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# IN PURSUIT OF THE CHERISHED NOTION OF EFFICIENCY THROUGH THE NEW PRAGUE RULES

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## ABSTRACT

*One of the most frequently used words in arbitration in recent times is ‘efficiency’, as most of the arbitration players encounter difficulties in managing less expensive and faster cases that are prolonging due to a growing adverse bureaucracy. Although this bureaucracy has been developed precisely to ease the work of the arbitral institutions and the arbitral tribunal, it has failed to solve the problem, instead only aggravating it. In an attempt to respond to these needs, already identified by many statistics, a sustained campaign to update the rules of arbitration institutions was adopted and standards of good practice in the field of efficient administration of the arbitration procedure were issued.*

*The most recent project in this regard is the one initiated by the Russian Arbitration Association in 2011 which officially launched in December 2018, The Prague Rules called “rules on the efficient conduct of proceedings in international arbitration” which won the GAR Awards 2019 for the Best Innovation of 2018. Its title is no longer focused on the inquisitorial administration of evidence in civil law systems in opposition to the one based on the adversarial principle under common law systems, even specific features in this respect are emphasized as tools to reach efficiency.*

*This article seeks a plea for efficiency tools that are made available to users to streamline arbitration procedures in the specific framework of The Prague Rules and to inform Romanian users and arbitration community in general on this soft law and on how it responds to the issues addressed.*

**Keywords:** arbitration, efficiency, taking of evidence, Prague Rules

## I. Introduction

Arbitration as a private alternative for dispute resolution does not substitute for state jurisdiction, which actively participates in strengthening the structure

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and principles of arbitration, but they are in a complementary relationship beneficial to both forms of justice. Thus, arbitration is a non-state procedure that operates on the basis of legal provisions, a form of private justice designed to give parties the advantages that they do not find in state justice.

Since international trade and investment arbitration has become the main choice to settle international disputes, the focus is increasingly on finding solutions to achieving efficiency, predictability and consistency in addition to reducing the rigidity and judicialization tendency of arbitration. There are voices stating that it can be reached by shifting towards the founding principles of arbitration, something like 'back to the future'.

The predictability and consistency of decision-making (and also of arbitral awards) can be found in the rule of law and are important as they are elements that the public is frequently relying on to assess fairness and legitimacy of a judicial system, and adherence to these principles favours the trust of individuals in the system.<sup>2</sup>

In a permanent debate, predictability,<sup>3</sup> transparency, consistency, efficiency and flexibility<sup>4</sup> are the most current and relevant topics that test the capacity of the arbitration system, which is in pursuit of viable and compliant solutions. The fulfilment of these goals is also considered to have a significant role in ensuring recourse of those interested in arbitration. In order to strengthen and enhance trust in arbitration, effective mechanisms are needed to remove vulnerability and to implement the most appropriate instruments for attracting parties to make more frequent and consistent use of arbitration. However, in each arbitration, parties, lawyers and arbitrators should make the most of the inherent flexibility in international arbitration and should only use procedures that are justified in the case.

## II. Efficiency

One of the most frequently used words in arbitration in recent times is 'efficiency',<sup>5</sup> since most participants in the arbitration procedure encounter

<sup>2</sup> Julia Hildebrandt, *Persuasive Authority, Predictability and Consistency in Arbitral Decision Making*, Seminar Paper Winter Term 2017/2018, pp. 2, 3, [https://deicl.univie.ac.at/fileadmin/user\\_upload/i\\_deicl/VR/VR\\_Personal/Reinisch/Internetpublikationen/hildebrandt.pdf](https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/VR/VR_Personal/Reinisch/Internetpublikationen/hildebrandt.pdf), last accessed on 14 June 2019.

<sup>3</sup> Nikolaus Pitkowitz and the 26 contributors, *The Vienna Predictability Propositions: Paving the Road to Predictability in International Arbitration*, Austrian Yearbook on International Arbitration 2017, pp. 115-159.

<sup>4</sup> José María Alonso, *The Globalization of International Arbitration*, The Baker McKenzie International Arbitration Yearbook 2017, pp. 11-21.

<sup>5</sup> Loukas Mistelis, *Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems Theories and Party Autonomy*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 313/2019, <https://ssrn.com/abstract=3372341>, last accessed on 14 June 2019.

difficulties in managing less expensive and speedier cases that go on prolonging because of adverse bureaucracy. Although this bureaucracy was developed precisely to ease the work of the arbitration and arbitral tribunals, it failed to solve the problem, instead it emphasized it and generated adoption of an expanding palette of dilatory techniques (guerrilla tactics as they are called by the scholars)<sup>6</sup> by the parties and especially their lawyers.

It is said that international arbitration is increasingly akin to international litigation as to how the lawyers present arguments and how they analyse evidence, including 'discovery' elements characteristic of American style. The word 'judicialization' is used to describe this trend. We believe that this perception is true, and the interference of guerrilla tactics borrowed within the arbitration procedure from the state court's trials has unfortunately led to bureaucratization, in fact to the inefficiency increasingly perceived by all players, who proclaim that international arbitration has distanced itself from its most significant purpose of being a more efficient and appropriate way of settling commercial litigation.<sup>8</sup>

Evolutions, ideas and trends must be seen in the near future, because the issue of efficiency is largely debated, analysed by scholars, tested by practitioners and commented in conferences, and we look forward to seeing new proposals for good practice regulated under both institutional arbitration rules and *soft law*, as long as they promote real efficiency.<sup>9</sup>

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<sup>6</sup> C. Rogers, *Ethics in International Arbitration*, Oxford University Press, 2014; G. Horvath & S. Wilske, *Guerrilla Tactics in International Arbitration*, Wolters Kluwer, 2013; C. Rogers, J. Jeng, *The Ethics of International Arbitrators*, The Leading Arbitrators' Guide to International Arbitration, Third edition, Juris Publishing, 2014, pp. 175-206.

<sup>7</sup> Cristina Florescu, *Towards Achieving Efficiency in International Arbitration*, Austrian Yearbook Int'l Arb., 2015, pp. 51-71; Cristina Florescu, *Excessive Judicialization, an Obstacle to Efficiency in Arbitration*, in CYArb (Czech & Central European) Yearbook of Arbitration, vol. V, Interaction Of Arbitration and Courts, Ed. JurisNet, LLC (USA) 2015, pp. 87-114.

<sup>8</sup> Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?*, <https://arbitration.fi/wp-content/uploads/sites/22/2016/12/efficiency-in-international-arbitration.pdf> last accessed on 14 June 2019; Michael McIlwrath, *Anti-Arbitration: 10 Things to Do Before the Arbitration Gets Underway*, Kluwer Arbitration Blog (12 November 2011) last accessed on 14 June 2019; College of Commercial Arbitrators, *Protocols for Expedited, Cost-Effective Commercial Arbitration 2010*, pp. 24-42, 61-67; Debevoise & Plimpton LLP, *Protocol to Promote Efficiency in International Arbitration 2010*, [https://www.debevoise.com/insights/publications/2010/04/debevoise-issues-protocol-to-promote-efficiency\\_\\_](https://www.debevoise.com/insights/publications/2010/04/debevoise-issues-protocol-to-promote-efficiency__); <https://www.debevoise.com/news/2018/01/debevoise-updates-two-key-resources>, last accessed on 14 June 2019.

<sup>9</sup> Loukas Mistelis, *Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems Theories and Party Autonomy*, Queen Mary University of London, School of Law Legal Studies Research Paper No. 313/2019, <https://ssrn.com/abstract=3372341>, last accessed on 14 June 2019; David Earnest, Raul Gallardo, Gardar Vidir Gunnarsson, Tobiasz Kaczor, *Four Ways to Sharpen the Sword of Efficiency in International Arbitration*, 2013, [https://www.arbitration-icca.org/media/0/13630881906410/four\\_ways\\_to\\_sharpen\\_the\\_sword\\_of\\_efficiency\\_yicca\\_group\\_paper.pdf](https://www.arbitration-icca.org/media/0/13630881906410/four_ways_to_sharpen_the_sword_of_efficiency_yicca_group_paper.pdf); last accessed on 14 June 2019. Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?*, <https://arbitration.fi/wp-content/uploads/>

As a result, the arbitration community is forced to put added pressure on the arbitrators to exercise a more pro-active role,<sup>10</sup> and the institutions to issue and enforce a stricter and more formal procedure. But this becomes the opposite of a flexible, tailored and liberal procedure, whereas arbitration always promoted flexibility, as one of its main advantages.

