

# Prague Rules on evidence in international arbitration: a viable alternative to the IBA Rules?

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## Introduction

In any arbitration a procedure will need to be adopted for the provision of documentary, witness and expert evidence in all its forms. Often the parties to an arbitration will have agreed that a certain set of institutional rules (such as those offered by the London Court of International Arbitration (“**LCIA**”) or the International Chamber of Commerce (“**ICC**”)) will apply to their dispute, but such rules tend to shy away from being overly prescriptive as to the precise procedure for the gathering and provision of evidence (and this is more so the case for *ad hoc* arbitrations). This leaves the parties and the Tribunal with a gap to fill when determining the precise procedures to be followed on evidentiary matters.

Since 1999, that gap has often been filled by the adoption of the International Bar Association Rules on the Taking of Evidence in International Arbitration (the “**IBA Rules**”, as amended in May 2010). But now there is a further option offering an alternative to the IBA Rules in the form of the Rules on the Efficient Conduct of Proceedings in International Arbitration (also known as the “**Prague Rules**”) which were officially launched on 14 December 2018.

The need for an alternative to the IBA Rules had been predominantly voiced by civil law arbitration practitioners, mainly from Eastern European jurisdictions. Such practitioners felt that generally the adoption of the IBA Rules tended to result in large disclosure exercises and lengthy cross-examination of witnesses which are more typical traits of litigation in common law jurisdictions. This led to a presentation, at the Annual Conference of the Russian Arbitration Association in Moscow in April 2017, entitled “*Creeping Americanisation of international arbitration: is it the right time to develop inquisitorial rules of evidence?*” which, it is said, was the genesis for the Prague Rules. Whilst the Prague Rules were initially conceived as a set of rules for disputes between companies from civil law jurisdictions, it is now proposed that they “*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.*”<sup>1</sup>

As the above quote indicates, at the heart of the Prague Rules is the desire to empower a Tribunal to take greater control of proceedings leading to a determination in the most expeditious and cost-effective way. This, in part, reflects the origins of the Prague Rules which are rooted in the approach to determining disputes in civil law jurisdictions which tend to adopt an “inquisitorial” approach where the judge or arbitrator is vested with a more proactive role to managing the dispute to trial and there is a limited, or no, disclosure exercise. This contrasts with the so called “adversarial” approach adopted in many common law jurisdictions which sees the parties take the lead and, when it comes to evidence, engage in (potentially) vast and often costly disclosure exercises.

Parties to an international arbitration will often come to the dispute with different expectations as regards the evidentiary process derived from the rules and procedures adopted in their home jurisdictions. The IBA Rules were themselves drafted to “*reflect procedures in use in many different legal systems*”<sup>2</sup> with a view to harmonising the approach to evidence “*when the parties come from different legal cultures*”. In this article we analyse the key provisions of the Prague Rules and discuss some of the practical issues that might arise if they are adopted without amendment, either as guidelines or strict rules of evidence in an international arbitration seated in England and Wales.

## Key provisions of the Prague Rules

### 1. Proactive Role of the Tribunal (Article 2)

This is not a particularly novel aspect – as other commentators have observed, the IBA Rules also encourage the Tribunal to take a leading role in determining matters of evidence. What is novel, however, is the emphasis placed on the Tribunal’s role in directing the form and content of the evidence it wishes to see deployed in the arbitration.

How will this sit with Tribunal members from common law jurisdictions?

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<sup>1</sup>Note from Working Group, page 2 of the final version of the Prague Rules dated 14 December 2018.

<sup>2</sup>Foreword to the IBA Rules (29 May 2010 version).

Two possible issues come to mind. Firstly, it is not unusual for Tribunal members to be appointed to multiple arbitrations running broadly in parallel and so a greater involvement in one or more as a consequence of the adoption of the Prague Rules may give rise to a number of practical difficulties for a Tribunal member juggling a full diary.

Secondly, and perhaps more fundamentally, is the potential tension with section 33(1) of the Arbitration Act 1996 (the “Act”) which requires a Tribunal to:

*“(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*

*(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined”.*

Under section 68(2)(a) of the Act, a Tribunal’s failure to comply with section 33 of the Act can constitute a “serious irregularity” enabling a party to challenge an award before the English High Court. With that in mind, while the Prague Rules confer broad procedural powers on the Tribunal to direct the evidence it wishes to see<sup>3</sup>, in practical terms a Tribunal may be reticent in excluding evidence (or being overly prescriptive) in the light of the risk of challenge to any subsequent award.

