Are the Prague Rules Suitable for Investment Arbitration?

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Introduction

The Prague Rules have been widely discussed over the past few months, among others, on this blog.[fn]Posts on the topic of the Prague Rules can be found here, here, here, here, here, here, here, here and here.[/fn] Yet, to the knowledge of the authors, none of those discussions has specifically addressed the application of the Prague Rules to investment arbitration.

Although the Prague Rules may have been drafted with a view to making commercial arbitration more efficient, there is in principle nothing that would prevent the Prague Rules from being applied in investment arbitrations. Given the civil law approach of the Prague Rules, one might even think that in a dispute between a civil law state and an investor from a civil law state they would be capable of meeting the expectations of the parties. Moreover, the work of the UNCITRAL Working Group III and the amendment process of the ICSID Rules also seek to make investment arbitration more streamlined. In particular, ICSID – the arbitration "dinosaur" – has recently even proposed expedited rules for investment disputes. Against this background, could the Prague Rules also assist in achieving greater efficiency in investment arbitration proceedings?

This blog post looks at the practice in investment arbitration regarding the taking of evidence and contrasts its approach to that of the Prague Rules. The post reflects on current practice as opposed to expressing a view as to the state of such practice.

Taking of Evidence in Investment Arbitration

An almost autonomous practice has emerged within investment arbitration that seems to be generally accepted regardless of the parties' legal traditions. Is that practice compatible or at least open to the Prague Rules?

Investment arbitrations typically involve complex issues that require equally complex evidence. When it comes to evidence, it is frequently the case that document production will occur, a hearing will take place, and witnesses/experts will be cross-examined. The IBA Rules on the Taking of Evidence ("IBA Rules") are often used as guidance.[fn]Further articles on the IBA Rules can be found here.[/fn]

ICSID's rules amendment project has provided valuable insights into current practice. Although not all

investment disputes are conducted under the ICSID Rules, ICSID cases can serve as an indication for what may constitute accepted practice in investment arbitration and extrapolations from ICSID practice to general practice will be made throughout this post.

- **Party-led**

In investment arbitration, the initiative to provide and request evidence resides primarily with the parties who enjoy wide discretion. The tribunal's powers concerning evidence are understood to be "supplementary".[fn] ICSID Arbitration Rule 34; *See also* Schreuer, *Commentary to the ICSID Convention*, para 10 p. 643 and para 44, p. 651.[/fn] The currently proposed amendments to the ICSID Arbitration Rules uphold this approach, far more common law- or at least IBA Rules-oriented, even when two civil law parties are involved.[fn]*See* ICSID Arbitration Rule 20(2) and proposed ICSID Rule 26(4).[/fn]

- **Document Production, Witnesses and Experts**

Tribunals rarely encroach on the parties' choice or presentation of evidence. Although ICSID Rule 34 provides that the tribunal may "call upon the parties to produce documents, witnesses and experts", it rarely takes the initiative.

ICSID has noted that document production occurs in two-thirds of cases.[fn]In particular, in its Schedule 9 (Working Paper #1) concerning time and costs, ICSID has identified document production taking place in 41 out of 63 (65%) cases over a given timeframe.[/fn] It is the authors' experience that a full document production takes place whenever requested by a party. It is often assumed at the outset of the proceeding that there will be a full document production and the tribunal and the parties merely discuss how it best fits into the procedural calendar.[fn]Proposals for Amendment of the ICSID Rules – Working Paper #2 (2019) vol I, para 237. ICSID explains that document production takes place in many cases.[/fn] Regarding witnesses/experts and the conduct of the hearing, tribunals give deference to the parties' decision on which witnesses or experts to hear and how to allocate time at the hearing. In particular regarding experts, parties will appoint their own experts while tribunal-appointed experts are rarely engaged.[fn]Choudhury, *Tribunal-appointed damages experts: Procedural improvements can serve as a better alternative in arbitration*, pp. 3-4. Nevertheless, *see* new proposed Rule 38 on tribunal-appointed experts.[/fn]

In the authors' experience, tribunals are also lenient when a party seeks to submit evidence after the last written submissions, again showing deference to the party adducing "new" evidence.

Taking of Evidence under the Prague Rules

The Prague Rules' aim to improve procedural efficiency is certainly commendable. However, its emphasis on the tribunal's active role in the taking of evidence appears to be in direct contrast with the approach to evidence in investment arbitration.

In particular, the provision of the Prague Rules on documentary evidence (Article 4) is in stark contrast to established practice in investment arbitration.[fn]For an overview, *see* Schreuer, *Commentary to the ICSID Convention*, pp. 643-645.[/fn] Article 4 encourages the avoidance of any document production and constraints the parties to request specific documents.

The situation is similar in relation to the examination of witnesses and experts and to the holding of a hearing. Experts and witnesses are rarely excluded by the tribunal; witnesses will generally appear for examination if requested by the parties or the tribunal – and not just by the tribunal as the Prague Rules mandate (Article 5). Again deference is shown to the decision of the parties on the presentation of evidence. The tribunal-appointed expert as the default under the Prague Rules is also in contrast to the practice in investment arbitration as explained above: while party-appointed experts are the rule in investment disputes (and tribunal-appointed experts rarely used), the Prague Rules show their preference for tribunal-appointed experts. Finally, Article 8 of the Prague Rules favoring documents-only proceedings runs directly counter to the common practice in investment proceedings where typically at least one hearing will be held.

Clearly, the Prague Rules seem to stand diametrically opposed to the practice in investment arbitration.

What about Expedited Proceedings?

ICSID recently proposed to introduce expedited arbitration ("EA") rules for investment disputes. According to the Center, these rules may be appropriate, for example, for SMEs with investment disputes based on a contract.

The main gist of the proposed ICSID EA rules is the tightening of deadlines. The Center has warned the parties that compromises will have to be made in relation to procedural applications, including document production.[fn]Proposals for Amendment of the ICSID Rules – Working Paper #1' (2018) vol III, para 663. Proposed Rule 36 applies with modifications.[/fn] Additionally, the proposed rules on tribunal-appointed experts that are applicable to regular proceedings do not apply in EA. Although the Center has again placed an emphasis on parties and counsel in order to showcase the efficiency of the EA rules, one can see how parties to a less complex investment case, concerned about costs, may wish for the tribunal to adopt a more active role. The tribunal, whose availability is especially relevant in these proceedings, may also want to ensure that deadlines mandated by the EA rules are diligently met. The Prague Rules may be well-suited in this scenario as they bring back the necessary focus on the arbitral tribunal.

Conclusion

The Prague Rules require the tribunal to become seriously involved in the taking of evidence whereas practice in investment arbitration gives deference to the parties' choice and presentation of evidence with the tribunal taking a more supplementary role. To some degree, the greater deference to the parties' choice may also ensure the legitimacy and acceptance of ISDS proceedings considering that states are involved. More often the stakes are simply too high to curtail a parties' choice and presentation of evidence for the benefit of speedy proceedings. Although the nature of many investment arbitrations often justifies more rigid management of deadlines and a firm exclusion of late evidence, the approach of the Prague Rules is unlikely to be suited for regular investment arbitrations for the reasons outlined above. The Rules may nevertheless contribute to the debate on procedural efficiency in investment arbitration and such a debate may open the door for their application to cases that justify a more streamlined procedure, such as those to which expedited arbitration rules may apply.

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