Surprisingly it is stated that, primarily, only arbitrators are required to maintain efficiency of the arbitration procedure, to implement and protect the necessary measures in this respect, regardless of those who are really responsible for the disruption of the procedure. It is well known that arbitrators are called upon to implement measures against endangerment of proper conduct of effective and efficient management of the proceedings, and also to keep control and police of the arbitration process,<sup>11</sup> nonetheless we believe responsibility should be borne

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sites/22/2016/12/efficiency-in-international-arbitration.pdf, last accessed on 14 June 2019; John Fellas, *A Fair and Efficient International Arbitration Process*, <https://arbitrationlaw.com/library/fair-and-efficient-international-arbitration-process-dispute-resolution-journal-vol-59-no-1>; <https://arbitrationlaw.com/library/fair-and-efficient-international-arbitration-process-chapter-2-icdr-handbook-internationa> last accessed on 14 June 2019; Cristina Florescu, *Towards Achieving Efficiency in International Arbitration*, Austrian Yearbook Int'l Arb., 2015, p. 51-71; Cristina Florescu, *Excessive Judicialization, an Obstacle to Efficiency in Arbitration*, in CYArb (Czech & Central European) Yearbook of Arbitration, vol. V, *Interaction Of Arbitration and Courts*, Ed. JurisNet, LLC (USA) 2015, pp. 87-114; Michael McIlwrath, *Faster, Cheaper: Global Initiatives to Promote Efficiency in International Arbitration*, 76 Arbitration 2010, pp. 532-537; Michael Moser, *The 'Pre-Hearing Checklist' – A Technique for Enhancing Efficiency in International Arbitral Proceedings*, 30 (2) J. Int'l Arb. 2013, pp. 155-159; Christopher Newmark, *Controlling Time and Costs in Arbitration*, in Newman and Hill,(eds.), *The Leading Arbitrators' Guide to International Arbitration*, Juris, 2008, pp. 81-96; Veit Öhlberger and Jarred Pinkston, *The Arbitrator and the Arbitration Procedure, Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blinders and Misplaced Concerns About Impartiality*, Austrian Yearbook Int'l Arb. 2016, pp. 101-117; Wilson Pimentel, *Efficiency and Equilibrium in the Allocation of Costs*, XII Revista Brasileira de Arbitragem 2015, pp. 59-67; Andreas Respondek, *Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings*', 31(4) J. Int'l Arb. 2014, pp. 507-513; Jorg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 23(3) Arb. Int'l 2013, p. 5; Anne-Veronique Schläpfer and Marily Paralika, *Striking the Right Balance: The Roles of Arbitral Institutions, Parties and Tribunals in Achieving Efficiency in International Arbitration*, 2(2) BCDR Int'l Arb. Rev. 2015, pp. 329-342; Irene Welser, *Efficiency – Today's Challenge in Arbitration Proceedings*, Austrian Yearbook Int'l Arb. 2014, pp. 151-166.

<sup>10</sup> Pierre Mayer, *The Arbitrator's Initiative: Its Foundation and Its Limits*, Chapter 1, ASA Special Series No. 45, *The Arbitrators' Initiative: When, Why and How Should It Be Used?*, Juris, 2016, p. 3; Marine Koenig, *A Report on the Delos Paris Inaugural Event (April 2018) – Powers of the Arbitrator: How Far is too Far?*, 28 May 2019, <http://arbitrationblog.kluwerarbitration.com/2019/05/28/a-report-on-the-delos-paris-inaugural-event-april-2018-powers-of-the-arbitrator-how-far-is-too-far/>, last accessed on 14 June 2019.

<sup>11</sup> Lucy Reed, *Chapter 2: Sanctions Available for Arbitrators to Curtail Guerilla Tactics*, in *Guerilla Tactics in International Arbitration*, Günther Horvath and Stephan Wilske eds., 2013, pp. 93, 99; Maxi Scherer, *Inherent Powers to Sanction Party Conduct*, Chapter 4, Diego P. Fernandez Arroyo (ed.), *Inherent Powers of Arbitrators*, Juris, 2018, p. 9; Cristina Florescu, *Introducere în probleme de etică privind arbitrii și avocații în arbitrajul internațional*, RRDA no. 1/2016, pp. 106-118; Cristina Florescu, *Arbitral Tribunal Power to Disqualify Unethical Counsel*, Procedia of Economics and Business

by other players too, such as parties, their representatives and counsels. After all, arbitration is the parties' procedure and they should set the directives of this exercise of an efficient conduct and management of the case, if they so choose. But then to complain no more of the arbitrators if parties with their counsels opt not to follow the efficiency path!

The rising appetite for efficiency, ethics and transparency has also been recognized in the recently published "*2018 International Arbitration Survey: The Evolution of International Arbitration*" and also in "*2015 International Arbitration Survey conducted by the School of International Arbitration, Queen Mary University of London*". Participants in these surveys voiced concerns about the increasing lack of efficiency due to guerrilla tactics used by counsels and not sanctioned by the arbitral tribunal for fear of due process paranoia.<sup>12</sup> These surveys are a good barometer of the entire perception of the arbitration community on improving, modernizing and innovating in international arbitration. The surveys aim to compensate for gaps by re-examining the effectiveness of perceptions of past innovations and testing the viability of future developments.<sup>13</sup> Extremely relevant considerations are made on the most significant and hot topics in arbitration.

### **III. Soft Law as Potential Contributor to Efficiency**

Various good practice rules and guidelines have already been issued on the most useful and relevant ways of supplementing arbitration rules that can be applied in an arbitration procedure. In fact, all that has been issued so far takes into considerations the same primary aspect: efficiency.

The terminology used to designate these good practice standards is diverse and terms such as "Notes", "Rules," Guidelines, "Checklists", "Principles", "Guides" or

Administration, Bucharest, 2015, pp. 74-81 and in Journal of Economic Development, Environment and People no. 4/2015 [http://jedep.spiruharet.ro/RePEc/sph/rjedep/JEDEP15\\_2Florescu\\_p15-30.pdf](http://jedep.spiruharet.ro/RePEc/sph/rjedep/JEDEP15_2Florescu_p15-30.pdf), last accessed on 14 June 2019, pp. 15-30; Cristina Florescu, *Rolul pro-activ al arbitrilor în managementul eficient al arbitrajului*, RRDA no. 6/2015, pp. 15-24; Cristina Florescu, *Towards Achieving Efficiency in International Arbitration*, Austrian Yearbook Int'l Arb., 2015, pp. 51-71; Cristina Florescu, *Excessive Judicialization, an Obstacle to Efficiency in Arbitration*, in CYArb (Czech & Central European) Yearbook of Arbitration, vol. V, Interaction Of Arbitration and Courts, Ed. JurisNet, LLC (USA) 2015, pp. 87-114.

<sup>12</sup> Klaus Peter Berger, J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbor For Procedural Management Decisions By International Arbitrators*, 2017, 14 Revista Brasileira de Arbitragem, Issue 54, pp. 73-94, <http://kluwerlawonline.com/preview.php?id=RBA2017022>, <http://www.praguerules.com/upload/iblock/882/88256e5a0d39997b4d6ec9be17303671.pdf>, last accessed on 14 June 2019.

<sup>13</sup> <http://www.arbitration.qmul.ac.uk/news/2017/qmul-and-white-and-case-launch-international-arbitration-survey.html>, last accessed on 14 June 2019.

"Protocols" are used.<sup>14</sup> The purpose of this deliberate choice of terminology is to emphasize their character as practical rules and to avoid any misunderstandings in the sense that these standards are not of a legal nature, for they are not compulsory being issued for use in addition to applicable arbitral laws and institutional rules. In spite of their private nature, standards of good practice assume soft law with a norm-like and a legality effect in practice.

However, good practice guidelines have several advantages over the law, since they are based on consensus of users in different legal systems and have the best potential for merging different procedures and cultures, thus developing a truly global arbitration practice, setting out a procedural standard for different legal traditions. Practices set a high level of basic principles that they achieve through global international consensus, they provide greater predictability and greater legal certainty for the conduct of the arbitration procedure. At the same time, best practice facilitates the work of arbitrators, saving their efforts to find solutions to procedural issues for which there is already practice in that sense.<sup>15</sup> Good practice ensures legitimacy of the arbitration process, since self-regulation through good practice can provide a mean to avoid more invasive forms of external regulation that may be imposed by internal lawmakers and other 'outsiders' poorly informed and with less benevolent intentions.<sup>16</sup>

Of course, benefits of issuing such standards have overcome disadvantages, however, despite these obvious benefits, there are inherent dangers that relate to the restrictive effect of such pre-formulated texts, perhaps sometimes too detailed, often running undesirable, as prevention to the independent legal thinking of arbitrators,<sup>17</sup> shifting flexibility and possibility of adapting the arbitration process. Excessive regulation caused by a large number of good practices, covering almost every area of the arbitration procedure, along with their code effect, are

<sup>14</sup> Klaus Peter Berger, *Common law vs. Civil law In International Arbitration: The Beginning Or The End?*, in New Horizons of International Arbitration. Issue 5, Collection of Articles / Academic Editors A. V. Asoskov, A. N. Zhiltsov, R. M. Khodykin, Russian Institute of Modern Arbitration. Moscow, 2019, pp. 213-215.

