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The Prague Rules: A Soft Law Solution to Due Process Paranoia?

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The publication of the Rules on the Efficient Conduct of Proceedings in Arbitration ("**Prague Rules**") on 14 December 2018 heralded a challenge to the well-established incumbent (*i.e.* the International Bar Association ("**IBA**") Rules on the Taking of Evidence ("**Evidence Rules**")) and prompted much debate amongst the arbitral community, including at least six posts on this blog,[1)] but none have quite come out in full support of it. This post suggests that there is much to celebrate about the bold new rules.

Briefly, the key differences relate to the default rules that apply when adducing evidence. While under the Evidence Rules the right to rely on documents, call fact witnesses and appoint experts generally lies with the party, under the Prague Rules parties are encouraged to avoid document production, and the tribunal (rather than the party) calls the fact witnesses and appoints the expert(s).[2)] Other "novel" features not present in the Evidence Rules include having the tribunal present its preliminary views at an early stage, the principle of *iura novit curia*, and conferring on the tribunal the power to assist in the amicable settlement of disputes.

Challenging a Well-Established Incumbent

There is, of course, inertia in changing what is a well-established way of doing things. One wonders whether the criticism would be quite so strong if the Prague Rules sought to "supplant" other soft law instruments instead. Not all IBA soft law has reached the levels of the tremendous success that the Evidence Rules have. The IBA Guidelines on Conflicts of Interest ("**Conflicts Guidelines**") and the IBA Guidelines on Party Representation, for instance, have a more muted reception amongst the international arbitral community. Still, because the Prague Rules invade a space where the Evidence Rules are adopted sometimes almost *pro forma*, the resistance to change is keener.

Filling the "Gap"

The oft-cited goals of soft law include "gap"-filling and harmonisation of international best practices. It is clear that the Evidence Rules sought to do that when it was first promulgated.

Similarly, the Prague Rules seek to fill a perceived "gap" in international arbitration. Cost and the lack of effective sanctions during the arbitral process against dilatory tactics remain the worst characteristics of international arbitration.[3] This "gap" is filled by the Prague Rules insofar as it seeks to codify best practice in arbitral procedure on these issues.

It should be noted that the Prague Rules are far from the first soft law instrument attempting to regulate time and costs in arbitral proceedings. Institutions like the UNCITRAL (Notes on Organising Arbitral Proceedings), the ICC (Appendix IV of the ICC Arbitration Rules 2017) and the College of Commercial Arbitrators (Protocols for Expeditious, Cost-Effective Commercial Arbitration) have all issued guidelines and protocols to deal with issues of time and cost. Even law firms have pitched in – New York-based law firm Debevoise and Plimpton LLP has issued a Protocol to Promote Efficiency in International Arbitration. What is significant about the Prague Rules is that it seeks to codify a set of *evidentiary rules*, as opposed to being just mere *techniques*, to achieve this end.

Does the fact that the Prague Rules and Evidence Rules refer to themselves as "Rules" rather than "Protocols" or "Guidelines" suggest that they are of a more mandatory nature? Such a notion would be inaccurate. Rather, soft law instruments "*draw their strength from their intrinsic merit and persuasive value rather than from their binding character*".[4] The arbitral community is a sophisticated one – time will be the ultimate arbiter of whether it gains any traction. But to deny it a chance to enter the fray at all would be unfortunate.

Are the Prague Rules a Panacea to Due Process Paranoia?

The specific goal of the Prague Rules, stated in both the Preamble and the Note from the Working Group, is to increase the efficiency of arbitral proceedings by encouraging a more active role for arbitral tribunals. To do so, the Prague Rules have the following notable provisions:

1. The Arbitral Tribunal is to have wide powers of case management, including expressing its preliminary views on the case: Article 2.4.
2. The Arbitral Tribunal and the parties are encouraged to avoid any form of document production, including e-discovery: Article 4.2.
3. The Arbitral Tribunal may apply legal provisions not pleaded by the parties if it finds it necessary: Article 7.2.
4. The Arbitral Tribunal and the parties should seek to resolve the dispute on a documents-only basis: Article 8.1.
5. The Arbitral Tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration unless one of the parties objects: Article 9.1.

