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INTRODUCING THE YOUNG CONTENDER – THE RULES ON THE EFFICIENT CONDUCT OF PROCEEDINGS IN INTERNATIONAL ARBITRATION – (THE PRAGUE RULES)[1]

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ABSTRACT

International arbitration is an excellent platform for the resolution of international commercial disputes, not least because of the advantages of international enforcement provided by the New York Convention. However, in recent years some international arbitration proceedings have been criticised for being too expensive and taking too long. Perhaps one reason for this is that a singular procedure has come to dominate the world of international arbitration and it is proving more difficult to implement alternative procedures even in circumstances where good arguments are made that alternative procedures may be more efficient.

This situation was the catalyst for a group of international arbitration practitioners to put together a set of soft law called the Prague Rules. This article provides an insight into how the Prague Rules came to exist and looks at some of the procedures proposed by the Prague Rules with a view of making the conduct of international arbitration more efficient. The underlying idea of the Prague Rules is the need for a more proactive arbitral tribunal.

KEYWORDS: *Prague Rules, international arbitration, efficient conduct, proceedings, proactive tribunal, framework, guidance, supplementary rules, guidelines, soft law, fact finding, documentary evidence, witnesses, experts, amicable settlement*

Introduction

The importance of international arbitration in resolving international commercial disputes is evidenced by its wide use and popularity. The keystone

[1] This article was first published in the October 2018 issue of the Ukrainian Journal of Business Law. Since first publication this article, where relevant, it has been updated to reflect the final draft of the first edition of the Prague Rules as launched in Prague on 14 December 2018.

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of success for international commercial arbitration is the consensual nature of the 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 process 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**")[3].

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 Survey[4] confirmed that the IBA Rules were the most *"widely known, the most frequently used and highly rated"*. A report[5] by the IBA dated 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 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 to be 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). The first official version of the Prague Rules was formally launched at an 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

[3] https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC, last accessed on 14 June 2019.

[4] http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf, last accessed on 14 June 2019.

[5] https://www.ibanet.org/Document/Default.aspx?DocumentUid=105d29a3-6261-4437-84e2-1c8637844beb, last accessed on 14 June 2019.

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 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 intentions of the authors of these new rules. It clearly states that the rules are not there to replace the various institutional rules but they 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 this is 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 cases 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 it will cost" them and "how long will it take". Often, in particular 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 a 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.

Early comments on some of the articles in the Prague Rules

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 the case and also in the management of the case. There are two features of the Prague

Rules that clearly differentiate them from the 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 is 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 allocation of the burden of proof between the parties; 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 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 any document production, the extent of document production is usually an area of major dispute between the parties in international arbitrations. Most of the major institutional rules applicable to international arbitration do not address document production. In theory, the silence of the 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 already mentioned, in majority of cases this gap is filled by the IBA Rules.

The stated aim of the IBA Rules was to prevent expensive American or English – style discovery in international arbitrations.[6] The IBA Rules provide that a party

[6] *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,* last accessed on 14 June 2019.

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 a chance 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 encouraging the avoidance of any form of document production. Pursuant to Article 4.3 of the Prague Rules, a party needs to first justify to the tribunal that document production may be needed. Only if the tribunal agrees with this, can a party seek production but only of specific documents based on criteria set out in Article 4.5 of the Prague Rules. This appears to place an additional hurdle for document production to be sought and also appears to exclude the opportunity to make requests in respect of a category of documents. These sort of limitations may most likely work well in smaller cases and result in cost savings.

However, the reduction of document production 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. So 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 tribunals allow for e-discovery, the parties and tribunals may find helpful guidance in the Chartered Institute of Arbitrators' Protocol for E-disclosure in Arbitration (the "**CIArb Protocol**")[7]. 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 kinds of exercises. With the continued growth of 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 a detrimental effect on the ultimate completeness of evidence available to tribunals.

[7] https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/e-discolusure-in-arbitration.pdf?sfvrsn=2, last accessed on 14 June 2019.

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. As already mentioned, the arbitral tribunal can give preliminary views with regards to the parties' respective positions. The parties should not consider these preliminary views by the tribunal as a pre-judgment.

According to Articles 9.2 - 9.3 of the Prague Rules, when permissible under *the lex arbitri* and upon written consent of all parties, any member of the arbitral tribunal 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 further 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 respect of the same dispute. One of the key risks arises from the fact that a 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 possession 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, parties would have to be very cautious if choosing to proceed with a 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 their authors' aims of making arbitration more efficient will remain to be seen and in large depends on whether parties agree on their inclusion 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.


Official Launch of Prague Rules
Official Launch of Prague Rules

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