

**RULES
ON THE EFFICIENT CONDUCT
OF PROCEEDINGS
IN INTERNATIONAL
ARBITRATION
(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, using multiple fact and expert witnesses and their cross-examination at lengthy hearings and the time it may take for an award to be issued 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 common law traditions, as they follow a more adversarial approach regarding document production, fact witnesses and Party-appointed experts. In addition, the parties’ entitlement to cross-examine witnesses is almost being taken for granted.

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.

On the other hand, many arbitrators are reluctant to actively manage arbitration proceedings, including earlier determination or preliminary evaluation of issues in dispute and the disposal of such issues, to avoid the risk of a challenge.

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 Arbitral Tribunals, would contribute to increasing efficiency in international arbitration.

By adopting a more inquisitorial approach of the Arbitral Tribunal, the new rules will help the Parties and Arbitral Tribunals reduce the duration and costs of arbitrations.

As the Rules are going to be approved in Prague in December 2018, the working group has decided to call them “the Prague Rules.”

Preamble to the Rules on the Efficient Conduct of Proceedings in International Arbitration

The Rules on the Efficient Conduct of Proceedings 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 to all or any part of the proceedings. 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 may agree on the application of the Rules before arbitration proceedings are initiated or at any stage of the arbitration.
- 1.2. The Arbitral Tribunal may apply the Rules or any part thereof upon the Parties' agreement or on its own initiative after having heard the Parties.
- 1.3. In all cases, due regard must be given to the mandatory legal provisions of the *lex arbitri* as well as to the applicable arbitration rules and the procedural arrangements of the Parties.

Article 2. Proactive Role of the Arbitral Tribunal

- 2.1. The Arbitral Tribunal shall hold a case management conference without any unjustified delay after receiving the case file.
- 2.2. During the case management conference, to the extent possible and appropriate (taking into account the earlier stage of the proceedings and the positions of the Parties) or at any later stage of the proceedings, if it deems appropriate, 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 undisputed between the Parties and the facts which are disputed;
 - iii. the legal grounds on which the Parties base their positions; and
 - b. fix a procedural timetable
- 2.3. The Arbitral Tribunal may at the case management conference or at any later stage of the proceedings, if it deems appropriate, indicate to the Parties:
 - a. the facts which it considers to be undisputed between the Parties and the facts which it considers to be disputed;

- b. with regard to the disputed facts – type(s) of evidence the Arbitral Tribunal would consider to be appropriate to prove the Parties’ respective positions;
 - c. its understanding of the legal grounds on which the Parties base their position;
 - d. 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/or
 - e. its preliminary view on the allocation of the burden of proof between Parties.
- 2.4. When establishing the procedural timetable, the Arbitral Tribunal may decide – after having heard the Parties – to determine certain issues of fact or law as preliminary matters, 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. Doing so, the Arbitral Tribunal shall ensure fair and equal treatment of the Parties and to provide them with a reasonable opportunity to present their respective cases.
- 2.5. During the case management conference or at any other stage of the proceedings, the Arbitral Tribunal is free to share with all Parties its (their) preliminary views with regard to the burden of proof or the relief sought, the disputed issues, and the weight and relevance of evidence submitted by the Parties. Expressing such preliminary views shall not by itself be considered as evidence of the Arbitral Tribunal’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 considers relevant for the resolution of the dispute. This, however, shall not release the Parties from their burden of proof.
- 3.2. The Arbitral Tribunal may, after having heard the Parties, at any stage of arbitration and on its own motion:
- a. request any of the Parties to produce relevant documentary evidence or make fact witnesses’ testimony available during the hearing;

- b. appoint one or more experts, including on legal issues;
 - c. order site inspections; and/or
 - d. for the purposes of fact finding take any other actions which it deems appropriate.
- 3.3. The Arbitral Tribunal shall consider imposing a cut-off date for production of evidence and not allowing the introduction of any new evidence after that date, save for exceptional circumstances.

