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THE PRAGUE RULES: MINIMAL NOTES FROM AN ITALIAN PERSPECTIVE

By Roberto OLIVA ¹

ABSTRACT

This article analyses certain provisions of the Prague Rules (namely, Articles 2, 4, 6 and 7) in the light of the author's background as an Italian lawyer and his experience as an arbitration practitioner. It identifies certain downsides of the Prague Rules, mainly provisions concerning: case management conference, documentary evidence and certain details of rules related to expert witnesses, with openness and expectations of seeing the actual application of the Prague Rules in international arbitration proceedings.

Keywords: *Prague Rules, case management, expert, Iura Novit Curia, Italian Code of Civil Procedure, Italian Association for Arbitration, Chamber of Arbitration of Milan*

1. Introduction

In the last months, the international arbitration community has widely discussed a new topic: the Rules on the efficient conduct of proceedings in international arbitration („*Prague Rules*”), officially presented in Prague on 14 December 2018².

¹ Roberto Oliva is an Italian qualified lawyer who works out of Milan office of Pavia e Ansaldo law firm. He sits as an arbitrator and practices as counsel in arbitration proceedings, and acts as counsel in domestic litigation proceedings. His practice areas focus on banking, commercial, corporate and insolvency disputes.

Roberto is a member of International Bar Association (IBA), Chartered Institute of Arbitrators (CI Arb) as an associate, the European Users Group of the London Court of International Arbitration and the Associazione Italiana dell'Arbitrato (AIA).

He published a number of articles concerning arbitration matters on Italian and international journals and he is the main author of Arbitration in Italy, the first legal blog on domestic and international arbitration in Italy (<http://www.arbitrationinitaly.com> – <http://www.arbitratoinitalia.it>).

He can be reached via e-mail: roberto.oliva@arbitratoinitalia.it.

The views and opinions expressed in this article are those of the author and do not necessarily reflect the views and opinions of his firm.

² Available at https://praguerules.com/prague_rules/ - last accessed on 14 June 2019.

Italian practitioners, a few exceptions apart³, did not get actively involved in this discussion, despite their background as civil law lawyers and therefore being amongst the intended recipients of the Prague Rules.

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The Prague Rules are a soft law tool aimed at increasing efficiency and reducing costs of international arbitration.

As highlighted by their heading („rules on efficient conduct of proceedings in international arbitration”), the Prague Rules do not only concern the taking of evidence, they refer to the entire proceedings and contain several provisions, properly related to taking of evidence, in the wider context of case management.

Indeed, the Working Group of the Prague Rules, mainly composed of practitioners from Eastern Europe and the CIS, believes that efficiency may be raised and costs of international arbitration may be reduced by granting the arbitral tribunal with a more active role in case management.

However, the Prague Rules are no longer openly opposed (as they were in their early drafts) to the IBA rules on the taking of evidence in international arbitration („*IBA Rules*”)⁴.

The first comments on the Prague Rules by most Western practitioners (regardless of their background as civil law or common law lawyers) can be divided into two categories. Some authors harshly criticised them, alleging a risk of „Russification” of international arbitration⁵. Other authors deem that these do not present a real change since their provisions on case management and taking of evidence are already contained in a number of institutional arbitration rules, as well as in the IBA Rules⁶.

Which is the right perspective?
In my opinion, neither of them.

³ For instance, a doyen of Italian arbitrators: De Nova, *Arbitrato internazionale con sede in Italia e Prague Rules*, on *Riv. Arb.*, 2018, p. 757.

⁴ Available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC> – last accessed on 14 June 2019.

⁵ For instance, Newman, Zaslowsky, *The Russians are coming, and they want to change how we conduct international arbitration*, in *New York Law Journal*, 23 May 2018, available at <https://praguerules.com/upload/iblock/a12/a1273233f7a9eb7f893c9ee4e6112da3.pdf> - last accessed on 14 June 2019.

⁶ For instance, Argerich, *A Comparison of the IBA and Prague Rules: Comparing Two of the Same*, in *Kluwer Arbitration Blog*, 2 March 2019, available at <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.

