The Prague Rules: "Civil" War On The Evidence In International Arbitration

24 JAN 2019
By: Miroslav Dubovský | Ben Sanderson | Nikki O'Sullivan

Efficiency has been a buzzword in international arbitration for a number of years. In response to concerns expressed by users about perceived spiralling cost and delays, practitioners and institutions have been keen to take steps to ensure that international arbitration remains fit for purpose. The latest initiative comes in the form of a new approach to dealing with evidence in international arbitration.

The Rules on the Efficient Conduct of Proceedings in International Arbitration (the "Prague Rules") were signed on 14 December 2018 and are now available for parties to adopt in their arbitration proceedings, alongside any institutional or ad hoc rules that might apply. The Prague Rules were drafted by a Working Group formed of representatives from predominantly civil law based jurisdictions. In essence, the Prague Rules seek to promote procedural efficiency in international arbitration by adopting procedures more akin to a civil law inquisitorial style. The Prague Rules are designed to offer an alternative to the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), which some commentators perceive as being biased in favour of promoting a the common law adversarial style and permitting an expansive approach to evidence which underpins many of the concerns about costs and delays.

A viable alternative to the IBA Rules?

To date, tribunals have commonly adopted the IBA Rules as a benchmark for dealing with evidence in arbitral proceedings. The IBA Rules are a comprehensive set of rules which are intended to "provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions". The IBA Rules are often expressly adopted (whether strictly or as guidance) in the parties' terms of reference, early procedural orders or in inter partes correspondence. It is envisaged that the Prague Rules may be used in much the same way. Both sets of rules offer flexibility insofar as they may be adopted in whole or in part by the parties, or the tribunal may itself determine that the respective rules should be applied.

Given the widespread use of the IBA Rules to supplement applicable legal provisions and the compatibility of its provisions with a large number of prominent institutional rules, it will be of interest to arbitration users to see how the Prague Rules are received and whether there is any significant level of uptake. According to the Working Group, the Prague Rules were developed in response to concerns from users who were "dissatisfied with the time and costs involved in arbitral proceedings". The Working Group has drawn on civil law practices "to increase the efficiency of arbitral proceedings" by encouraging "tribunals to take a more active role in managing the proceedings". In short, the Prague Rules seek to encourage arbitral tribunals to adopt an inquisitorial (i.e. fact-finding) approach to the taking and assessment of evidence and application of legal principles. But is it correct to conflate the common law traditions of an adversarial approach (in which parties must discharge the burden of proof) with procedural...
inefficiency?

How different are the Prague Rules?

A number of commentators have pointed out aspects in which the Prague Rules do not represent a significant departure from the guidelines provided in the IBA Rules. There are certainly notable areas of commonality, including the arbitral tribunal's ability to order the production of documents (Article 3 IBA Rules and Article 4.6 Prague Rules); the identification of fact witnesses, the submission of witness statements and the power of the tribunal to order the appearance of a fact witness for testimony at a hearing (Article 4.10 IBA Rules and Article 5.2 Prague Rules); as well as the use of party-appointed experts (Article 5 IBA Rules and Article 6.5 Prague Rules).

However, there are also key areas of difference between the IBA Rules and the Prague Rules, including the following:

1. **Case Management.** Under the Prague Rules, the arbitral tribunal is given the express power to give an indication at the case management conference of its preliminary views on the issues in dispute, the relief sought and the evidence submitted (Article 2.4(e)).

2. **Proactive approach.** There is an increased emphasis on the proactive involvement of the arbitral tribunal in establishing matters of fact under the Prague Rules. Article 3.1 states that "the arbitral tribunal is entitled and encouraged to take a proactive role in establishing the facts of the case which it considers relevant for the resolution of the dispute". In taking a proactive, fact-finding approach, the arbitral tribunal may take steps such as ordering the production of a document or ordering a site inspection. Whilst such steps are available to tribunals under the IBA Rules, there is no expectation that the tribunal will take such an express approach.

3. **Document requests.** Whilst a party's ability to request documents from another party is maintained under the Prague Rules, the requesting party must address its request directly to the tribunal at the case management conference (which practice differs from the approach taken under the IBA Rules) and explain why the particular document is being sought. Overall, a narrow and restrictive approach to document production is taken, with the arbitral tribunal and the parties being "encouraged to avoid any form of document production, including e-discovery" (Article 4.2).

4. **Experts.** Although parties are able to submit expert reports prepared by party-appointed experts, the preferred approach under the Prague Rules is for the arbitral tribunal to appoint an expert or joint expert commission (with input and submissions from the parties). Whilst tribunal-appointed experts are a possibility under the IBA Rules, no single approach is promoted above the other and common practice tends to lean towards party-appointed experts.

5. **Hearings.** Under the Prague Rules, the arbitral tribunal and the parties are encouraged to seek to resolve disputes on a documents-only basis in appropriate cases. This approach differs significantly from the procedure set out in the IBA Rules (Article 8), which contains detailed provisions as to the conduct of the final evidentiary hearing. Instead, under the Prague Rules it is necessary for a party to request a hearing, but the rules are silent on whether the tribunal retains discretion over the decision to hold a hearing following such a request or whether any request must be automatically granted (Article 8.2).

6. **Settlement.** Under the Prague Rules, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the proceedings, unless one of the parties objects (Article 9). In addition, upon the prior written consent of all parties, any arbitrator may act as a mediator to assist in the amicable settlement of the dispute. If a settlement is not achieved, the arbitrator who acted as a mediator needs the written consent of all parties in order to continue to act as arbitrator in the proceedings. The IBA Rules make no provision for members of the tribunal to act in the capacity of mediator vis-à-vis the parties. Further, most institutional rules, including the LCIA Rules (Article 5.3) and ICC Rules (Article 11(1)) contain express requirements regarding the impartiality and independence of arbitrators, and this particular provision of the Prague Rules sits uncomfortably alongside express prohibitions on arbitrators advising any party on the parties’ dispute or the outcome of the arbitration (see for example, LCIA Rules Article 5.3).

Which set of rules is right for me?

Whether to adopt the IBA Rules or the Prague Rules (or neither) in whole or in part in your arbitration proceedings is
an important decision to be taken after careful consideration with your legal adviser. Where one or more of the parties is from a civil law jurisdiction and the dispute is relatively straightforward and capable of being resolved on a documents-only basis, it may be the case that the Prague Rules are a suitable (and potentially more cost-efficient) alternative to the IBA Rules.

It is clear from the Foreword to the Prague Rules that the application of the rules is not limited to disputes involving parties from civil law jurisdictions. The Foreword states: "the Rules, initially intended to be used in disputes between companies from civil law countries, could in fact be used in any arbitration proceedings where the nature of the dispute or its amount justifies a more streamlined procedure actively driven by the tribunal". As noted above, however, some aspects of the Prague Rules differ notably from practices that users of international arbitration, especially those from common law backgrounds, will be more familiar with.

The Prague Rules are available here in English, Spanish, Portuguese and Russian.

1 Miroslav Dubovský, Country Managing Partner of DLA Piper's Czech office, is a member of the Working Group which drafted the Prague Rules.
2 Preamble, paragraph 1 of the IBA Rules
3 Article 6.5 of the Prague Rules states that the appointment of a tribunal-appointed expert does not preclude a party from submitting an expert report prepared by an expert appointed by that party.

AUTHORS

Miroslav Dubovský
Partner
Prague | T: +420 222 817 111
[email protected]

Ben Sanderson
Of Counsel
London | T: +44 (0)20 7349 0296
[email protected]