<sup>15</sup> *Idem.*

<sup>16</sup> *Idem.*

<sup>17</sup> "Progressively, the reflex of turning to the guidelines overcomes any residual reflexes of independent thinking. <...> If the process of guideline production continues, all aspects of arbitration will be fully covered by guidelines which are accepted as 'best practices' and 'state of the art'. When this happy moment is reached, the international arbitration community need not think any more" according to M.E. Schneider, *The Essential Guidelines For The Preparation Of Guidelines Directives Notes, Protocols And Other Methods Intended To Help International Arbitration Practitioners To Avoid The Need For Independent Thinking And To Promote The Transformation Of Errors Into "Best Practices"*, in: L. Lévy & Y. Derains (dir.), *Liber Amicorum en l'honneur de Serge Lazareff*, Pedone, 2011, p. 567 (available at: [https://www.lalive.law/data/publications/The\\_Essential\\_Guidelines.pdf](https://www.lalive.law/data/publications/The_Essential_Guidelines.pdf), last accessed on 14 June 2019).

considered to be a driving force for increasing judicialization<sup>18</sup> and excessive formalism in the field of international arbitration.<sup>19</sup>

International arbitration is a transnational, hybrid procedure, a mix of procedural rules taken from the civil law systems that coexists with others taken from common law systems,<sup>20</sup> so it is still being discussed how to overcome the gap between the two systems of law through governance to a large extent by non-statutory rules of good practice: "*The existence of a transnational arbitration law is an essential condition for arbitration to exist as a system of justice that is autonomous and disconnected from national legal systems. ... This transnational law can only be an emanation of the same international arbitral community. The way in which this law is generated and consolidated is... through the elaboration of non-binding guides, rules and norms, which nevertheless reach a certain level of normativity due to the general consensus they achieve and the consequent feeling of moral obligation to apply them, which they generate on the part of the arbitrators and the parties*".<sup>21</sup>

Since this view of international arbitration as standing apart from domestic laws and national procedural traditions, it is generally recognized that the seat of an international arbitration is an abstract legal link with the *lex loci arbitri*. It links the arbitration law procedures to the place(s) of the arbitration, without however anchoring them to the general procedural law and the legal traditions of that jurisdiction. This is the main basis of widely agreed international arbitration, the advantage of not applying a certain system of law, a framework of national rules and a national procedural law, that one party or none of the parties know, as parties do business at international level. That is to allow for an efficient alternative private justice within a truly transnational procedural framework with maximum autonomy of the parties and minimal state intervention. That is why all

<sup>18</sup> "Based on the justified concern of over-judicialization of the arbitration process, the formulation and establishing of general Best Practices is in my opinion only justified where the parties could otherwise be taken by surprise or where there is an inherent risk of unequal treatment due to the parties' varied legal backgrounds" in Natalie Voser, *Best Practices: What Has Been Achieved and What Remains to Be Done?*, p. 17. Cristina Floreescu, *Towards Achieving Efficiency in International Arbitration*, Austrian Yearbook Int'l Arb., 2015, pp. 51-71; Cristina Floreescu, *Excessive Judicialization, an Obstacle to Efficiency in Arbitration*, in CYArb (Czech & Central European) Yearbook of Arbitration, vol. V, Interaction Of Arbitration and Courts, Ed. JurisNet, LLC (USA) 2015, pp. 87-114.

<sup>19</sup> Fabricio Fortese and Lotta Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, Groningen Journal of International Law, vol 3(1): International Arbitration and Procedure, DOI: 10.21827/5a86a89d8e651, last accessed on 14 June 2019.

<sup>20</sup> U. Draetta, *The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization*, ASA Bulletin, Vol. 33 (2015), Issue 2, p. 329.

<sup>21</sup> Alexis Mourre, *La Soft law como condición para el desarrollo de la confianza en el arbitraje internacional*, CEU Ediciones, 2018, p. 28, <http://www.idee.ceu.es/Portals/0/CIAMEN/Docuweb%20Hugo%20Grocio%20n%C2%BA%208.pdf?ver=2018-10-01-180115-397> reference in K. P. Berger, *op.cit.*, p. 203.

the arbitration institutions try to update, modernize, become truly international, by adopting a set of rules that correspond to the requirements and tendencies in the field, encompassing the widest possible range of good practices developed to meet the users' requirements on which their very existence depends.

With regard to guidelines and various good practices issued by leading institutions in the field, which obviously make a significant contribution to the arbitration legitimacy by choosing their application to guarantee predictability of procedure, the general perception has proven positive, as there would be an adequate amount of regulation (though around one third of those surveyed<sup>22</sup> in various polls considered regulation to be excessive). The most appreciated and used guides are IBA Rules on Taking of Evidence, IBA Guidelines on Conflicts of Interest, UNCITRAL Notes on Organizing Arbitration Proceedings, IBA Guidelines on Party Representation, ICC In-House Guide of Effective Management of Arbitration, ICC Note to Parties and Arbitral Tribunals on Conduct of the Arbitration. Also there are other ICC reports focused on topical and interesting issues<sup>23</sup> that intend to develop the status of various areas in conjunction with arbitration and to harmonize the use of arbitration practice, such as ICC Report on Managing e-document production (2016), ICC Report on Decisions on Costs in International Arbitration (2015), ICC Report on Controlling Time and Costs in International arbitration (2007 revised 2018), ICC Report on Financial Institutions and International Arbitration (2016) and Supplement Materials (2018), ICC Report on IT in International Arbitration (2017), ICC Report on State Entities and ICC Arbitration (2015 revised 2017), ICC Report on Emergency Arbitrator Proceedings (2019), ICC Report on Construction Industry Arbitrations: Recommended Tools and Techniques for Effective Management (2001 revised 2019).

#### **IV. History and Launch of The Prague Rules**

In an attempt to respond to these needs of efficiency, predictability, transparency, flexibility, consistency (and not only!), already identified by several

<sup>22</sup> 2018 International Arbitration Survey: *The Evolution of International Arbitration*, <http://www.arbitration.qmul.ac.uk/research/2018/>; <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>; last accessed on 14 June 2019. This is the eighth international empirical study on arbitration conducted by the International Arbitration School at Queen Mary University in London. The study analyzes the evolution of international arbitration as a system: past, present and future. The survey aims to research the response of the international arbitration community as a whole, not just the opinions of a particular group within it.

See also 2015 International Arbitration Survey undertaken by the School of International Arbitration, Queen Mary University of London, p. 22, <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>, last accessed on 14 June 2019.

<sup>23</sup> [https://iccwbo.org/find-a-document/?fwp\\_publication\\_subject=arbitration-adr&fwp\\_publication\\_type=report](https://iccwbo.org/find-a-document/?fwp_publication_subject=arbitration-adr&fwp_publication_type=report), last accessed on 14 June 2019.

statistics, institutions and other players of the arbitral process, a sustained campaign to update institutional arbitration rules was adopted and standards of good practice in the field of efficient administration of proceedings were issued.

The most recent project in this regard is the one initiated by the Russian Arbitration Association as early as 2011, but at its annual conference on 20 April 2017 in Moscow it was intended to denounce the undesirable and worrying "Americanisation" of international arbitration. At the "*Creeping Americanisation of International Arbitration: Is It Right Time to Develop Inquisitorial Rules of Evidence*" session, the need for a set of alternative inquisitorial rules for obtaining evidence was discussed.<sup>24</sup> Vladimir Khvalei, Chairman of the Russian Arbitration Association's Board of Directors, has shown the prevalence of civil law in the world, as opposed to common law.

The system of taking evidence, i.e. system of administration of evidence by parties in arbitration, is based on the principle of party autonomy which grants parties equal opportunities during the process. The inquisitorial approach is more likely to produce sound, enforceable awards, but at the same time the use of the arbitrator's pro-active role in a non-adequate manner can raise the issue of prejudging the case or violation of the neutrality and impartiality principles. It can be a thin line that separates and balances these issues and the proper approach would be to combine them by applying this pro-active role of the arbitrators in a wise and moderate manner, adapted to the circumstances of each case, to avoid any mistrust from the parties' side.

