Kluwer Arbitration Blog

Do the Prague Rules Provide for an Efficient Resolution of Construction Arbitration Disputes?

Fabian Bonke (Hogan Lovells) · Saturday, July 20th, 2019

The main concerns of parties when considering arbitration are the costs and length of arbitration proceedings (*see, e.g.*, Queen Mary University of London 2018 International Arbitration Survey). The popularity of arbitration as a method of resolving construction disputes thus depends largely on whether costs can be reduced and efficiency maintained. This is particularly the case for construction cases of major international energy or infrastructure projects which are often very complex and lengthy due to certain key features: high factual and technical complexity, time pressure caused by the progress of the works that shall not be suspended, the involvement of multiple parties with a fragmentation of responsibilities, the involvement of voluminous evidence to be examined, and many witnesses and experts to be heard.

Whether arbitration proceedings can accommodate the particular features of construction disputes depends largely on the procedures for taking evidence which the arbitral tribunal applies. In this regard, the IBA Rules on Taking of Evidence in International Arbitration ("**IBA Rules**") take precedent, and in the years since their launch have been widely used within the arbitration community. However, there have been concerns over the IBA Rules being common law influenced in their approach by allowing for a too expansive approach to evidence.

Against this background, the Rules on the Efficient Conduct of Proceedings in International Arbitration ("**Prague Rules**") were drafted and published in December 2018 (for related posts on the Prague Rules on Kluwer Arbitration Blog click here, here, here, here and here). The Prague Rules aim at increasing the efficiency of arbitral proceedings by adopting a more inquisitorial style of proceedings. As opposed to the adversarial approach by the IBA Rules, the tribunal is to take a more active role in managing the proceedings, as is traditionally done in many civil law countries. However, do the Prague Rules provide a suitable set of rules for the efficient adjudication of arbitration cases in the construction sector with its particularly complex disputes? Are these Rules able to add to the appeal of arbitration as forum for major construction disputes? These questions will be addressed in view of the key features of the Prague Rules.

The Role of the Tribunal

The key feature emphasized by the Prague Rules is the proactive role played by the arbitral tribunal. The arbitral tribunal may "take an active role in establishing the facts of the case which it

finds relevant for resolution of the dispute" (Art. 3.1). The IBA Rules, on the contrary, do not expressly bestow an active role on the arbitral tribunal for the gathering of evidence. This, on the one hand, has the advantage that the parties are not limited in how to establish their facts. On the other hand, this adversarial approach bears the risk that the parties may provide too much evidence which would thus result in unnecessary costs.

Whether disputes in the construction industry are resolved in a more efficient way under the guidance of a proactive tribunal proves difficult to project. In particular, an arbitral tribunal experienced in construction disputes might be able to give directions as to which aspects of the case it finds relevant and which issues may require further elaboration. This might avoid lengthy descriptions of the irrelevant facts (*e.g.*, for an extension of time claims on events that were not time-critical for the project completion). This would then in turn contribute to also limiting legal counsels' fees, which make up for a major portion of the overall costs of arbitration.

Some additional features of the active role of the tribunal set forth in the Prague Rules seem less relevant, in particular for arbitrations under institutional rules. This applies, for example, to the tribunal's authority to hold a case management conference without undue delay, in which the tribunal provides, if it deems appropriate, preliminary indications to the parties and fixes a procedural timetable (Art. 2). These issues are usually addressed in institutional rules which would supersede the Prague Rules (Art. 1.3).

Document Production

Document Production is a controversial topic between civil law and common law jurisdictions (for latest posts on Kluwer Arbitration Blog click here, here and here). In contrast to countries adopting a civil law approach, parties from a common law background apply a more extensive approach when requesting documents or electronically stored information as deemed necessary to prove ones case. Likewise, the IBA Rules oblige a party to produce the documents requested to the counter party (Art. 3.4). Yet, the documents requested must be detailed (Art. 3.3) and may be objected based on the grounds in Art. 9.2.

Although the Prague Rules follow a more restrictive approach, the concept of document production is not entirely excluded. As a general rule, "the arbitral tribunal and parties are encouraged to avoid extensive production of documents", Art. 4.2 Prague Rules. According to the civil law rationale, the tribunal is to decide based on the facts as presented by the parties, Art. 4.1. If a party chooses to request documents, it needs to address such request to the arbitral tribunal at the latest in the Case Management Conference, Art. 4.3. Thereby, it must explain the reasons why document production may be necessitated and refer to specific documents only (Art. 4.5).