First, the Prague Rules have no revolutionary content. With a few exceptions, their provisions can also be found in the IBA Rules and/or in the rules of reputed arbitration centres. Hence, there is no „*Russification*” risk.

Nonetheless, the Prague Rules do not seem useless from the civil law practitioner point of view, and they could be useful for common law practitioners. Even though the Prague Rules have a handful of downsides (some of them will be examined hereinafter), they could be truly useful insofar as they would be able to streamline several arbitration proceedings (depending on their value and/or the available and/or suitable evidence) by shifting the balance of powers in favour of the arbitral tribunal.

2. The case management conference

Article 2 of the Prague Rules, headed „*Proactive Role of the Arbitral Tribunal*”, may be regarded as their nerve centre.

This Article concerns the case management conference, which is not a true innovation by itself: holding this conference at the outset of the proceedings is a long-established best practice in international arbitration and a number of arbitration rules set forth that it shall be held. For instance, Article 24 of the Rules of Arbitration of the International Chamber of Commerce („*ICC Arbitration Rules*”)⁷ also provides for a case management conference. In essence, even the IBA Rules provide for this conference, although their provision is far more concise than that of the Prague Rules: „*The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence*”⁸.

The subject matter of the case management conference set forth by the Prague Rules may appear broader than that of a „traditional” case management conference. After checking whether this conclusion is true, the following topics will be addressed: (i) the possible indication to the parties, during the case management conference or elsewhere, of the tribunal’s views on the case; and (ii) the procedural timetable.

⁷ Available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-2017-Arbitration-and-2014-Mediation-Rules-english-version.pdf.pdf> - last accessed on 14 June 2019.

⁸ The topic is also addressed by other pieces of soft law: for instance, see ICC, *Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration*, available at <https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/> - last accessed on 14 June 2019.

2.1. The subject matter of the case management conference

Under Article 2.2 of the Prague Rules, „*During the case management conference, the arbitral tribunal shall: a. discuss with the parties a procedural timetable; b. clarify with the parties their respective positions with regard to: i. the relief sought by the parties; ii. the facts which are undisputed between the parties and the facts which are disputed; and iii. the legal grounds on which the parties base their positions*”.

In other words, this kick-off meeting, labelled „case management conference”, is not limited to mere procedural issues, such as establishing a procedural timetable. It also concerns the merits of the dispute.

The arbitration rules of well-reputed centres already provide for something similar:

For instance, under Article 23 of the ICC Arbitration Rules, the arbitral tribunal shall draft a document called „terms of reference”. These terms of reference shall include, amongst other things, „*a summary of the parties’ respective claims and of the relief sought by each party [...]*” (Article 24.1.c) and „*unless the arbitral tribunal considers it inappropriate, a list of issues to be determined*” (Article 24.1.d)⁹.

The provision of Article 24.1.c of the ICC Arbitration Rules matches that of Article 2.2.b.i of the Prague Rules. In addition, it may be argued that the „*list of issues to be determined*” under Article 24.1.d of the ICC Arbitration Rules broadly corresponds to the indication of „*the facts which are undisputed between the parties and the facts which are disputed*” under Article 2.2.b.ii of the Prague Rules. Eventually, „*the legal grounds on which the parties base their positions*” under Article 2.2.b.iii of the Prague Rules could be mentioned in the ICC terms of reference under Article 24.1.c of the ICC Arbitration Rules (providing for a summary of the parties’ claims that may well include an indication of the legal grounds for these claims).

Similar provisions were contained in the 2008 and 2012 Rules of Arbitration of the Associazione Italiana per l’Arbitrato („**Italian Arbitration Association**”) („**AIA Rules**”).

Under Article 23 of the 2008 AIA Rules¹⁰, the arbitral tribunal had to draft the arbitration terms of reference („*atto di missione*”). These terms of reference had to contain, amongst other things, „*the facts concerning the dispute and the relief sought by the parties*’ (Article 23.d: „*l’esposizione dei fatti relativi alla controversia e l’indicazione delle pretese delle parti*”) and „*the issues to be determined, if the*

⁹ Under the ICC Rules, the case management conference shall be convened „*When drawing up the Terms of Reference or as soon as possible thereafter*” (Article 24.1).