In common law countries, it is possible for parties to provide an unlimited number of evidence in arbitration, which overloads the procedure and affects the timely examination of the disputes. It is necessary to better control and restrain the process of presenting the documents and the deadline for submission of documents and evidence in the process. Vladimir Khvalei stressed that the "Prague Rules on Evidence", which was incipient and in the process of being drafted at that time, can contribute to making arbitration more efficient on all levels.

A campaign to promote this project<sup>25</sup> followed not only the opinions and participation of specialists in the civil law system, but also those from common law system. They contributed to the widening of the original framework, in order to adapt and accommodate the needs of a broad range of users.

A Working Group was set up, in which I had the honour of being included, in order to establish an international as possible set of rules for obtaining evidence in international arbitration based on an investigative arbitration procedure model of the civil law system. The Prague Rules were published very early in the form of

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<sup>24</sup> *Creeping Americanisation of International Arbitration*, <http://praguerules.com/news/is-it-time-for-a-change-/>, last accessed on 14 June 2019.

<sup>25</sup> <http://praguerules.com/publications/>. Free access to publications containing analyzes and comments on the Prague Rules, last accessed on 14 June 2019.

a project before the Working Group was finalized, which has widened over time as a result of the promotion and interest captured by this project. Since then, several revisions have been published with up-to-date versions. This was probably one of the reasons why the Rules attracted so much attention from the arbitration community, initially in the form of criticism. But criticism is constructive and helps to clarify and improve the issues discussed and makes a significant contribution by highlighting, popularizing and engaging specialists in productive debates. That has happened and has led to a change in the radical initial vision and shifted to the emphasis on efficiency issues. This is why they are now called "rules on the efficient conduct of proceedings in international arbitration" and the title is no longer focused on the administration of evidence in the civil law-specific inquisitorial system as opposed to the one based on the adversarial principle under common law. A final revision of the text was made and the launch of the Prague Rules took place on 14 December 2018, in Prague. Since the rules were approved in Prague, the working group decided to name them the "Prague Rules".

After more than 4 years of discussions, surveys conducted in several jurisdictions of the civil law system, projects, consultations and public discussions held in different places around the globe, the Prague Rules were finally signed. The signing ceremony was organized in a historic private property, Martinický Palác, in the old city of Prague, which gathered more than 150 participants, experts and lawyers from the world's top companies, followed by the ceremony official signing of the Prague Rules Book, which is deposited in Prague.

In the opening of the official launch conference, Prof. Dr. Alexander Bělohlávek, stressed that the Prague Rules represent almost 10 years of hard work and a collective contribution of a multitude of professionals. The Prague Rules are designed to help and provide a viable alternative where appropriate, he said.<sup>26</sup> Vladimir Khvalei, President of the Russian Arbitration Association, revealed the history of drafting the Prague Rules, which had 6 projects, now elaborated in 8 (eight) languages - English, Russian, Portuguese, Spanish, Chinese, Estonian, Latvian, Lithuanian. The Rules have been discussed lately in arbitration events in more than 15 countries, from the US to China. The scope of the rules is wider than the obtaining of evidence - they extend to the role of the tribunal in arbitration, as Vladimir Khvalei stressed. The speaker named the main features of the Prague Rules, but insisted that the most important of them is considered to be the pro-active role of the tribunal in arbitration proceedings.

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<sup>26</sup> <https://praguerules.com/news/gar-reports-on-the-prague-rules/>. Vladimir Khvalei (Baker McKenzie, Moscow), the father of the Rules, explained that having procedures rooted in the common law may make sense in some cases, but not for disputes between parties from civil law countries alone. "*Whether people like it or not, the reality is that the majority of the world is made up of countries with civil law-based legal systems,*" he said. The number of disputes between parties from civil law countries is therefore "*significant and sufficient to justify developing rules...based on a traditional civil law model only.*"

An extensive conference on the various aspects of the presentation of evidence in international arbitration in the context of the new rules was followed by the signing and reception ceremony. Representatives of the main national arbitration associations and institutions from European and CIS countries, as well as individual arbitrators, have signed the Prague Rules.

Therefore, from now on we will see to what extent and how the Prague Rules will be applied in international arbitration.

I am honoured and proud to have participated in this achievement,<sup>27</sup> which is clearly highlighted in the international arbitration arena as the GAR winner of the Best Innovative Initiatives in 2018.<sup>28</sup> At the official signing in Prague on 14 December 2018, I participated in representing three of the Romanian Arbitration Courts (the Arbitration Court of The Bucharest Chamber of Commerce and Industry and the Territorial Courts of Prahova and Brasov), and I have officially signed the honorary book dedicated to this event and the Prague Rules, which others will also be able later to adhere to.

Arbitration community specialists from all categories of arbitration users and players, such as arbitrators, lawyers, counsels, experts, members of the arbitration institutions participated in the launch,<sup>29</sup> which all debated and heard the interesting and current issues of efficiency and generally more effective leadership procedure. Among the topics discussed,<sup>30</sup> after the general presentation of the Prague Rules and its history by Vladimir Khvalei and Prof. Alexander Bělohlávek, the first panellists drew the most attention because they referred to the role of the arbitrators in conducting the procedure, controversial and delicate focus of the Prague Rules on the pro-active role and wider competences conferred on arbitrators. The title of the first panel was: "Showing a sphinx face. Limits of the tribunal's role in the management of arbitration proceedings", with other related topics:

- The role of the tribunal in administering arbitration proceedings: the difference between Prague Rules and IBA Rules
- The limits of the tribunal's role in managing arbitration
- Is there a duty of the tribunal to establish facts?
- The proactive facilitation of settlement by international arbitrators.

There was another panel that discussed the counsels' perspective on preliminary decisions and expectations of users: "Let's not decide on anything until we decide everything? In-house expectations on the outcome of arbitration

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<sup>27</sup> [https://praguerules.com/working\\_group/](https://praguerules.com/working_group/), last accessed on 14 June 2019.

<sup>28</sup> <https://globalarbitrationreview.com/article/1189726/paris-hosts-largest-ever-gar-awards>, last accessed on 14 June 2019.

<sup>29</sup> <https://praguerules.com/news/report-from-the-prague-rules-inaugural-conference/>, last accessed on 14 June 2019.

<sup>30</sup> <http://gar.live/prague2018>, last accessed on 14 June 2019.

and the tribunal's role in facilitating settlement". Then a panel dedicated to managing the evidence followed with an intriguing title: "Is the sky the only limit? The scope of discovery and e-discovery in arbitration" with the sub-titles:

- Discovery in arbitration: use and abuse
- The role of the tribunal in document disclosure
- Civil law vs. common law approach.

We then discussed the witnesses and their role in the proceedings, the way of examination and possible issues related to the assessment of these witnesses: "Lie to me. Fact witnesses vs. documentary evidence: can documents lie?" with the sub-topics such as:

- The role of witness statements in evidentiary process
- The tribunal's role in managing witnesses
- The weight of witness statements in the tribunal's eyes
- Can witnesses lie?

The last panel focused on the role of experts in the arbitration procedure, how to work and possible methods of efficiency (cross-examination, conferencing, hot-tubbing): "How much do hired guns contribute to the truth? Party appointed vs. tribunal appointed experts" with two other sub-points:

- Tribunal-appointed experts in civil law countries
- How much does expert witness conferring contribute to the efficiency of proceedings?

Everyone's concern is about the ways in which all of these evidence management techniques and the entire procedure in general may succeed in making the process much more fluid, flexible, harmonized and cost-efficient, so that all the procedural steps that have been taking until now far too long to be accelerated and expeditiousness, which was once one of the advantages and prerogatives of arbitration, to be finally achieved. The efficient, tailored and circumstantial management of the arbitration proceedings are the main objectives for which the Prague Rules sought the most effective instruments in tune with the trend practices, substantive law of the process and applicable procedural rules.

## V. The Efficiency Tools Made Available by The Prague Rules

### V.1. The antithesis (or not!) IBA Rules – Prague Rules / Common law - Civil law paradigm

With regard to administration of evidence in international arbitration, the International Bar Association (IBA) adopted on 29 May 2010 the IBA Rules on

the Taking of Evidence in International Arbitration (IBA Rules),<sup>31</sup> a revised version of the 1999 initial version, which, in their turn, superseded IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration 1983.<sup>32</sup>

The procedures for obtaining evidence, in particular document production, the use of several factual and expert witnesses and their cross-examination during lengthy hearings and the time required to render an arbitral award are, to a great extent, reasons for dissatisfaction with arbitration users who claim that arbitration is not as efficient as it used to be. Drafters of the IBA Rules have overcome a gap between common law and civil law traditions to manage evidence and that it is the reason why the IBA Rules have been very successful in developing an almost standardized procedure in international arbitration, at least for procedures involving parts of different legal traditions and those with high amounts in play.

