

Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills - Part II

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On my [latest post](#), I addressed the announcement of the upcoming *Inquisitorial Rules on the Taking of Evidence in International Arbitration* ("The Prague Rules") as a reaction to the alleged "Creeping Americanisation of international arbitration", represented by the *IBA Rules on the Taking of Evidence in International Arbitration* ("IBA Rules").

In this post, I will assess whether the Prague Rules really differ from the IBA Rules and whether the former are actually capable of delivering a satisfactory result in terms of arbitration efficiency.

Prague Rules and IBA Rules: not that different after all

The Prague Rules provide for the arbitral tribunal's active role on the taking of evidence in article 2.5, which states that "[t]he Tribunal may also, if it deems appropriate, order the Parties to produce evidence (including making available fact witnesses or expert reports)". Furthermore, article 3.1 *entitles and encourages* the arbitral tribunal to take an active role in establishing the facts of the case, albeit not releasing the parties from their burden of proof. The tribunal may *on its own motion* "request any of the Parties to produce relevant documentary evidence or make fact witnesses identified by the Arbitral Tribunal available for testimony" (article 3.2, i), appoint experts or instruct the parties to do so (article 3.2, ii), order site inspections (article 3.2, iii) and take other appropriate actions for the purposes of fact finding (article 3.2, iv). The Tribunal may also *on its own initiative* request that both Parties and non-parties to the arbitration produce documents (articles 4.4 and 4.5).

From the declaration of purpose of the Prague Rules, we would expect the IBA Rules to take an entirely different stance on these issues. Yet the reality is much different.

The IBA Rules also encourage the arbitral tribunal to identify any issues (whether factual or legal issues) that it considers relevant to the case (article 2.3) and to order the production of documents (article 3) – and here the tribunal has an even more inquisitorial role as the verb *orderis* used instead of *request*, favoured by the Prague Rules. The IBA Rules even allow the arbitral tribunal itself to take "any step it considers appropriate to obtain Documents from any person or organisation" (article 3.10). The same goes for witnesses: the tribunal may order any Party to provide for the appearance for testimony of any person, "including one whose testimony has not yet been offered (article 4.10).

As for experts, the tribunal also has discretion to appoint their own (article 6), without prejudice to the appointment of experts by the parties (article 5). The arbitral tribunal may also order inspections *on its own motion* (article 7). Furthermore, the IBA Rules provide that the arbitral tribunal “shall at all times have complete control over the Evidentiary Hearing (article 8.2), varying the order of the proceeding *on its own motion* (article 8.3, f) and asking witness questions at any time (article 8.3, g).

Both the Prague Rules (articles 5.2 and 5.3) and the IBA Rules (article 9.2) allow the arbitral tribunal to exclude witness testimony on its own motion if said testimony is not relevant to the case. Both the Prague Rules (5.6) and the IBA Rules (article 8.2) bestow upon the arbitral tribunal the power to limit the number of questions to witnesses. Finally, both the Prague Rules (article 6.3) and the IBA Rules (articles 9.5 and 9.6) allow the arbitral tribunal to make adverse inferences, although the IBA Rules are much more detailed on the issue.

With so many similarities between the Prague Rules and the IBA Rules, especially concerning the arbitral tribunal’s proactive role on the taking of evidence, one may question whether the former might be an overreaction to a misconceived view on what the latter really stands for.

Maybe now is a good time to revisit the note from the Prague Rules’ working group. As we have seen so far, the approach towards document production, fact witnesses and party-appointed experts is quite similar in the two sets of rules. Yet the note from the Prague Rules’ working group points out that (i) the IBA Rules *take for granted* the party’s entitlement to cross-examine witnesses, (ii) many arbitrators are reluctant to actively manage arbitration proceedings, fearing the risk of a challenge, (iii) it is very rare that “document production brings a smoking gun to light”, and that (iv) there are doubts “as to the usefulness of fact witnesses and the impartiality of party appointed experts”.

As to the right to cross-examine, it remains unclear how it harms arbitration efficiency, as both the IBA Rules and the Prague Rules allow the tribunal to curtail undue or ineffective questioning of witnesses.

With regard to the arbitrators’ reluctance to manage proceedings for fear of challenges, this would actually stimulate an *adversarial* approach rather than an *inquisitorial* one, and both the IBA Rules and the Prague Rules provide room for arbitrators to follow the latter path unhindered.

Finally, doubts as to the usefulness of document production or party-appointed experts have not caused either the IBA Rules or the Prague Rules to ever dismiss such proceedings. Quite the contrary, both sets of rules confer to the parties the opportunity to appoint their own experts (IBA Rules, article 5; Prague Rules, article 6.6).

And yet the Prague Rules contain a rather questionable provision stating that the arbitral tribunal “shall avoid extensive production of documents, including any form of e-discovery” (article 4.1). It is important to note, however, that it is one thing to control the usefulness of documents in arbitration – a point that both the IBA Rules and the Prague Rules leave at the discretion of the tribunal. Another entirely different thing is to abdicate methods such as *e-discovery*, which are fundamental not only due to the way businesses are conducted nowadays but also due to the need to address the imbalance between the parties, assuring both a formal and a substantive due process in arbitration. At first glance, the suppression of e-discovery simply looks backward minded.

Anyhow, if the Prague Rules do not represent a clear departure from the IBA Rules – save exceptional and questionable provisions such as the condemnation of e-discovery – one may question whether there is any gain or even utility in issuing them in the first place.

Conclusion

The Prague Rules operate under the shadow of an apparent war between common law and civil law armies for dominance over the international arbitration landscape. Yet, just like Don Quixote, they mistake windmills for giants.

As commentators have pointed out, “[r]igid distinctions that exist between civil law and common law approaches are not imposed upon international commercial arbitration”, as “the emerging practice for taking of evidence in international commercial arbitration comprises elements of both civil and common law type procedures, other legal systems, and practices especially appropriate for an international process” (LEW, Julian D. M., MISTELIS, Loukas A., et al., *Comparative International Commercial Arbitration*. Kluwer Law International, 2003. p. 556).

This approximation between the common law and the civil law traditions is not circumscribed to international arbitration. It is rather a universal trend intensified by globalisation and the growth of international trade. For example, while civil law countries have been adopting their own case-law systems, common law countries have been relying more and more on statutes rather than on precedents. Good examples can be taken from the Chinese Case Guidance System and from the new Brazilian Code of Civil Procedure, which I have dealt with in a recent publication.

The Prague Rules and the IBA Rules are examples of *soft law*. In order to succeed, soft law needs to bridge gaps, not burn bridges. Its strength rests upon its *network effects*: the more agents rely upon the soft law, the more power it acquires (DRUZIN, Bryan H. *Why does Soft Law have any Power Anyway?* *Asian Journal of International Law*, vol. 7/no. 2, 2017, pp. 362-363). Therefore, it is not by building an illusory divide between common law and civil law practitioners that the Prague Rules will thrive. Such approach, in fact, practically sentences them to stillbirth.

There is much to gain from a joint effort of arbitration practitioners and academics from different cultural and legal backgrounds, as long as their shared goal is to put all their might at the service of a more reliable, legitimate and cost-effective international arbitration. It would be a terrible mistake to assume that by defending entrenched legal theories or traditions one could achieve such a goal.

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