¹⁰ Available at http://arbitratoaia.com/images/immagini/RegArbAIA_2008.pdf - last accessed on 14 June 2019.

tribunal deems it appropriate" (Article 23.e: „*l'individuazione delle questioni da risolvere, sempre che l'arbitro lo ritenga opportuno*")¹¹

The provision of Article 23.d of the 2008 AIA Rules matches that of Article 2.2.b.i of the Prague Rules. Similarly, it may be argued that the provision of Article 23.e of the 2008 AIA Rules matches that of Article 2.2.b.ii of the Prague Rules.

Although the ICC Arbitration Rules¹² provide for an indication of the issues to be determined, it should be taken into account that this indication is made „unless the arbitral tribunal considers it inappropriate". Similar provisions are contained in the AIA Rules (the arbitral tribunal drafts the list of issues to be determined if it „deems it appropriate": Article 23.e).

As a result, it is common that the list of issues to be determined, provided for by the rules governing the terms of reference, is replaced by a generic statement. There is no specific list, but a vague assertion, such as „the issues to be determined are those resulting from the Parties" submissions, including forthcoming submissions, and those relevant to the decision of the Parties" respective claims and defences".

In other words, it often happens that the tribunal exerts its discretion under the ICC Rules and decides not to draft a list of issues to be determined because drafting such a list would be „inappropriate" (in some occasions, even without specifying that the list of issues was not drafted because it was deemed as inappropriate).

Under the Prague Rules, the arbitral tribunal does not enjoy this discretion. The indication of the disputed/undisputed facts is mandatory.

It could happen that at the time of the case management conference, the parties' position has not yet been sufficiently presented¹³. Therefore, Article 2.3 of the Prague Rules appropriately specifies that the above tribunal's duty could be postponed.

¹¹ The same wording is used by Article 23 of the 2012 AIA Rules (available at <http://arbitratoaia.com/images/immagini/Regolamento-AIA-2012.pdf> - last accessed on 14 June 2019), whereby the terms of reference were drafted only upon the parties' request. The 2016 AIA Rules (available at http://arbitratoaia.com/images/Regolamenti/REG_AIA_2016_italiano.pdf - last accessed on 14 June 2019), currently in force, dropped the provision concerning the terms of reference.

¹² As well as the rules of other arbitration centres, such as the mentioned AIA Rules and, for instance, the Arbitration Rules of Istanbul Arbitration Centre (available at <https://istac.org.tr/en/dispute-resolution/arbitration/arbitration-rules/> - last accessed on 14 June 2019). These rules set forth that the arbitral tribunal has to draft terms of reference whose content is very similar to that under the ICC Rules (Article 26).

¹³ This could occur, and in fact it often occurs, if the parties filed a short Request for Arbitration and/or Response instead of more comprehensive submissions. The issue of the advisability of a short/comprehensive Request for Arbitration/Response is addressed by ICC, *Effective Management of Arbitration. A guide for in-house Counsel and Other Party Representatives*, available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf> - last accessed on 14 June 2019.

The actual application of the Prague Rules will let us understand whether this possible postponement could undermine the achievement of the Prague Rules purpose, the efficiency of the proceedings.

2.2. Tribunal's indication to the parties

Article 2.2 of the Prague Rules concerns discussions and clarifications between the parties and the arbitral tribunal. Article 2.4 apparently goes a step further, in that it also allows (although it does not require) the arbitral tribunal, „if it deems it appropriate”, to „*indicate to the parties: a. the facts which it considers to be undisputed between the parties and the facts which it considers to be disputed; b. with regard to the disputed facts – the type(s) of evidence the arbitral tribunal would consider to be appropriate to prove the parties' respective positions; c. its understanding of the legal grounds on which the parties base their positions; d. the actions which could be taken by the parties and the arbitral tribunal to ascertain the factual and legal basis of the claim and the defence; e. its preliminary views on: i. the allocation of the burden of proof between the parties; ii. the relief sought; iii. the disputed issues; and iv. the weight and relevance of evidence submitted by the parties*”.

