

**Inquisitorial Rules
on the Taking of Evidence
in International Arbitration
(The Prague Rules)**

Note from the Working Group

It has become almost commonplace these days that users of arbitration are dissatisfied with the time and costs involved in the proceedings. The procedures for taking evidence, particularly document production, and using multiple fact and expert witnesses and their cross-examination at lengthy hearings are, to a large extent, reasons for this dissatisfaction.

The drafters of the IBA Rules on the Taking of Evidence in International Arbitration (“**IBA Rules**”) bridged a gap between the common law and civil law traditions of taking evidence. The IBA Rules were very successful in developing a nearly standardized procedure in international arbitration, at least for proceedings involving parties from different legal traditions and those with significant amounts at stake.

However, 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 primarily 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.

With the aim of signing the Rules in Prague at the conference with participation of practitioners from Europe and other civil law countries, the working group has decided to call them “the Prague Rules.”

Preamble

The Inquisitorial Rules of Taking Evidence in International Arbitration (the “**Rules**”) are intended to provide a framework and/or guidance for Arbitral Tribunals and Parties for the efficient conduct of arbitration proceedings by using a traditional inquisitorial approach.

The Rules are not intended to replace the arbitration rules provided by various institutions and are designed to supplement the procedure to be agreed by Parties or otherwise applied by Arbitral Tribunals in a particular dispute.

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.

Article 1. Application of the Rules

- 1.1. The Parties to arbitration (“the Parties”) may agree on application of the Rules in the arbitration agreement or later at any stage of the arbitration.
- 1.2. The Arbitral Tribunal may apply the Rules either by virtue of the Parties’ agreement or by its own initiative upon consultation with the Parties.
- 1.3. In all cases, due regard shall be given to the mandatory legal provisions of *lex arbitri* as well as applicable arbitration rules.

Article 2. Proactive Role of the Tribunal

- 2.1. The Arbitral Tribunal shall hold a case management conference without any unjustified delay after receiving the case file.
- 2.2. The Arbitral Tribunal and the Parties are encouraged to hold a case management conference by means of electronic communication.
- 2.3. 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
 - 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.

Article 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;

- iii. appoint one or more experts or instruct any of the Parties to appoint an expert, including on legal issues;
- iv. order site inspections;
- v. take other actions, which it deems appropriate, for the purposes of fact finding.

Article 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 and identified 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).
- 4.4. The Arbitral Tribunal may also, on its own initiative and at any time, request a Party to produce any document which the Arbitral Tribunal considers to be relevant and material to the outcome of the case.
- 4.5. To the extent permissible under applicable law, at the request of the Party or on its own initiative, the Tribunal can request documents which it considers are relevant and material to the outcome of the case from non-parties of the arbitration, including applying for court assistance where it is available.
- 4.6. 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.
- 4.7. As a rule, documents shall be produced in photocopies and/or electronically, which are considered to be identical to the originals unless the other Party disputes it. However, the Arbitral Tribunal may, at the request of a Party or on its own motion, order the Party to present the original of the document for observation or expert review.

- 4.8. 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.

Article 5. Fact Witnesses

- 5.1. A Party wishing to rely on a fact witness to establish its case shall first seek permission from the Arbitral Tribunal to present a fact witness.
- 5.2. In the application, the Party shall explain to the Arbitral Tribunal how the fact witness testimony can contribute to proving the circumstances relevant to the disputed issues.
- 5.3. Such application may be submitted after exchange of statement of claim and statement of defence, or at another stage of the proceedings which the the Arbitral Tribunal finds appropriate.
- 5.4. The Arbitral Tribunal, after hearing the other Party, may allow the Party to make the fact witness available for the hearing. The Arbitral Tribunal may also, if it deems necessary, offer the Party to present a written witness statement before the hearing.
- 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.
- 5.6. At the hearing, the examination of the fact witness shall be conducted under the direction and control of the Arbitral Tribunal. The Tribunal may not allow the Parties to ask questions if it finds them not relevant to the disputed issues. The Arbitral Tribunal may also impose other restrictions, eg, regarding the time for examination or type of questions, as it deems appropriate.

Article 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.

- 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;
 - 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.
- 6.3. The Arbitral Tribunal may, if it deems appropriate, make an adverse inference regarding a Party's position if the Party does not pay its share of the advance of expert costs or does not provide the expert with access to the subject matter of the expert examination or with requested documents or information.
- 6.4. At the request of a Party or under the Arbitral Tribunal's initiative, the expert shall be available for examination at the hearing.

- 6.5. 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.
- 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.

Article 7. Jura Novit Curia

- 7.1. Generally, a Party has a burden to prove a legal position on which it relies.
- 7.2. However, when all members of the Arbitral Tribunal are qualified in the substantive law applicable to the dispute and upon consultation with the Parties, the Arbitral Tribunal can apply legal provisions not pleaded by the Parties. 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.

Article 8. Hearing

- 8.1. If one of the Parties insists on holding 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.

Article 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.

- 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. This shall not disqualify the members of the Arbitral Tribunal from continuing to act as arbitrators in the arbitration proceedings if the mediation does not result in settlement.

Article 10. Adverse Inference

- 10.1. 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.

Article 11. Allocation of Costs

- 11.1. When deciding on the allocation of costs in an award, the Arbitral Tribunal may also take into account the Parties' conduct in the arbitration, including any co-operation in conducting the proceedings in a cost-efficient manner.

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