At risk of over-simplification, critics have argued that the above provisions fall afoul of the principles of due process – the right to be heard and the right to an independent and impartial tribunal. Such criticism may not be appropriate for at least three reasons.

First, to the extent that the Prague Rules are adopted by the parties in its entirety, it has safeguards built in to ensure that arbitrators comply with procedural rules of natural justice.

- The mandate of the tribunal *generally* under the rules already requires the tribunal to be

cognizant of due process principles and ensure that they are observed and adhered to. Article 1.4 states: "*[a]t all stages of the arbitration and in implementing the Prague Rules, the arbitral tribunal shall ensure fair and equal treatment of the parties and provide them with a reasonable opportunity to present their respective cases*".

- Similarly, Article 7.2 providing for *iura novit curia* safeguards the parties' due process rights by ensuring that "*parties have been given an opportunity to express their views in relation to such legal authorities*".

Second, the rules are not completely radical departures from the established arbitral procedure. In fact, most of them find expression in either soft law or arbitral institutional rules.

- Assistance in amicable settlement is a familiar concept in many arbitral jurisdictions. Article 26 of the 2018 DIS Arbitration Rules provides for the same (other examples are cited on this blog here). It is also found in international instruments like the aforementioned Appendix IV of the ICC Rules, and General Standard 4(d) of the Conflicts Guidelines clearly envisions the possibility of the arbitrator taking on such a role.
- *Iura novit curia* is endorsed in Article 22.1(iii) of the LCIA Arbitration Rules (2014).
- Avoidance of document production is envisioned under Article 25(6) of the ICC Rules, which provides that the tribunal "*may decide the case solely on the documents submitted by the parties unless any of the parties request a hearing*".
- An active role for the tribunal was also contemplated, somewhat ironically, in the Evidence Rules – Article 8.2 of the Evidence Rules provides that the tribunal "*shall at all times have complete control over the Evidentiary Hearing*".

In any event, even if the criticism that so many *new* provisions enshrined in one combined document potentially go too far in establishing a new arbitral procedure, this can be overcome by applying the rules in a piecemeal fashion (such a view was alluded to previously here). Rules which are entirely foreign to the parties can always be opted out of, and the "standard procedure" under the Evidence Rules can apply as a fall-back.

Third, as a matter of principle, if the parties have actually agreed to the rules, it cannot be that adoption of the rules *simpliciter* amounts to a violation of due process. The New York Convention provides for the refusal of recognition and enforcement for *both* a failure to observe principles of due process (Article V(1)(b)) *and* a failure to respect the autonomy afforded to parties in determining arbitral procedure (Article V(1)(d)). If due process paranoia stems from a perceived reluctance by tribunals to act decisively for fear of awards being challenged, the clear mandate given to the tribunal to actively take such measures must surely militate against such fears.

This is classically illustrated by the Prague Rules themselves in situations where the power conferred to the arbitrator appears particularly contentious. For instance, the aforesaid Article 2.4(e) which allows the tribunal to express its preliminary views also states that such views cannot be taken as evidence of the tribunal's lack of independence or impartiality and cannot constitute grounds for disqualification.

The Way Forward

The advent of the Prague Rules affords parties greater variety when choosing their arbitral procedure. More specifically, it articulates a framework for tribunals to play a more active role,

which is likely to have the salutary benefits of discouraging dilatory and guerrilla tactics.

As both the Evidence Rules and the Prague Rules note in their preambles, they operate as "guidelines", and are not meant to limit the inherent flexibility of arbitration. This must be correct – soft law should not be seen as "hard" law, no matter the regularity of use. In this vein, the "challenge" to the status quo also reduces the perception that arbitration has become increasingly judicialized. Arbitration has always prided itself on its inherent flexibility – the reception to the Prague Rules should be no exception.

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References

?1 The previous KAB posts are available here, here, here, here, here and here.

?2 For a more detailed discussion, see here and here.

?3 *Queen Mary University of London and White & Case LLP*, 2018 International Arbitration Survey: The Evolution of International Arbitration (9 May 2018), 7, 8.

?4 *Railroad Development Corporation v Republic of Guatemala, ICSID Case No. ARB/07/23, Decision on Provisional Measures*, (Oct 15, 2008), ¶32.

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