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A Comparison of the IBA and Prague Rules: Comparing Two of the Same

Sol Argerich (Clyde & Co.) · Saturday, March 2nd, 2019

On December 2018, the [Prague Rules on the Efficient Conduct of Proceedings in International Arbitration](#) (“**Prague Rules**”) were released. (For related posts on the Prague Rules on Kluwer Arbitration Blog click [here](#), [here](#), [here](#), and [here](#).)

The Prague Rules aim to increase efficiency and reduce costs in arbitral proceedings. The project arose from a general dissatisfaction with both the costs of arbitration and the length of proceedings. Drafters believe that one of the causes of this is that, generally, tribunals are not sufficiently proactive in providing cost efficient and time-saving procedures.

The drafters proposed the Prague Rules as an alternative to the well-known and commonly adopted IBA Rules on the Taking of Evidence in International Arbitration (“**IBA Rules**”). The note following provides an analysis of the main differences (and similarities) between the IBA Rules and the Prague Rules.

Application

The Prague Rules are intended as a framework providing guidance to conduct effective arbitration proceedings. They do not replace institutional rules which govern arbitral procedure and are only applicable upon the parties’ agreement or at the arbitral tribunal’s own initiative after consultation with the parties and, even then, only to the extent to which the parties have agreed (see Prague Rules, Article 1). In practice, although unlikely, a tribunal could apply the Prague Rules without party consent under Article 1.2.

The IBA Rules, on the other hand, provide that they may be adopted in whole or in part by the parties and tribunals. There is no specific provision for the tribunal adopting the IBA Rules of its own initiative.

Key differences

The key underlying difference between the IBA Rules and the Prague Rules is that while the IBA Rules were intended to create a level playing field in international arbitration, it is commonly believed that they are more aligned with common law. In contrast, the Prague Rules openly adopt a more inquisitorial approach more in line with the civil law tradition. This below illustrates, by way of comparative charts, the four main issues addressed by the Prague Rules:

1. A Proactive Arbitral Tribunal: Arbitrators should be active both in the taking of evidence and in fact finding to speed up proceedings.

	Art.	Prague Rules	Art.	IBA Rules
Proactive Arbitral Tribunal	2	<i>The arbitral tribunal shall hold a case management conference (CMC) without any unjustified delay after receiving the case file</i>	N/A	No express mandate for the tribunal to adopt an active role. However, Article 2 focuses on agreeing to efficient economical and fair process for the taking of evidence.
	3.1	<i>The arbitral tribunal is entitled and encouraged to take an active role in establishing the facts of the case [...]</i>		
	3.2	<i>The arbitral tribunal may, after having heard the parties, at any stage of the arbitration and at its own initiative:</i> <i>a. request any of the parties to produce relevant documentary evidence or make fact witnesses' testimony available during the hearing;</i> <i>b. appoint one or more experts, including on legal issues;</i> <i>c. order site inspections; and/or</i> <i>d. for the purpose of fact finding take any other actions which it deems appropriate</i>	3.10	<i>Request parties to produce evidence that they consider appropriate</i>
			5.4	<i>Organise meetings between the party-Appointed Experts</i>
			6	<i>Appoint one or more independent tribunal-appointed experts</i>
			7	<i>Require inspections</i>
		9.2	<i>The arbitral tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection</i>	
Tribunal's power to limit time	3.3	<i>The arbitral tribunal shall consider imposing a cut-off date for production of evidence [...]</i>		N/A

In sum, the Prague Rules contain unequivocal provisions on how the tribunal should be active. Yet, the IBA Rules also encourage the tribunal to adopt a proactive attitude.

2. Document production: The drafters of the Prague Rules criticise the current IBA-style practice of document discovery arguing that it is highly time and cost consuming. The Prague Rules, following the civil law style, limit document production.