Document production can be a costly and time-consuming process. Particularly in construction proceedings, which habitually include copious drawings, notices of defects and contract documents, restrictions may contribute to efficiency. With their restrictions, the Prague Rules may thus be beneficial in terms of efficiency. However, it seems as if the Prague Rules went a step too far, by abdicating methods such as e-discovery, particularly nowadays when most documents, also in construction projects, are only saved electronically. As to the IBA Rules, it needs to be pointed out that they merely allow that parties may request the production of only "narrow and specific" categories of documents (Art. 3.3 lit. a. ii.). As another limitation, the tribunal may exclude those

documents from production without relevance to the case (Art. 9.2). If the condition of "relevance" is interpreted in a narrow sense, and if the document production is generally managed properly by the arbitral tribunal, document production also under the IBA Rules can be an efficient exercise.

Expert Evidence

A key issue in almost all construction disputes is the resolution of complex technical issues which require expert evidence.

The IBA Rules regulate in detail both the use of party appointed and of tribunal appointed experts. Yet, in practice, under the IBA approach, the proceedings are generally only attended by party appointed experts who often provide the tribunal with conflicting reports. The Prague Rules, on the contrary, have a focus on tribunal appointed experts and only mention party appointed experts incidentally (Art. 6.5-6.7 of the Prague Rules). This preference for a tribunal appointed expert has the benefit of being cost-saving. The sole reliance on tribunal appointed experts is, however, not without its downsides. Critiques argue that tribunal appointed experts gain too much influence on the decision since their findings are almost taken as dispositive. To address this issue, the Prague Rules allow the parties to appoint their own experts who can be called upon for examination during the hearing (Art. 6.5 of the Prague Rules). It can be expected that also under the Prague Rules, parties will thus appoint their own experts in order to challenge the tribunal-appointed expert in the hearing, where necessary.

It is thus not very clear whether the choice of the Prague Rules will bring about an increased efficiency in the use of experts. Independent of the applicable rules it seems key in the context of efficiency to identify the areas of agreement and disagreement. To this end, one might defer to the use of tools such as expert conferencing (Art. 8 Abs. 3 lit. of IBA Rules and Art. 6.7 Prague Rules) or joint-party expert reports (see *e.g.* Art. 6.5 Prague Rules), which have proven to be particularly helpful in finding a solution to multifaceted construction disputes.

Hearings

According to the IBA Rules, an evidentiary hearing must be held – whether in person, by telephone conference, or another method of oral evidence. In practice, a hearing requires large amounts of time, personnel and costs. In line with the stronger emphasis in civil law jurisdictions for written proceedings, the arbitral tribunal and the parties shall on the contrary, under the Prague Rules, seek to resolve the dispute on a documents only basis (Art. 8.1). Yet, the Rules allow a party to request a hearing, while they remain silent on whether this request must be granted or whether it lies within the discretion of the tribunal.

Whether or not a hearing is necessary and considered as appropriate in construction disputes must be decided on a case-by-case basis. Regularly, a hearing will be indispensable since factual witnesses and expert witnesses need to be heard and complex issues need to be discussed. In order to have an efficient hearing in construction disputes, written witness statements are often useful, a fact which is also recognised in the Prague Rules (see Art. 5.2-5.8). The hearings themselves should then focus on the examination of witnesses and experts and avoid the repetition of legal arguments that were made in written submissions.

Conclusion

The Prague Rules undoubtedly contain some beneficial aspects for the efficient resolution of complex construction arbitration disputes in major projects. The more proactive role of the arbitral tribunal, as well as certain limitations on document production, seems preferable particularly for civil law practitioners. In that sense, the Prague Rules provide a valuable supplement for the IBA Rules offering the parties additional options. However, it needs to be pointed out that an efficient dispute resolution very much depends on how the arbitral tribunal uses its wide discretion to proactively manage the proceedings. With a robust arbitral tribunal experienced with the complexity of construction disputes this efficiency can without a doubt be realized under the IBA Rules.

This entry was posted on Saturday, July 20th, 2019 at 10:00 am and is filed under Arbitration,

Arbitration Institutions and Rules, Arbitration Proceedings, Construction, Construction arbitration, Dispute Resolution, Document Production, Expert evidence, Hearings, IBA, IBA Rules of Evidence, International arbitration, Prague Rules

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.