

New “Prague Rules” on the taking of evidence will be released in December 2018.

The Prague Rules, also referred to as “Inquisitorial Rules on the Taking of Evidence in International Arbitration,” will be officially launched on 14 December 2018 in Prague. These rules are intended to constitute a tool available to parties and arbitral tribunals to increase efficiency in international arbitration and to reduce costs.

According to the drafters of the Prague Rules, this new initiative has arisen as a response from civil law practitioners to what has been perceived to be the “creeping Americanisation of international arbitration”. The drafters of the Prague Rules considered that whereas the IBA Rules on Taking of Evidence in International Arbitration (“IBA Rules”) has successfully fulfilled its purpose of bridging a gap between the common law and civil law traditions with respect to the taking on evidence, for some civil law practitioners they are still closer to common law traditions arguing that the IBA Rules follow a more adversarial approach in certain matters (as document production, fact witnesses and party-appointed experts). Considering that these factors contribute greatly to the increased costs of arbitration¹, and that their efficiency is sometimes rather questionable, the drafters of the Prague Rules propose an alternative approach with respect to taking of evidence based on an inquisitorial model of procedure. They argue that their application would enhance a more active role of arbitral tribunals and would therefore contribute to increasing efficiency in international arbitration. In this regard, the drafters of the Prague Rules consider that, by explicitly granting the tribunal with more inquisitorial powers, the risks of challenges based on procedural conduct of the proceedings could be reduced².

Some commentators point out that the Prague Rules are not a competitor of the IBA Rules but on the contrary, they can supplement the latter and vice versa. The Prague Rules would play a fundamental role in according the parties additional options to tailor their process to fit their interests and needs. The Prague Rules would therefore not constitute a criticism to the IBA Rules, but rather a promotion of different options and different mind-sets in the international decision-making process³. The drafters of the Prague Rules consider that there should be a set of written rules that allows the parties to specify that they want the tribunal to be more in control of the case and to have a more proactive and inquisitive role.

The Prague Rules can be applied by arbitral tribunals as a binding document or be used as guidelines. Parties and arbitrators can also agree or decide to select or modify the elements they wish to apply.

On the basis of a traditional inquisitorial approach, the Prague Rules suggest:

1. **A more proactive role of the arbitral tribunal, including the imposition of a number of duties including:**
 - a. A duty to investigate the circumstances of the case, and as such it will have the right to (i) request documentary evidence from the parties; (ii) call fact witnesses; (iii) order site inspections and (iv) appoint experts (Article 3.2);

¹ Costs continues to be seen as arbitration’s worst feature. 2018 International Arbitration Survey of the Queen Mary University of London, (“2018 QMUL Survey”) available at [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF).

² 2018 QMUL Survey reports that “Due process paranoia” continues to be one of the main issues that users believe is preventing arbitral proceedings from being more efficient.

³ Duarte Henriques, “The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?”, in Matthias Sherer (ed), ASA Bulletin, (Association Suisse de l’Arbitrage; Kluwer Law International 2018, Volume 36 Issue 2).

- b. A duty to establish law, which implies a more developed approach to the principle of *iura novit curia*. Whereas the classical adversarial mode imposes on the parties an obligation to prove the issues of law, (and this principle becomes predominant in international arbitration), the Prague Rules propose that the arbitral tribunal should have a duty to find and apply the rules of law that it considers appropriate, after having given the parties an opportunity to comment (Article 7.2); and
- c. A duty to adopt an active role in managing the proceedings, including for instance (i) the identification of facts that are not disputed between the parties (Article 2.3); or (ii) the limitation in the number of rounds for exchange of submissions, and their length (Article 2.4);

2. **That priority will be given to documentary evidence.** The Prague Rules propose a presumption that to the extent appropriate for a particular case and possible under the *lex arbitri*, the arbitral tribunal and the parties should seek to resolve the dispute on a documents-only basis (Article 8.1). Nevertheless, the tribunal keeps discretion in allowing or denying witnesses to testify on disputed facts (Article 5.2).
3. **That there will be limitations with respect to document production.** The Prague Rules assume that each party has its own burden of proof. Accordingly, as a matter of principle, arbitral tribunals shall avoid extensive production of documents, including any form of e-discovery (Article 4.2).
4. **That witness examination will be framed by the arbitral tribunal.** As such, the Prague Rules propose that subject to any requirement provided by the applicable law, the arbitral tribunal can decide (i) which witnesses will be called for

examination at the hearing; (ii) not to call a witness for examination during the hearing, either before or after a witness statement has been tendered (Article 5.6); or (iii) to invite a Party to submit a written witness statement before the hearing (Article 5.5). The Prague Rules also propose that the examination of the fact witness shall be conducted under the direction and control of the arbitral tribunal (Article 5.7).

5. **That the arbitral tribunal can have a settlement facilitation role.** The Prague Rules not only give the tribunal members the power to act as mediators but encourage them to facilitate settlement. Article 9.1 provides that the arbitral tribunal shall assist the Parties in reaching an amicable settlement of the dispute at any stage of the proceedings, unless any of the parties objects. To the aim of facilitating settlement, the members of the arbitral tribunal can be entitled to (i) express its preliminary views with regard to the parties' respective positions in order to assist in an amicable settlement of the dispute (Article 9.2); or (ii) act as mediators (Article 9.3). The involvement of the arbitral tribunal in case mediation fails would only be possible upon written consent from all parties.

This proposal has created a number of criticisms from some practitioners, including (i) the fact that the Prague Rules are no different from the IBA Rules; (ii) that the Prague Rules are not needed as the IBA Rules allow the same approach to be taken by arbitral tribunals; (iii) that the Prague Rules contain severe limitations of procedure which would prevent them to be applied in practice; or (iv) that the settlement facilitation role of arbitral tribunals may lead to pre-judge issues against the interest of the parties, among other criticisms. As a reaction to these criticisms, the drafters of the Prague Rules conclude that arbitration is about party autonomy and diversity, this proposal being a way to realise and embrace such high acclaimed diversity.

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