Article 4. Documentary Evidence

- 4.1. Each Party shall produce documentary evidence upon which it intends to rely in support of its case as early as possible in the proceedings.
- 4.2. Generally, the Arbitral Tribunal shall avoid extensive production of documents, including any form of e-discovery.
- 4.3. A Party may, however, request the Arbitral Tribunal to order another Party to produce 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 another Party or within its power or control.
- 4.4. The Arbitral Tribunal, after hearing the Party's(ies) view on such request, may order it to produce the requested document(s).
- 4.5. To the extent permissible under the applicable law, at the request of a Party pursuant to Section 4.3 above or on its own initiative, the Arbitral Tribunal may request any documents which it considers relevant and material to the outcome of the case from non-Parties to the arbitration, and may apply for court assistance in this regard where it is available.
- 4.6. Documents shall be produced in photocopies and/or electronically. The produced documents are presumed to be identical to the originals unless disputed by the other Party/ (ies). However, the Arbitral Tribunal may, at the request of a Party or on its own initiative, order the Party producing the

document to present the original of the document for observation or expert review.

- 4.7. 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(ies), and may only be used in connection with that arbitration, *save where and to the extent that disclosure may be required of a Party by the applicable law*.

Article 5. Fact Witnesses

- 5.1. When filing a statement of claim or defence, or at any another stage of the proceedings which the Arbitral Tribunal considers appropriate, each Party shall identify (a) factual witness(es), on whose testimony the Party intends to rely in support of its position, as well as (b) the factual circumstances on which the respective factual witness(es) intend(s) to testify.
- 5.2. Subject to any requirement provided by the applicable law, the Arbitral Tribunal, after providing the other Party(ies) with an opportunity to comment, will decide which witnesses are to be called for examination during the hearing in accordance with Article 5.3-5.6 below. When taking such a decision the Arbitral Tribunal shall duly consider the right to be heard and the equal treatment of the Parties.
- 5.3. The Arbitral Tribunal may decide not to call the witness for examination during the hearing, either before or after a witness statement has been tendered, in particular, if it considers the testimony of such a witness to be irrelevant, immaterial, unreasonably burdensome, duplicative or for any other important reasons not necessary for the resolution of the dispute before them.
- 5.4. If the Arbitral Tribunal decides not to call the witness for examination during the hearing prior to any witness statement being tendered this does not, by itself, preclude a party from tendering a witness statement for that witness.
- 5.5. The Arbitral Tribunal may also, if it deems appropriate itself invite a Party to submit a written witness statement before the hearing.
- 5.6. If a written witness statement is submitted by a Party or at the invitation of the Arbitral Tribunal, the Arbitral Tribunal

after hearing the Parties may decide not to call for the hearing the fact witness whose witness statement has been submitted. Any decision not to call a witness who has tendered a witness statement does not limit the Arbitral Tribunal's authority to give as much evidential value to the written witness statement as it finds appropriate.

- 5.7. At the hearing, the examination of the fact witness shall be conducted under the direction and control of the Arbitral Tribunal. The Arbitral Tribunal can reject a question posed to the witness if the Arbitral Tribunal considers it to be irrelevant, redundant, not material to the outcome of the case or for other reasons. The Arbitral Tribunal may also impose other restrictions, including setting the order of examination of the witnesses, time limits for examination or types of questions to be allowed, as it deems appropriate.

Article 6. Experts

- 6.1. At the request of a Party or on its own initiative and after having heard the Parties, the Arbitral Tribunal may appoint one or more experts to present a report on disputed matters which require specialised knowledge.
- 6.2. If the Arbitral Tribunal decides to appoint an expert, the Arbitral Tribunal shall:
- a. 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:
 - i. appoint a candidate:
 - a) proposed by any one of the Parties; or
 - b) identified by the Arbitral Tribunal itself;
 - ii. compose a joint expert commission consisting of the candidates proposed by the Parties; or
 - iii. seek a proposal for a suitable expert from a neutral organization, such as a chamber of commerce or another professional association;