In other words, under Article 2.4 of the Prague Rules, the arbitral tribunal may inform the parties about its preliminary views on the case, in particular regarding the disputed/undisputed facts, the allocation of the burden of proof and the appropriate evidence concerning the disputed facts.

Seemingly, this is a ground-breaking provision, and it is for this reason that the Prague Rules specify that the expression of the said views of the arbitral tribunal does not by itself constitute an evidence of the lack of independence and/or impartiality, and cannot constitute grounds for disqualification.

Nonetheless, the matter should be carefully examined in light of the *lex arbitri*, as well as in light of the jurisdiction(s) where the recognition of the award could be possibly requested under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York on 10 June 1958 („**1958 New York Convention**”)¹⁴.

For instance, under Italian law the expression of the said views of the arbitral tribunal should not, by itself, constitute grounds for disqualification of the arbitrator(s)¹⁵. In addition, on the basis of a preliminary analysis, it appears that,

¹⁴ Available at http://www.uncitral.org/uncitral/it/uncitral_texts/arbitration/NYConvention.html - last accessed on 14 June 2019.

¹⁵ Under Article 815 of the Italian Code of Civil Procedure, as amended in 2006 and currently in force, the expression of preliminary views on the case is not included in the exhaustive list of grounds for disqualification.

It is worth mentioning that, under the previous rules, expression of the said views by the arbitral tribunal could constitute grounds for disqualification, although there is no reported case law on that specific point. Indeed, while the new law laid down specific and strict grounds for disqualification,

under Italian law, the said expression should not, by itself, constitute grounds to request the setting aside of an Italian award nor to deny the recognition in Italy of a foreign award under the 1958 New York Convention, provided that it is in compliance with the *lex arbitri*¹⁶.

Different laws could lead to different conclusions and, therefore, it is likely that the arbitral tribunals will rarely and cautiously use the powers they are granted with by Article 2.4 of the Prague Rules.

In fact, in applying Article 2.4 of the Prague Rules, the arbitral tribunals might use the same discretion they exert under Article 23 of the ICC Arbitration Rules, as mentioned in the previous paragraph. Therefore, they will refrain from informing the parties about their preliminary views on the case, stating (explicitly or, most likely, implicitly) that it is „inappropriate” to inform the parties about the said views.

In conclusion, it seems that Article 2.4 of the Prague Rules, the (seemingly) most revolutionary rule of the entire set, risks to be also the less effective, notwithstanding its potential convenience and usefulness¹⁷.

2.3. The procedural timetable

The procedural timetable constitutes the link between the case management conference and the taking of evidence.

Under Article 2.5 of the Prague Rules, *„When establishing the procedural timetable, the arbitral tribunal may decide – after having heard the parties – to determine certain issues of fact or law as preliminary matters, limit the number of rounds for exchange of submissions, the length of submissions, as well as fix strict time limits for the filing thereof, the form and extent of document production (if any)”*.

under the old law the grounds for disqualification of an arbitrator coincided with the grounds for disqualification of a State Judge. State Judges are subject to a general prohibition (stricter in criminal matters) to express their views on the cases they are dealing with. Therefore, there could be room to maintain that the old law prevented the application of the provision at hand of the Prague Rules.

An unofficial English translation of the Articles of the Italian Code of Civil Procedure concerning arbitration proceedings is available at http://www.camera-arbitrale.it/Documenti/dlgs_2feb2006_en.pdf - last accessed on 14 June 2019.

¹⁶ Indeed, if the said expression of views is not in compliance with the *lex arbitri*, the recognition in Italy of the arbitration award could be refused (Article 840.1.5 of the Italian Code of Civil Procedure and Article V.1.d of 1958 New York Convention).