Art.	Prague Rules	Art.	IBA Rules
4.2	<i>Generally, the arbitral tribunal and the parties are encouraged to avoid extensive production of documents, including any form of e-discovery</i>	3.1	<i>Within the time ordered by the arbitral tribunal, each party shall submit [...] all Documents available to it on which it relies [...]</i>
4.3	<i>However, if a party believes that it would need to request certain documents from the other party, it should indicate this to the arbitral tribunal at the CMC [...] If the arbitral tribunal is satisfied that the document production may be needed, it should decide on a procedure for document production and make an appropriate provision for it in the procedural timetable.</i>	3.3	<i>A Request to Produce shall contain: description in sufficient detail of a narrow and specific requested category of Documents that are reasonably believed to exist [...]</i>
4.5	<i>A party may request the arbitral tribunal to order another party to produce a specific document 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 another party or within its power or control.</i>	3.10	<i>At any time before the arbitration is concluded, the arbitral tribunal may (i) request any party to produce documents, (ii) request any party to use its best efforts to take or (iii) itself take, any step that it considers appropriate to obtain documents from any person or organisation.</i>

3. Number of witnesses: Another proposed solution to reduce the duration of arbitral proceedings under the Prague Rules is that the tribunal will have the final say regarding the number of witnesses to be heard throughout the proceedings. While under the IBA Rules, the tribunal has no say over this matter.

4. Examinations of witnesses: Despite the criticism of the cross-examination of witnesses in arbitration, the drafters of the Prague Rules retained the cross-examination process in the new Rules. However, provisions that tend to avoid lengthy hearings were included. The Prague Rules even suggest not having a hearing, and when possible, resolving the dispute on a document basis only (Article 8.1).

Art.	Prague Rules	Art.	IBA Rules
5.3	<i>The arbitral tribunal may decide that a certain witness should not be called for examination during the hearing [...] (however, the party is allowed to submit a written statement for that witness as stated in Article 5.4)</i>	8.2	<i>The arbitral tribunal shall [...] have complete control over the Evidentiary Hearing. The arbitral tribunal may limit or exclude any question to, answer by or appearance of a witness, [...]</i>
5.7	<i>The hearing, shall be conducted under the direction and control of the arbitral tribunal. The arbitral tribunal can reject a question posed to the witness [...]. 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.</i>	8.5	<i>[...] The arbitral tribunal may request any person to give oral or written evidence on any issue that the arbitral tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the arbitral tribunal may also be questioned by the parties.</i>

Innovations

The Prague Rules included two other provisions that are not addressed in the IBA Rules and may not be familiar to common law practitioners:

1. *'Iura Novit Curia'* principle (Article 7). This maxim demands for proactive arbitrators who are able to spot and determine the applicable law on their own initiative and thus apply provisions that were not set out by the parties. This requires prior consultation with the parties; furthermore, the tribunal must seek the parties' views on those legal provisions it intends to apply.
2. *Assistance in Amicable Settlement* (Article 9). Unless the parties object the tribunal may assist the parties in reaching an amicable settlement. This alternative dispute resolution mechanism can be used at any stage of the proceedings. Where that no agreement is reached, the arbitrator who acted as mediator may (a) continue as an arbitrator (parties' written consent is required) or (b) terminate his/her mandate.

Even though common law practitioners may not be familiar with this mechanism, it is interesting to note that it is used in other jurisdictions, specifically Asia. Similar provisions are contained in the HKIAC Rules 2018 (Article 13.8) and in the China International Economic and Trade Arbitration Commission (Article 47).

Conclusion

On the whole, even when there are some differences in procedures under the two sets of rules, the Prague Rules do not present a radical change. However, these changes and innovations could have an impact on the costs and the duration of the proceedings.

Will the Prague Rules yield better results overall? We will have to wait for the Prague Rules to be put into practice in order to fully analyse their impact on international arbitration.

This post is an expression of the author's personal opinion, the views expressed here do not reflect Clyde & Co's position.

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