Even though the IBA Rules have been developed as a resource for parties and arbitrators to ensure an efficient, economic and fair trial for obtaining international arbitration, their main purpose was to reduce the gap between the different legal systems and their own procedures which are particularly useful when parties come from different legal cultures (IBA Rules, Foreword).

The IBA Rules have successfully influenced the practice of international arbitration, since arbitral tribunals consisting of members of different legal traditions applied it either on their own initiative or at the parties' request, irrespective of the express choice of the IBA Rules in the start of the proceedings (such as in the Terms of Reference). However, such success has not prevented the reaction of the members of the arbitration community concerned to the IBA Rules being regarded as a rule of common law tradition.

In light of this overall success of the IBA Rules and other good practice rules that got ahead in guiding a path between common law and civil law standards and expectations, thereby contributing to further trans-nationalization of international arbitration, it seems paradoxical that the Prague Rules are the latest standards of good practice that come at this time to question precisely these achievements touched by the same type of rules. However, such a success has not prevented the reaction of members of the arbitration community to consider the rule of common law to be dominant in the IBA Rules. And as the search for efficiency still fails to find clear answers and, in particular, effective methods of implementing measures

<sup>31</sup> IBA Rules on the Taking of Evidence in International Arbitration, <https://www.google.ro/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwjkuNKhxf7eAhVDAhAIHdw9BfIQFjAAegQICBAC&url=https%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3D68336C49-4106-46BF-A1C6-A8F0880444DC&usg=A0vVaw3HzXoVle-Dn3sPkjBUdWRb>, last accessed on 14 June 2019.

<sup>32</sup> IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration.

to come up with the issues of assurance, in fact restoring, efficiency in arbitration, new approaches have been opened. Thus, it was considered that, in search for efficiency, these IBA Rules did not prove effective in ensuring an optimal process, even contributing to a lack of evolution of the vision in the field by standardization that favoured the tradition of common law. Thus, hope is that opportunity will be given to put the civil law legal culture at the forefront. Instead of ultimately adding an element to the cornerstone of the global transnational arbitration paradigm, the Prague Rules<sup>33</sup> seem to reopen the common law / civil law division through global re-enactment and discussing the benefits of each legal tradition in finding an answer to the effectiveness of international arbitration procedures.<sup>34</sup>

Since their launch, questions have already been raised about the novelty of the Prague Rules since many of their original features can be already found in the IBA Rules.<sup>35</sup> However, there are a number of key provisions contained in the Prague Rules, which show a clear departure from the IBA Rules. As a general remark, an arbitral tribunal may apply the Prague Rules upon the agreement of the parties or on its own initiative after giving the parties the right to comment. The Prague Rules explicitly encourage the arbitral tribunal to play a proactive role. Moreover, the approach to obtaining evidence by requesting the submission of documents, witnesses and experts is much more interesting than that of the IBA Rules, which is more adversarial.

We take note from the previous versions of the Prague Rules Working Group Note,<sup>36</sup> which stated that from civil law perspective, IBA Rules are closer to common law traditions, as they follow an adversarial approach to document submissions, witnesses and party appointed experts. In addition, the right of the parties to examine witnesses is almost implied. These factors contribute greatly to the costs of arbitration, while their effectiveness is sometimes questionable. For example, most commentators admit that seldom production of documents really brings to light any evidence. Many commentators also express doubts about the usefulness of the witnesses and the impartiality of the party appointed experts. Many of these procedural features are not known or used to the same extent in jurisdictions that are not of common law such as mainland, central and southeast Europe, Latin America, the Middle East and Asia. On the other

<sup>33</sup> The Prague Rules, <http://www.praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf>, last accessed on 14 June 2019.

<sup>34</sup> Klaus Peter Berger, *Common law vs. Civil law in International Arbitration: The Beginning Or The End?*, in New Horizons of International Arbitration. Issue 5, Collection of Articles / Academic Editors A. V. Asoskov, A. N. Zhiltsov, R. M. Khodykin, Russian Institute of Modern Arbitration. Moscow, 2019, p. 211 (pp. 200-224).

<sup>35</sup> Duarte G Henriques, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?*, ASA Bull.nr. 2/2018, p. 351.

<sup>36</sup> <http://www.praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf>, last accessed on 14 June 2019.

hand, many arbitrators are reluctant to actively manage arbitration proceedings, including 'earlier determination' or 'preliminary evaluation' of the issues at stake, and eliminate such issues in order to avoid the risk of a challenge. In view of all this, the drafters of the Prague Rules consider that development of a new set of rules for effective evidence management based on the investigative (inquisitorial) procedure model and the streamlining of the procedure in general would enhance the pro-active role of arbitral tribunals and would contribute to increasing the efficiency of international arbitration (a more streamlined procedure actively driven by the tribunal). By adopting a more rigorous and vigorous approach to the arbitral tribunal, the new rules will help parties and arbitral tribunals reduce the duration and costs of arbitration.

In the Preamble to the above-mentioned Notes, it is stated that the Prague Rules are rules for the efficient conduct of international arbitration proceedings. Although initially intended to be evidence rules based on the investigative model, the project later evolved to include other case management techniques, including, for example, facilitation of settlement by the arbitrators and an ARB-MED system, along with provisions on *Jura Novit Curia*. It is acknowledged that the Prague Rules never intended to draw up a set of unheard-of or completely innovative rules. Indeed, the model proposed by the Prague Rules is largely based on the procedural tradition of civil law and on how arbitration procedures are conducted in non-continental jurisdictions. And yet, the techniques gathered in the Rules will be known to many non-civil arbitrators. The Prague Rules add or encode these techniques in a homogenous and balanced manner in a single document, initiating a new 'soft law' regulation. All these tools are reflected by the practice and the users' needs which have emerged from diverse dynamic situations, circumstances and cases that proved that regulatory implementation is welcomed in a comprehensive approach. This new instrument is designed to safeguard the rule of law, to offer more control on time and different details of arbitration, to make effective use of proceedings and allow guerrilla tactics' sanctions by granting powers to arbitrators to reorganize the proceedings. The adversarial principle is upheld, by maintaining the right to deal with the other party's case, the right to be heard on its own case, the parties' right to nominate their own arbitrators according to the arbitration agreement – all are equally treated. This new guideline responds to the need for more transparency, arbitrators' increased powers and professionalism in managing and conducting efficient, predictable and consistent proceedings, for contributing to the creation of not an excessive judicialization but a robust and sound justice system in arbitration.

Since these rules deal mainly with the issue of the administration of evidence in international arbitration, it is important to understand that the Prague Rules were not intended to replace the IBA Rules or to suggest better ways to organize and conduct arbitration than those which are already being used in practice, but

only listed them in a single set of such techniques to complement the applicable procedural rules when not updated according to current trends in efficiency. There are still a lot of institutional rules that have not yet adopted the modern tendencies of an efficient procedure. The drafters have tried to resolve this by introducing also accelerated procedures, which are intended for smaller and rather not high profile disputes. But in reality, larger cases can be also simple and relatively simple.

International arbitration is primarily a lawyer-based process, significantly grounded on the adversarial (confrontational) procedural tradition of the common law system. Sometimes this is appropriate when the case is high-profile, i.e. complex, difficult, complicated, various facts involved, hard to prove and explained and with high stake in game. Often, it turns into an unbearable burden for parties who do not want to spend years and millions in resolving their trade dispute. And then, in order to unblock such situations, the initiators of the Prague Rules had the purpose to bring into the international arbitration the procedural practices of the civil law system, which gives the arbitral tribunal increased interest and discretion in finding effective solutions for blocking guerrilla tactics that can be used by the parties to win at any cost.

The Prague Rules are a positive manifestation of the civil law tradition and an international arbitration approach, as well as an attack on the inefficiencies of the adversarial approach. Their original title included the indication of the investigative (inquisitorial) method: *Inquisitorial Rules on the Taking of Evidence in International Arbitration*. The classic distinction between the inquisitorial approach and the adversarial approach is based on the sharing of tasks and powers between the parties and judges (or arbitrators). An investigative procedure is based on an active role of the adjudicator, who can take the initiative both in establishing the facts (producing the evidence) and in establishing the law. The adversarial approach, on the other hand, encumbers the parties to these activities and gives the adjudicator the obligation to preside over the procedure and to rule on the litigation as an arbitrator, certainly a more passive position towards the required and foreseen pro-active role.