Finally, one further consideration is on the question of costs. While it is to be hoped that a more involved Tribunal will result in a streamlined process for resolving the dispute (in accordance with the intent of the Prague Rules) thereby reducing costs overall, if a Tribunal is expected to devote more time and attention to the proceedings then it is to be expected that the Tribunal’s costs will increase. Overall this may be a zero-sum calculation, or, more positively, represent a cost saving for the proceedings as a whole, but it could well increase the amount of up-front “arbitration costs” to be borne by the parties at the outset as a deposit<sup>4</sup>. Such a front-loading of costs may be viewed unfavourably by disputing parties.

## **2. Limited document production (Article 4)**

The starting premise of Article 4 (Documentary Evidence) of the Prague Rules is that the parties will seek to “avoid any form of document production, including e-discovery”<sup>5</sup> (Article 4.2) with all key documents provided with its pleadings.

That is not to say that there is a complete bar to any document production as the subsequent article does provide for parties to “request certain documents” at the case management conference (Article 4.3) provided the requesting party can satisfy the Tribunal that any such document is relevant and material to the outcome of the case, is not in the public domain and is in the possession of another party or within its power or control (Article 4.5; which is similar in scope to the requirements in Article 3(3) of the IBA Rules).

It is unclear whether the request for “certain” documents will be viewed as materially different from Article 3(a) of the IBA Rules which requires any document production request to contain either a “description of each requested document sufficient to identify it” or “a description in sufficient detail...of a narrow and specific requested category”. In any event, in this day and age with the proliferation of electronic documents and communications resulting in large and costly disclosure exercises (which more often than not fail to produce the hallowed “smoking gun”), steps to limit document production should be welcomed. There will, of course, always be cases where serious allegations of, for example, fraud or conspiracy are pleaded which will require inevitably document production from the defendant party or parties to substantiate such claims. In those types of cases in particular a more limited (or complete absence) of any document production is unlikely to be appropriate.

## **3. Expert evidence (Article 6)**

Unlike the IBA Rules which give equal prominence to Tribunal-appointed and party-appointed experts<sup>6</sup>, the

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<sup>3</sup> See for example, its powers regarding document production (Article 4; addressed further below) and witness evidence (Article 5) – for example, under Article 5.3 of the Prague Rules, the Tribunal “may decide that a certain witness should not be called for examination during the hearing, either before or after a witness statement has been submitted”.

<sup>4</sup> See for example, Article 24.1 of the LCIA Arbitration Rules effective 1 October 2014.

<sup>5</sup> It is worth noting that the corresponding provision in the September 2018 draft of the Prague Rules referred to the need to avoid “*extensive production of documents*” (emphasis added) but this was taken a step further in the final version issued on 14 December 2018.

<sup>6</sup> See Articles 5 and 6 of the IBA Rules.

emphasis in the Prague Rules is on the appointment of Tribunal-appointed experts (save that the parties are not precluded from submitting their own expert's reports (Article 6.5)).

For many disputes the appointment of a single expert in a particular field could represent a significant cost saving. However, the fact that the door has not been closed on party-appointed experts means that, practically, there may be no additional benefit in adopting the approach in the Prague Rules over the IBA Rules particularly in cases where contrary expert opinions can be validly held (such that each party will want their "own" independent experts).

#### **4. *Iura Novit Curia* (Article 7)**

Article 7 poses a trap for an unwary Tribunal. Pursuant to Article 7.2, a Tribunal can apply legal arguments not pleaded by the parties, having given them the opportunity to express their views on them first. This legal principle is widely adopted in civil law jurisdictions.

It appears that the drafters of the Prague Rules were alive to the risks posed by a Tribunal considering legal provisions and authorities which had not been advanced by the parties by providing that the Tribunal should grant the parties the opportunities to express their views. From an English law perspective, that opportunity is of paramount importance and Tribunals hearing arbitrations seated in England and Wales will be alive to the risks of not canvassing opinion on any such provisions or authorities (as set out above under 1. in respect of sections 33 and 68 of the Act).

#### **5. Hearing (Article 8)**

The starting point under the Prague Rules is that the dispute be resolved on paper, without the need for an oral hearing. Whilst the parties can request a hearing, it is ultimately up to the Tribunal to decide whether to allow it and therefore it cannot be taken for granted that there would be one<sup>7</sup>.

While this approach could be appropriate in very straightforward disputes, we consider that oral hearings in the majority of cases provide a good opportunity to ensure that the Tribunal has understood the parties' cases. It is also important to grant each party the opportunity to cross-examine the other side's expert or factual witnesses. Overall, the lack of an oral hearing may jeopardise the quality of any award and may give rise to questions as to whether a party has had a "*reasonable opportunity of putting [its] case*" (per Article 33(a) of the Act).