¹⁷ As noted by Panov, *Why the Prague Rules may be needed?*, in *Thomson Reuters Arbitration Blog*, 22 October 2018, *„it’s better to learn the views of your tribunal with respect to these matters as early as possible, instead of pleading the case the way you (but not necessarily your tribunal) believe to be helpful only to find out the tribunal’s view on this in the final award. No reasonable counsel can honestly believe that lack of guidance is better than some guidance which may allow you to adapt your advocacy”* (available at <http://arbitrationblog.practicallaw.com/why-the-prague-rules-may-be-needed/> - last accessed on 14 June 2019).

It is clear that clarifications on disputed issues made during the case management conference allow the arbitral tribunal to better define a bespoke procedure, assess the opportunity of a possible bifurcation and determine together with the parties the rounds of submissions, also in light of the expected (and/or appropriate) evidence.

This virtuous model may properly work only if, at the time of the case management conference, the parties have already filed comprehensive initial submissions (request for arbitration and response). Otherwise, the arbitral tribunal could not exercise its powers. In other words, the fate of this provision, its usefulness or uselessness, depends on the choices made by the parties (and their counsel) at the outset of the procedure, possibly before constitution of the arbitral tribunal and even before choosing the Prague Rules.

3. The taking of evidence

With respect to taking of evidence, the Prague Rules roughly contemplate the same procedural tools of the IBA Rules: however, from the (alleged) point of view of civil law practitioners.

The early drafts of the Prague Rules (such as the March 2018 draft¹⁸) were labelled „Inquisitorial rules of taking evidence in international arbitration”, as they were deliberately opposed to the IBA Rules that were purportedly „*closer to the common law traditions, as they follow a more adversarial approach*”.

The qualification „inquisitorial” and the direct opposition to the IBA Rules were dropped in the final version of the Prague Rules.

In several civil law jurisdictions, civil proceedings before State Courts, and domestic arbitration proceedings that are often designed on the model of the State Courts proceedings, are adversarial proceedings.

For instance, before Italian State Courts, ordinary civil proceedings are adversarial ones. The general rule is that „*the Court shall base its judgment on the evidence submitted by the parties*” (Article 115 of the Italian Code of Civil Procedure). This general rule suffers a handful of exceptions that are however unable to transform the proceedings in inquisitorial ones. However, inquisitorial proceedings (or, more correctly, adversarial proceedings with some inquisitorial elements) are held in Italian labour disputes.

Inquisitorial rules on taking of evidence are therefore far from the background of Italian counsel and practitioners of international arbitration.

¹⁸ Available at <http://praguerules.com/upload/medialibrary/d2c/d2c395e838916bc89af22f90f6c18a37.pdf> - last accessed on 14 June 2019.

Thankfully, only certain rules on taking of evidence laid down by the Prague Rules are true inquisitorial rules, in that they grant the arbitral tribunal with the power to order the parties to submit precise pieces of evidence.

* * *

The below analysis does not concern all the Prague Rules provisions on taking of evidence. The reason is that some provisions, such as those concerning fact witnesses (Article 5) and the hearing (Article 8)¹⁹, need to be tested by the actual application of the Prague Rules²⁰. The same goes for the rule regarding the arbitration-mediation-arbitration process (Article 9), which is also really sensitive and requires a careful consideration and analysis of the *lex arbitri*.

In the following paragraphs, only the provisions concerning documentary evidence (Article 4) and experts (Article 6) are analysed.

3.1. Documentary evidence

Article 4 of the Prague Rules concerns documentary evidence, and it opens with the general rule that „*Each party shall submit documentary evidence upon which it intends to rely in support of its case as early as possible in the proceedings*” (Article 4.1).

Another general rule is contained in Article 4.2: „*Generally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery*”.

An adjective was dropped in the final wording of Article 4.2 of the Prague Rules and that tightened up the provision at hand. A more flexible approach was followed in the early drafts, such as the September 2018 draft²¹, whereby the arbitral tribunal and the parties were not encouraged purely to avoid „any form of document production, including e-discovery”, but were imposed the duty to „avoid extensive production of documents”. In fact, the stricter „duty” imposed in the drafts was significantly tempered by qualifying as „extensive” the document production to be avoided.