## V.2. The Pro-Active Role of the Arbitrator

Alongside this pro-active role of arbitrators, even though the Rules mainly deal with evidence management in international arbitration, other techniques that can address inefficiency are also envisaged, such as:

- organizing case management conference by electronic communication,
- clarification of legal grounds on which parties base their position,
- setting a procedural timetable,
- limitation of memorials' numbers or their length,

- tribunal's right to share with the parties during the proceedings its views on requests,
- assistance in amicable settlement,
- drawing adverse inferences against the party that refuses to answer, or
- deciding allocation of costs depending on the behaviour and participation of the parties in the efficient conduct of the arbitral proceedings.

Therefore, in promoting efficiency, the Prague Rules have decided in favour of flexibility, so it is desirable that the arbitrators and parties' counsels always think with care and open minds on what procedure is appropriate and necessary to resolve a particular conflict. This means that it is not advisable for any process to start with the appropriate Procedural Order no. 1<sup>37</sup> standard without distinguishing what is really appropriate for the case at hand. This first procedural order needs to be adapted and updated to the particular circumstances of the case and not to be taken as granted with all the standard provisions and without assessing to what extent they are really necessary and useful for the proper functioning and organization of that procedure.

That also means adopting other legal cultures and procedural techniques that may be foreign to the arbitrators' jurisdictions. As practitioners trained in civil law have embraced cross-examination in international arbitration, lawyers trained in common law may have to accept that witnesses and production of documents may not be necessary to establish the facts of the case. Of course, integrating flexibility requires more energy and dedication, but this is the only way to serve international arbitration users with what they really need. For this purpose, the Prague Rules serve as a reminder that there are alternative techniques available to arbitrators and counsels, and that these techniques should at least be considered and then adopted in appropriate cases.<sup>38</sup>

Another important issue is the need to establish a strong tribunal that does not suffer from due process paranoia and to find effective means of counteracting these manoeuvres so as not to jeopardize the proper conduct of the arbitration procedure. Interestingly, judges in almost any jurisdiction (whether by common

<sup>37</sup> PO1 is generally the first procedural order that sets the procedural framework on the basis of which the applicable rules are agreed and all aspects that facilitate and lead to better management and conduct of the proceedings in accordance with the applicable law and rules. The importance of this PO1 and its practicability has long been debated, and for that purpose more and more generous and all-encompassing standard forms are used that are no longer adapted to the case, so it became of real importance to set the correct basics by adjusting and not hindering the procedure. This is done by considering all the elements that can be based on various soft law and it is set how the tribunal conducts the procedure, manages the procedural timetable and how costs are allocated at the end of the arbitration.

<sup>38</sup> <http://arbitrationblog.practicallaw.com/why-the-prague-rules-may-be-needed/>; <https://www.lexology.com/library/detail.aspx?g=b6252eca-1798-4e93-8a8b-d6609c53310c>; [https://journal.arbitration.ru/upload/iblock/9eb/Arbitration.ru\\_N4\\_4\\_December2018\\_web.pdf](https://journal.arbitration.ru/upload/iblock/9eb/Arbitration.ru_N4_4_December2018_web.pdf), last accessed on 14 June 2019.

law or civil law) would never tolerate the behaviour that arbitrators often have to see from parties in arbitration and which they must temper and to hold back. Thus, parties do not meet deadlines, introduce evidence of last resort, overwhelming decision-makers with thousands of pages of documents, make claims, requests and endless procedural demands; all of these are distinctive signs of modern arbitration proceedings that are often but guerrilla tactics. Many arbitrators consider and accept that their role would be to endure all of this, as the proceedings are conducted by the parties' counsels and paid by the parties.<sup>39</sup> However, it can be said that many parties want the judges to be more skilled and pro-active in the management of procedures, but at the same time they believe that by using guerrilla tactics this can protect them from possible abuses of the other side and put them in a better position against their opponent.

Answering to all this, the Prague Rules provide for arbitrators to have increased case management powers, hoping that this could at least cure the paranoia of the fair and equitable process in question if the parties expressly agree to these powers (rather than by default).

### ***V.2.1. The Romanian main Arbitration Institution's Solution Regarding Implementation of the Arbitrator's Pro-Active Role***

Regarding the increased pro-active role of the arbitral tribunal, this is already a tool used by international arbitration to try to find solutions to effectively counteract the guerrilla tactics increasingly used by counsels by removing or sanctioning them. It is not always as simple as it may seem, so to support the arbitrators in this respect, new procedural rules have been adopted in recent years by modern arbitral institutions keeping up with trends in the field and considering these actions to be effective and useful.

As an example, since 1 January 2018, the Rules of Arbitration of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania ("CICA Rules") have changed in this respect, and not only. The reform of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania, the most famous, reliable and old permanent arbitration institution in Romania, celebrating 65th anniversary of its existence last year, has adopted a series of norms aimed at streamlining and modernizing domestic arbitration to bring it into line with the international one. The new CICA Rules strive to consistently promote Bucharest as a modern arbitration centre and have a strong fashioned, international, slim and flexible accent, being developed in line with best practice in the field. They propose improving the functioning of commercial arbitration in Romania by facilitating arbitration in the business environment through this arbitration mechanism, providing an efficient, flexible, faster procedure, proposing an accelerated option without sacrificing, but enhancing its quality.

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<sup>39</sup> *Idem.*

Though internationally pronounced, in accordance with the rules of the main arbitration institutions of the European Union, UNCITRAL and beyond, the adopted CICA Rules could not depart from the applicable legal provisions of the new Civil and Civil Procedure Codes, as well as prestigious scholarly opinions in Romania in the field of arbitration. It is particularly distinct that the CICA Rules have indeed become international, in order to avoid the style adapted only to national law, opening to the use of newer, more flexible and easy to adapt to virtual space, modern means of communication, already extensively used worldwide.

The main novelties<sup>40</sup> brought by the CICA Rules highlight the principle of procedural autonomy of parties and arbitrators, emphasizing the pro-active role of the latter, introducing a clear boundary between the written and oral phases of the arbitration process, featuring the importance of the written phase, improving the management and efficient conduct of the case by the arbitral tribunal, by setting the requirement for a provisional or complete procedural timetable, the possibility of bifurcating procedure, facilitating administration of evidence and appointing experts, regulating a simplified accelerated procedure, introducing the emergency arbitrator, lessening the difference between international and national arbitration.

### **V.2.2. Conclusion on the Arbitrator's Pro-Active Role**

Users are faced with new terminologies, tools and procedures that are more than welcome and useful in conducting the arbitration procedure as close as possible to the needs of each case and in accordance to the international practice already known by more experienced users. The new intention of arbitration rules is to become a slim, simple and effective tool for resolving commercial disputes.

If counsels turn out to be incapable in many cases to organize procedures in the most efficient way, arbitrators prove to be the most appropriate to lead and set the procedural framework to follow. Indeed, parties' counsels must always take into account the interests of their own client. Nonetheless if we were to be realistic, these interests are not always aligned with the quick and effective resolution of an arbitration process.<sup>41</sup> Arbitrators, on the other hand, should be impartial and independent.

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<sup>40</sup> C. Florescu, *Tendințe de eficientizare în lumina noilor reguli române de procedură arbitrală*, in *Dreptul românesc la 100 de ani de la Marea Unire. Dimensiuni și tendințe*, Ed. Universul Juridic 2018, pp. 121-126; C. Florescu, *A Time For Change: Internationalizing Romanian Institutional Arbitration Rules*, in *100 Years Of United Romania Within The International Relations Context*, Ed. Pro Universitaria 2018; D. M. Șandru, *Elemente esențiale ale noilor Reguli de procedură ale Curții de Arbitraj Comercial Internațional de pe lângă CCIR*, RRD nr. 6/2017, pp. 41-48; *Numirea arbitrului – pilon fundamental al procedurii. Observații privind noile Reguli de procedură arbitrală ale Curții de Arbitraj Comercial Internațional de pe lângă Camera de Comerț și Industrie a României*, RRDA nr. 2/2018.

<sup>41</sup> Andrey Panov, *Why the Prague Rules May Be Needed*, 11 October 2018, <http://arbitrationblog.practicallaw.com/why-the-prague-rules-may-be-needed/>, last accessed on 14 June 2019.

