant aspect of international disputes, both in terms of prominence as a step in the proceedings and in terms of the costs involved. This is despite the fact that historically this was a concept used only in common law jurisdictions and foreign to civil law countries. Even though it is difficult today for parties to argue against a total ban on production of documents, the extent of production of document is usually



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an area of major dispute between the parties in international arbitrations. Most major institutional rules applicable to international arbitration do not address the issue of document production. In theory, the silence of institutional rules on this subject is intended to show possible flexibility and should not be regarded as an unspoken presumption in favour of one approach over another. In practice, as mentioned, this gap is filled in the majority of cases by IBA Rules.

The stated aim of IBA Rules was to prevent expensive American or English – style discovery in international arbitrations⁵. IBA Rules provide that a party may request a specific document or a "narrow and specific requested category of documents" (Article 3 (3) of the IBA Rules). In practice, requests for documents are often voluminous and lack specificity. Parties usually exchange lengthy requests for categories of documents to be presented, including by way of e-discovery. Parties have the opportunity to provide objections to various requests on the basis of proportionality,

privilege and other reasons for objections set out in the IBA Rules. The requests, objections and the tribunal's ultimate decisions are usually set out in what is known as a "Redfern Schedule". It is not unusual to have parties accusing each other of using the document production phase of the proceeding as a "fishing expedition" in an attempt to try to find evidence for new, previously unknown, arguments rather than achieving the legitimate purpose of the exercise.

Under The Prague Rules production of documents, including any form of e-discovery, is intended to be a much more limited exercise, with a clearly stated aim of avoiding extensive production of documents. Pursuant to Article 4.3 of The Prague Rules, a party can only request production of specific documents. This appears to exclude the opportunity to make requests in respect of a category of documents. This type of limitation will most likely work well in smaller cases and result in cost savings.

However, the reduction in the production of documents may result in tribunals reaching decisions without all of the relevant evidence being in front of them, which may be particularly unfair in circumstances where only one party has access to relevant documents. Thus, it is important that limits on document production are reasonable. Such limits and/or ground rules are even more critical for any exercises of electronic document production. Where a complete ban on e-discovery, as proposed by The Prague Rules, may not be appropriate, the parties and tribunals may find helpful guidance in the Chartered Institute of Arbitrators' Protocol for E-disclosure in Arbitration (the "CI-Arb Protocol")⁶. This CIArb Protocol encourages parties to agree on an appropriate scope

and procedure in dealing with e-discovery (using any relevant tools, which may reduce the cost and burden of the exercise, limiting disclosure by category, date range or custodian). The reference to the use of relevant tools is particularly important in light of the ever-growing number and sophistication of specialised software tools being developed for these types of exercises. With the continued growth use of artificial intelligence and big data for such tasks, it is likely that there will be significant increases in efficiencies, which ought to reduce costs without having a detrimental effect on the ultimate completeness of evidence available to tribunals.

Amicable settlement of disputes

The Prague Rules mandate the tribunal to facilitate the amicable settlement of disputes between the parties, and provide a number of options for achieving this. While it may be generally inconceivable for a "common law" arbitrator to initiate facilitation of settlement, a "civil law" arbitrator will most likely be comfortable encouraging parties' discussions to settle the case. According to Article 9.2 of The Prague Rules, the arbitral tribunal can give preliminary views with re-

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gard to the respective positions of the parties. The parties should not consider these preliminary views by the tribunal as a pre-judgment.

According to Articles 9.3 — 9.4 of The Prague Rules, when permissible under *the lex arbitri* and upon the written consent of all parties, the arbitral tribunal or any of its members may act as a mediator in the dispute. Furthermore, if the mediation does not result in settlement, the person previously acting as mediator may continue to act as arbitrator subject to written consent from all parties.

Mediation is a legitimate ADR procedure allowing for a quick and inexpensive route to resolving disputes. However, there are some significant risks that arise from situations where the same person acts both as arbitrator and mediator in the same dispute. One of the key risks arises from the fact that the cornerstone of the mediation procedure is the process whereby a party is able to provide

the mediator with confidential information that is not shared with the other party. It is the mediator's knowledge of such confidential information from both parties that usually allows the mediator to guide the parties to an amicable settlement. The above process is contrary to the principles of arbitration, where a party is prohibited from communicating with an arbitrator without the other party's knowledge. At the very least the parties would have to be very cautious if choosing to proceed with mediation as available under the Prague Rules.

Conclusion

It is evident that the idea behind The Prague Rules to create an alternative set of rules for dealing with certain aspects of the conduct of arbitration is a good one. The advantages of a more proactive arbitral tribunal are difficult to argue against. In theory, some of the other provisions should also be able to find cases where they will be able to have a positive impact. However, whether The Prague Rules achieve the aims of their authors of making arbitration more efficient remains to be seen. It depends a lot on whether parties agree on the inclusion of The Prague Rules in actual cases. It will also be interesting to see how The Prague Rules develop and change over time, and whether at some point they will grow to be as widely used and considered as the IBA Rules. The authors of this article are keeping an open mind.

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⁵ Commentary on the revised text of the 2010 IBA Rules on the Taking Evidence in International Arbitration p.7: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=DD240932-0E08-40D4-9866-309A635487C0>

⁶ <https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/e-disclosure-in-arbitration.pdf?sfvrsn=2>

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