- b. after having heard the Parties, approve the terms of reference for the Arbitral Tribunal-appointed expert;
 - c. request the Parties to pay an advance on costs to cover the expert's work in equal proportion. If a Party refrains from advancing its share of the costs, this share shall be advanced by the other Party;
 - d. request the Parties to provide the expert appointed by the Arbitral Tribunal with all information and documents he or she may require to perform his or her duties in connection with the expert examination;
 - e. monitor the expert's work and keep the Parties informed about all communications between the Arbitral Tribunal and the expert.
- 6.3. At the request of a Party or on the Arbitral Tribunal's own initiative, the expert shall be made available for examination at the hearing.
- 6.4. The appointment of experts by the Arbitral Tribunal does not preclude a Party from submitting expert reports by experts appointed by that Party. At the request of any other Party or on the Arbitral Tribunal's own initiative, such Party-appointed expert shall be made available for examination during the hearing.
- 6.5. After consultation with the Parties, the Arbitral Tribunal may instruct the Party-appointed or the Arbitral Tribunal-appointed experts to establish a joint table of contents for their reports, covering the issues that they consider necessary to be reviewed. This table of contents does not imply that all experts consider the items in the table of contents relevant or will cover them.
- 6.6. All information submitted by the Parties for consideration by the Party-appointed or the Arbitral Tribunal-appointed experts shall be submitted in the same way to all experts.
- 6.7. After having heard the Parties, the Arbitral Tribunal may instruct the Party-appointed or the Arbitral Tribunal-appointed experts to have a conference and to issue a joint report in order to provide the Arbitral Tribunal with:
- a. a list of issues on which the experts agree;
 - b. a list of issues on which the experts disagree; and
 - c. reasons why the experts disagree.

Article 7. *Iura Novit Curia*

- 7.1. A Party bears the burden of proof with respect to the legal position on which it relies.
- 7.2. However, after having heard the Parties the Arbitral Tribunal may apply legal provisions not pleaded by the Parties if it finds it necessary, including, but not limited to public policy rules. In such cases, the Arbitral Tribunal shall seek the Parties' views on the legal provisions it intends to apply. The Arbitral Tribunal is entitled to rely on legal authorities even if not submitted by the Parties, provided they relate to legal provisions pleaded by the Parties or applied by the Arbitral Tribunal. However, the Arbitral Tribunal shall invite the Parties to provide their views in relation to such legal authorities.

Article 8. Hearing

- 8.1. To the extent appropriate for a particular case and possible under the *lex arbitri*, the Arbitral Tribunal and the Parties should seek to resolve the dispute on a documents-only basis.
- 8.2. If one of the Parties requests to hold a hearing or the Arbitral Tribunal itself finds it appropriate, the Parties and the Arbitral Tribunal shall seek to organise the hearing in the most cost-efficient manner possible, trying to reduce the duration of the hearing and to use video, electronic or telephone communication to avoid unnecessary travel costs for Arbitrators, Parties and other participants.

Article 9. Assistance in Amicable Settlement

- 9.1 Unless one of the Parties objects, the Arbitral Tribunal shall assist the Parties in reaching an amicable settlement of the dispute at any stage of the proceedings.
- 9.2 To the extent permissible under the *lex arbitri*, the Arbitral Tribunal may, upon obtaining consent from all of the Parties, express its preliminary views with regard to the Parties' respective positions in order to assist in an amicable settlement of the dispute. The expression of such preliminary views shall not be considered as a pre-judgment or by itself

constitute a ground for disqualification of any member of the Arbitral Tribunal.

- 9.3 To the extent permissible under the *lex arbitri* and upon the written consent of all Parties, the Arbitral Tribunal or any of its members may also act as a mediator.
- 9.4 If the mediation does not result in a settlement within an agreed period of time the Arbitral Tribunal or its member(s) involved in mediation:
- a. may continue to act as an arbitrator in the arbitration proceedings after obtaining a written consent from all Parties upon the end of the mediation; or
 - b. shall terminate their mandate in accordance with the applicable arbitration rules if such written consent is not obtained.

Article 10. Adverse Inference

If a Party breaches the Arbitral Tribunal' order or instruction without justifiable ground, the Arbitral Tribunal may draw, where appropriate, an adverse inference with regard to such Party's respective case or issue.

Article 11. Allocation Of Costs

When deciding on the allocation of costs in an award, the Arbitral Tribunal may take into account the Parties' conduct during the arbitral proceedings, including their co-operation and assistance (or the lack thereof) in conducting the proceedings in a cost-efficient and expeditious manner.

Article 12. Award

The Arbitral Tribunal shall use its best efforts to issue an award as soon as possible.

To this end, the Arbitral Tribunal shall consult on the case before the hearing and hold first deliberations as soon as possible after the hearing and final ones after the post-hearing submissions, if there are any. In case of a documents-only arbitration, the Arbitral Tribunal shall hold deliberations as soon as possible after all documents have been submitted.

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