Consequently, the main idea underlying the Prague Rules is to offer arbitrators express powers to manage procedures, but at the same time the authority to proactively conduct and tune the proceedings.<sup>42</sup> Thus, arbitrators have a wide power to require parties to submit written memorials or witnesses in the hearing, as well as to reject a request for the document production or to request a witness to be examined, the Prague Rules allow the parties to signal this at the initial case management conference, request specific documents and specify what conditions should be met in order its request for document production to be granted. An application for document production at a later stage of arbitration is only possible in exceptional circumstances. Unlike the IBA Rules, parties may in any case not require categories of documents, but only specific documents that are relevant to the settlement of the case.

### V.3. Witnesses

As regards witnesses, the Prague Rules stipulate that the tribunal may decide not to appoint witnesses that it deems irrelevant, immaterial, unfounded, considers too burdensome to bring them, duplicative, or for any other reason not necessary in order to settle the dispute. The tribunal carries out the examination of the witnesses and may reject the questions that are irrelevant, immaterial or redundant. At the same time, the tribunal may impose further restrictions on the examination, such as deadlines, the order of the depositions or the types of questions that are allowed.<sup>43</sup>

Another innovation, which gives wider powers to arbitrators, is related to witness examination and their cross-examination. Although it is the party's right to bring the evidence it wishes to rely on, the tribunal is given the authority to decide which witnesses are best suited to be examined during the hearing, either before, or after the witness has submitted the statement. This approach is questionable from a common law perspective and could violate the rights of a party to a fair trial, the natural justice, and right to present the case (the right to be heard). However, considering these issues (called *due process*), the Prague Rules give the final word to parties in determining whether or not to produce witness evidence but in conjunction with a civil law approach, according to which the arbitral tribunal ultimately decides which witnesses will be summoned for examination. However, there are similarities on what concerns the role of the arbitral tribunal in the hearing, examination of witnesses being controlled by

<sup>42</sup> Miroslav Dubovský, Ben Sanderson, Nikki O'Sullivan, *The Prague Rules: "Civil" War On The Evidence In International Arbitration*, 24 Jan 2019, <https://www.dlapiper.com/en/finland/insights/publications/2019/01/the-prague-rules/>; Craig Tevendale, *Prague Rules on efficiency in arbitration now launched*, 9 Jan 2019, <https://hsfnotes.com/arbitration/2019/01/09/prague-rules-on-efficiency-in-arbitration-now-launched/>, last accessed on 14 June 2019.

<sup>43</sup> <https://www.clydeco.com/insight/article/the-prague-rules>, last accessed on 14 June 2019.

the arbitral tribunal. Such control includes the power of the arbitral tribunal to reject witness's questions if, for example, the arbitral tribunal considers that said question is irrelevant or not material to the outcome of the case.

Cross-examination of witnesses is familiar to any practitioner of common law. The position adopted in the Prague Rules is that this process must be taken out of the hands of the parties and placed in those of the tribunal, which again reflects a civil law approach that wishes to give an active role to the arbitrators and give them the necessary prerogatives to assess to what extent these aspects really contribute to the resolution of the case and to what extent they are also effective (necessary, useful, relevant for the case).

#### **V.4. Tribunal Appointed Experts**

Arbitrators may appoint an expert (independent, not hired by the parties but directly by the tribunal) if they consider a knowledgeable specialist is necessary for a good understanding of the case. When the parties appoint their experts, the tribunal may urge them to set clear and concise objectives for their reports, covering the issues they consider relevant, and may also invite experts to produce a joint report, which often is proving useful in practice.

As regards the role of experts appointed by the tribunal, it is not a new concept, either in civil law, or in common law. The Prague Rules give the court the right to appoint its own expert if it considers that it is necessary to have a specialized knowledge of a particular subject that it cannot dispose of through its own specialized knowledge. While the tribunal has to consider the suggestions of the parties as to the identity of the expert, it is by no means held by the parties' opinions and can appoint any candidate it considers appropriate by removing the party experts who often only exaggerate the cause of the party who called them and who do not bring efficiency to the procedure, but to the contrary. This expert may then be summoned for cross-examination, either by the tribunal itself, or by either party.

#### **V.5. Limited Hearings**

The Prague Rules contribute to the attempt to limit the frequent use of unnecessary hearings and encourage the procedure to be based on documents (only) by using modern means of communication and transmission. An oral hearing may be requested by the parties and it only takes place if one of the parties so requests, or may be organized if the arbitral tribunal considers it appropriate but should in any event be arranged with a shorter duration in the most cost-effective way, avoiding, in particular, costs travel.<sup>44</sup> The provisions describe

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<sup>44</sup> <https://www.lexology.com/library/detail.aspx?g=1f8f45fb-1408-4c09-94dd-365c66281b2b>, last accessed on 14 June 2019.

examples such as limiting the length of the hearing and using video, electronic or telephone communications for the hearing.<sup>45</sup>

The arbitrators are called upon to adopt the procedural timetable in consultation with the parties and in this way to decide the determination of certain matters of fact or of law as preliminary issues, to decide on the possibility of bifurcation of procedure, adjudication of provisional (interim) or partial judgments, limiting number of rounds for exchange of views and length (volume) of memorials (applications), as well setting strict deadlines for submitting comments. The Prague Rules specify that these clarifications will be requested from parties so that arbitrators can decide (at any time, starting with the initial case management conference or afterwards when necessary) being properly informed of the claims and the relief requested, uncontested and disputed facts, legal grounds on which parties base their position. At the same time, the Prague Rules encourage the tribunal to indicate as soon as possible to the parties (all) evidence they are based on, what may be needed in administering the evidence, and who bears the burden of proof on the relevant issues in the dispute.<sup>46</sup>

In the past, there have been voices who argued that this approach runs counter to the autonomy of the parties and their ability to present the case as it deems appropriate. But since the issue of excessive judicialization has arisen in arbitration, with guerrilla tactics used more and more frequently by parties' counsels, there is no longer any problem with regard to parties' autonomy, if parties have agreed to these procedures by adopting the Prague Rules. It is obviously better to understand as soon as possible the tribunal's views on these issues instead of finding latter that a misunderstanding occurred.

Considering the interconnection between the case management conference and the issuing of the first procedural order together with the related procedural timetable, the mission of the arbitrators is to try to familiarize themselves, as soon as possible, with the particular circumstances of the case and to prepare in due time for these in the first stages of the arbitration procedure to be convinced that, by listening to the parties and based on their comments and suggestions, they could choose the most appropriate measures and procedures for conducting an efficient procedure in accordance with applicable laws and arbitration rules.

In order for these steps to be possible and for an optimal outcome, their parties and counsels often have to recognize when, and if, they need to involve efforts that are not evaluated in terms of cost-benefit analysis. They can spend money

<sup>45</sup> <http://arbitrationblog.practicallaw.com/why-the-prague-rules-may-be-needed/>, last accessed on 14 June 2019.

<sup>46</sup> <https://www.august-debouzy.com/fr/blog/1278-the-launch-of-the-prague-rules-useful-or-unnecessary-tool-for-international-arbitration>; Dmitry Artyukhov, *Report From The Prague Rules Launch Conference*, pp. 9-15, [https://journal.arbitration.ru/upload/iblock/b11/Arbitration.ru\\_N1\\_5\\_January2019\\_2.pdf](https://journal.arbitration.ru/upload/iblock/b11/Arbitration.ru_N1_5_January2019_2.pdf), last accessed on 14 June 2019.

and years until an arbitration process is completed, and yet the result is far from expected, so doing the impossible is not always the right solution, and so, for sake of efficiency, the tribunal may be left to manage the procedure as it thinks fit. This is the basic idea that is promoted by the Prague Rules. And that is why delaying the presentation of evidence is not desirable because the tribunal is called upon to take early action in the proceedings.<sup>47</sup> Thus, it may be advisable to disclose all evidence as soon as possible in order to avoid costs with a lengthy prolonged procedure and to be able to explain to the tribunal in due time why a particular document or witness or expert is necessary and really make the procedure effective. It is therefore judicious for the parties and their counsels to be aware of what means an efficient procedure and to present as fully as possible their case at the beginning, through the request for arbitration, without waiting for developed memoranda and other intermediate steps that only delay the case and increase expenses.<sup>48</sup>

## V.6. Mediation and Arbitration

It is also in the same spirit that arbitrators function as settlement facilitators so as to guide the parties in establishing a compromise solution, as conveniently as possible. Unless one of the parties objects, according to the Prague Rules, the tribunal shall offer to assist the parties to reach an agreement. In this way, the tribunal may express its preliminary views (if neither party objects) and the tribunal or one of its members may act as a mediator with the written consent of all parties. If mediation fails, the arbitrator concerned will only resume his arbitration mission if all parties expressly accept this at the end of the unsuccessful mediation.