#### **6. Assistance in Amicable Settlement (Article 9)**

Article 9 is, perhaps, the most contentious of the provisions of the Prague Rules. In short, it allows a member of a Tribunal to also act as a mediator in an attempt to resolve the parties' dispute. Critically, however, if the parties are unable to agree a mediated settlement then the arbitrator's mandate will be terminated unless the parties consent in writing to the arbitrator continuing to act in that capacity.

In theory there is nothing to prevent a member of a Tribunal in promoting, or assisting with, the settlement of a dispute using ADR<sup>8</sup>. However, a number of potential practical difficulties arise:

- i. Which arbitrator? In cases before a three-person Tribunal where each party has nominated an arbitrator and the chairperson has been appointed by an institution or by the party-nominated arbitrators, the most logical potential mediator would be the chairperson. However, Article 9 is silent on this point and there may very well be reasons why another member of the Tribunal would be better suited for the role (because, for example, they are a CEDR qualified mediator) which may complicate any question as to which of the arbitrators should take up the mantle of mediator.
- ii. Is it suitable for sole arbitrators? Article 9.2 refers to "*any member of the arbitral tribunal*" acting as a mediator which begs the question as to whether such an approach is suitable for cases overseen by a sole arbitrator. In view of the potential risks associated with an arbitrator conducting a mediation of

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<sup>7</sup>This is the obverse of the position taken by a number of arbitral institutions for which the starting position is that there will be hearings unless the parties have agreed to dispense with in-person hearings (see Article 19.1 of the LCIA Arbitration Rules effective 1 October 2014 and Article 24.1 of the Singapore International Arbitration Centre Arbitration Rules, 2016 edition).

<sup>8</sup>See for example the Chartered Institute of Arbitrators' ("CiARB") "*Guidelines for Arbitrators on the use of ADR procedures*" dated 25 October 2018 (particularly paragraphs 3 and 4).

the matters in dispute before him or her (addressed further below) it seems that the answer is “no”, but this is not adequately addressed in the Prague Rules.

- iii. How will the mediation be conducted in practice? As noted above, in principle, there is nothing to prevent an arbitrator from also acting as a mediator but if they are to do so, the process is fraught with risks. Chief amongst those risks is if the mediation involves any form of “caucusing” where the arbitrator/mediator meets separately with each of the parties - any form of caucusing would run contrary to the general position that parties should not engage in *ex parte* communications with the Tribunal<sup>9</sup>. The risk in any such *ex parte* communications is that one party, either of its own volition or at the prompting of the arbitrator/mediator may share confidential information or documentation which is not otherwise available to the counter-party and on terms that it cannot be shared with the counterparty. In those circumstances, is it realistic to expect the arbitrator/mediator to close their minds to that information when preparing an award (assuming that the mediation is unsuccessful and the arbitrator so appointed is retained as a member of the Tribunal)? That certainly seems a stretch. Also, does such an approach give rise to questions as to the arbitrator/mediator’s impartiality? In our view, it could do.
- iv. Termination of the mandate of the arbitrator/mediator. Unless the termination occurs in the early stages of the arbitration, there is a real risk of derailing the proceedings (particularly in the case of arbitrations before a sole arbitrator (if this rule is intended to apply in those circumstances)). It may take time to appoint a new arbitrator – during which time the Tribunal is unlikely to be able to provide directions or deal with any interlocutory applications. Then there will be the costs of getting a new arbitrator up to speed. Also, given the more proactive involvement of the Tribunal, any incoming arbitrator may have differing views on the evidence he or she wishes to see deployed in the arbitration. All of this adds up to significant ramifications in terms of both time and cost which seriously risks derailing the effective and expeditious determination of the dispute.

## Comment

The flexibility afforded to parties to direct the process to be adopted in arbitration disputes is one of the greatest selling points for arbitration. In this regard, the introduction of a new set of rules to the canon of arbitration rules and guidelines is to be welcomed.

While the Prague Rules are worth considering by parties embarking on arbitration, we recommend caution with an early assessment of their appropriateness based on advice from legal representatives. In a number of respects, the Prague Rules are similar in nature to the IBA Rules but adopt a different emphasis or focus (for example on expert evidence) and a benefit of arbitration is that it is open to parties to pick and choose which provisions of which set of rules will apply to their cases (subject, of course, to confirmation by the Tribunal).

When considering whether to adopt the Prague Rules (either as guidelines or hard rules), due consideration should be given to any applicable institutional rules and, in the case of English seated arbitrations, the provisions of the Act.

Ultimately, the Prague Rules’ ability to displace the IBA Rules as the preponderant guide to dealing with issues of evidence in international arbitration is open for debate. It will be interesting to see what the take-up of the Prague Rules will be going forward, but we certainly see that they could be appropriate in certain circumstances.

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<sup>9</sup>See, for example, Article 13 of the LCIA Arbitration Rules effective as of 1 October 2014.

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