This double hat role presents potential conflict of interest issues, especially if the parties have had confidential discussions on a more liberal (non-prejudicial) basis or in separate meetings (caucuses). It can also cause procedural delays if the respective arbitrators (with double role of a mediator too) is forced to stop his/her engagement.

Usually a ‘common law’ arbitrator does not share his opinion with the parties and does not suggest or encourage amicable settlement, whereas a ‘civil law’ arbitrator does not feel uncomfortable and, in principle, is more inclined to render an award that contains the parties’ settlement.<sup>49</sup> In some jurisdictions of civil law,

<sup>47</sup> Sol Argerich, *A Comparison of the IBA and Prague Rules: Comparing Two of the Same*. 2 March 2019, <http://arbitrationblog.kluwerarbitration.com/2019/03/02/a-comparison-of-the-iba-and-prague-rules-comparing-two-of-the-same/>, last accessed on 14 June 2019.

<sup>48</sup> James M. Turner QC, *Prague Rules... or does it?*, 23 April 2019, <http://arbitrationblog.practicallaw.com/prague-rules-or-does-it/>, last accessed on 14 June 2019.

<sup>49</sup> A. Panov, A. Khrapoutski, *The Prague Rules — An Alternative Way Of Conducting International Arbitration?*, <https://praguerules.com/upload/iblock/142/142ae6cc924c6a2ac7959fa335ca7ad1.pdf>, last accessed on 14 June 2019.

guidance towards conciliation or amicable settlement is considered a primordial feature, close to arbitration, as an alternative method to state courts resolving the dispute. The Prague Rules encourages the parties that want to settle their dispute by mediation to adopt these guidelines in order to benefit of an award by consent.

### V.7. *Iura Novit Curia*

In common law jurisdictions, an arbitrator cannot rely on a ground of law (or fact) not invoked by the parties, whereas in civil law jurisdictions the arbitrators may apply a provision that is not invoked by the parties (*iura novit curia*),<sup>50</sup> provided that the parties have the opportunity to present their views.<sup>51</sup> If deemed necessary, the arbitrators may decide to apply the law or use doctrine or case-law that parties have not invoked, including public policy, being advisable to allow parties the opportunity to express their comments and arguments to respect the adversarial principle and, in general, all *due process* principles.

## VI. Conclusions

All these instruments inserted in the Prague Rules can raise issues of due process, but in this respect state courts are called upon to express their views and to prove themselves arbitration friendly. It is expected that state courts will support and accept these techniques of fluency and efficiency of the arbitration procedure, of pro-active and expanded authority granted to arbitrators under these new Prague Rules. Then the problems of the arbitrators related to fear of challenges or claims from the parties of possible violations of the right to a fair trial will cease to be used as guerrilla tactics and thus the long-awaited efficiency can become effective. State courts, arbitral institutions and counsels need to support arbitrators' efforts to apply efficiency and not to give up too easy. Only time will show if these Prague Rules are useful and if their use will determine the efficiency of the procedure<sup>52</sup> as expected by the arbitration community.

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<sup>50</sup> On *Iura Novit Curia* see <http://arbitrationblog.kluwerarbitration.com/2009/03/20/jura-novit-curia-the-arbitrators-discretion-in-the-application-of-the-governing-law/>; [https://arbitrationlaw.com/sites/default/files/free\\_pdfs/iura\\_novit\\_curia\\_title\\_page\\_and\\_toc.pdf](https://arbitrationlaw.com/sites/default/files/free_pdfs/iura_novit_curia_title_page_and_toc.pdf), last accessed on 14 June 2019.

<sup>51</sup> Rob Javin-Fisher, Erika Saluzzo, *Prague Rules On Evidence In International Arbitration: A Viable Alternative To The IBA Rules?*, <https://praguerules.com/upload/iblock/587/5872685539bddee7618083c020f6ff93.pdf>, last accessed on 14 June 2019.

<sup>52</sup> Cristina Ioana Florescu, *Regulile de la Praga, alternativă la Regulamentul IBA privind administrarea probatorului în arbitrajul internațional*, Revista Română de Drept al Afacerilor nr. 3/2018, Wolters Kluwer, pp. 35-49; Klaus Peter Berger, *Common law vs. Civil law In International Arbitration: The Beginning Or The End?*, in New Horizons of International Arbitration. Issue 5, Collection of Articles / Academic Editors A. V. Asoskov, A. N. Zhiltsov, R. M. Khodykin, Russian Institute of Modern Arbitration. Moscow, 2019, pp. 215, 216 (pp. 200-224); Luiza Lins Silva e Dutra, *Taking of Evidence*

Therefore, the Prague Rules have never been meant to present a completely new and perfect vision of how to conduct the arbitration procedure. The intention is for the parties and the arbitrators to think about which of the existing good practices these guides describe are most appropriate for a given case, while retaining the flexibility, the most appropriate techniques to streamline, administer and manage an efficient procedure.

In this respect, the parties may choose to apply these Rules or any part of them or even exclude any special provision and may do so in the arbitration agreement or later at any time during the procedure. Flexibility and adaptation are the keywords because the parties can apply (or exclude) certain provisions of them. The arbitral tribunal may, however, apply the Prague Rules - in whole or in part - when the parties cannot reach an agreement in this respect, but in any event only after the parties have been heard. The Prague Rules are not meant to compete with the IBA Rules, but should be perceived as a complement or alternative to them. The courts and parties may choose to adopt the IBA Rules, the Prague Rules or a combination of the two, although this latter option is not advisable because it involves additional work to adapt and approve a hybrid by developing an alternative procedure for their particular case, which will not always work fluently and can even produce the opposite effect to the one expected.

The Prague Rules do not exempt the parties from the burden of proof, and even less allow the tribunal to undermine the obligations (and rights) of the parties to present their case and opinions. There is no authority of the arbitral tribunal which could be exercised without giving the parties the opportunity to present their views. Mandatory *lex arbitri* should always be complied with. The Prague Rules may not apply to arbitration if the parties have agreed to their exclusion and the arbitral tribunal may apply the Prague Rules only after consulting and hearing the parties in order to ensure the adversarial nature of the proceedings and the right to a fair trial.

The launch of a new set of good practice on the arbitration market, responding to the need for so much debated efficiency, shows how users can take advantage of the inherent flexibility of arbitration, which is in fact the only way to keep alive international arbitration and in accordance with trends and users' requirements, which are connected to most modern techniques and technologies.

Even though these Prague Rules refer to issues related to administration of evidence, their primary purpose is to reassess the position of the arbitral tribunal and to confer it more powers to be equipped with the necessary tools to react and

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*in International Arbitration: IBA Rules v. Prague Rules?*, 19 December 2018, <https://www.changing-perspectives.legal/taking-of-evidence-in-international-arbitration-iba-rules-v-prague-rules/>; Vinson & Elkins LLP, *The Prague Rules on the Efficient Conduct Of Proceedings in International Arbitration - Restriction to Achieve Efficiency?*, 25 April 2019, <https://www.lexology.com/library/detail.aspx?g=7b219f48-0382-45ba-b174-93ea3d493042>; <https://praguerules.com/publications/>, last accessed on 14 June 2019.

discipline the parties when necessary. The tools for managing and conducting the procedure are accessories that support the tribunal's efforts to obtain evidence in an appropriate (inquisitorial) manner, closer to the civil law system.

Perhaps there are other case management tools and measures that may be used by tribunals to effectively lead arbitration and to support better evidence management as described in almost all modern international arbitration rules. For example, the CICA Rules contain since 2018 a specific Annex on efficiency, such as the ICC Rules per example.

But there may be other arbitration rules that still do not include these efficiency measures in their provisions and therefore the Prague Rules is now equipped to supplement these issues and enable the parties to refer to them in support of the taking of evidence and apply these efficiency tools if needed. Otherwise, the efficiency tools can be considered only accessories to be able to apply an efficient administration of the proposed evidence.

This article seeks a plea for using efficiency tools made available to users to streamline arbitration procedures and to inform Romanian users about the existence of the Prague Rules that are prepared to respond to the issues addressed.

To the extent that the Prague Rules aim to provide alternatives to standardized international arbitration practices, they represent more options for the parties, providing them with diversified tools to respond to the current diversity, transparency and predictability requirements, promoting a pro-active tribunal, therefore achieving greater efficiency in the conduct of arbitration in a modern and harmonized manner.

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