¹⁹ As it was noted (for instance, by Argerich, *loc. cit.*), the Prague Rules suggest not having a hearing and when possible resolving the dispute on a document basis only (Article 8.1). Again, the Prague Rules provision does not amount to a true innovation, since proceedings with no hearings are provided for, e.g., by the CI Arb Cost-Controlled Expedited Arbitration Rules (available at <https://www.ciarb.org/media/1548/ccea-appendix-ii-15-june-2018.pdf> - last accessed on 14 June 2019).

²⁰ In fact, the powers the tribunal is granted with by the said Articles of the Prague Rules are not substantially different from the powers granted, for instance, under Articles 22 and 25 of the ICC Arbitration Rules, which the ICC tribunals, on occasion, do exercise. Therefore, in order to assess on these points the Prague Rules, my opinion is that it is necessary to see them in action.

²¹ Available at <https://praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf> - last accessed on 14 June 2019.

The requests for document production are further addressed by Articles 4.3-4.6 of the Prague Rules.

It is well known that the IBA Rules have already tried to limit this procedural tool and to depart from its common law model (IBA Rules, Article 3). Nonetheless, it is also well known that the requests for document production often entail an expensive exercise (in terms of time and costs), and the Redfern Schedule that is usually employed rarely brings to an agreement between the parties on the sought documents. The said requests may concern broad categories of documents (despite the provision of Article 3.3.a.(ii) of the IBA Rules, whereby the requests should concern „narrow and specific [...] category of Documents”), in an attempt to perform a „fishing expedition”. Moreover, as a result of the obvious objections from the other party, it is usually (if not always) up to the tribunal to issue a decision on the request.

In this respect, the Prague Rules Working Group, in the early drafts of the rules (such as the September 2018 draft²²), openly expressed their doubts on the usefulness of the requests for document production: *„most commentators admit that it is very rare, if ever, that document production brings a smoking gun to light”*.

I believe that this statement is not entirely true. Indeed, the requests for document production may bring to light – as it is not that rare – „guns” whose existence was not even suspected, and it is up to counsel’s skills and ability to (re) create, with this material, a „smoking gun”.

Thankfully, the Prague Rules do not abolish the request for document production. They only adopt a different model similar to the corresponding procedural tool available in some civil law jurisdiction (such as the order for production of documents provided for by Italian procedural law: art. 210 of Italian Code of Civil Procedure). The parties may request that the arbitral tribunal orders production of certain documents explaining the reasons for their request (Article 4.3). In turn, the tribunal orders the production if it is satisfied that the sought document is relevant and material for the outcome of the case, is not in the public domain and is in the possession of the other party or within its power or control (Article 4.5).

The main downside of the system outlined by the Prague Rules is its timing. Indeed, under Article 4.3 of the Prague Rules, the request for production of documents shall be made at the case management conference. The same request is allowed later on, but *„only in particular circumstances [...] if the tribunal is satisfied that the party could not have made such a request at the case management conference”* (Article 4.4).

²² Available at <https://praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf> - last accessed on 14 June 2019.

As already noted, it could happen – as it frequently happens – that at the time of the case management conference, the parties have only filed summary submissions. This is not a „particular circumstance”. Nonetheless, it could prevent the parties from requesting the production of documents, the case being in a too early stage. A greater flexibility would be more valued, flexibility being the main feature of international arbitration proceedings²³.

3.2. Experts

Article 6 of the Prague Rules concerns experts, their report, and their examination.

Both IBA Rules (Article 6) and Prague Rules (Article 6) provide for the possibility of a tribunal-appointed expert. Provisions on tribunal-appointed experts are also contained in the arbitration rules of reputed arbitration centres²⁴, such as the ICC Arbitration Rules (Article 25), the Arbitration Rules of the London Court of International Arbitration (Article 21)²⁵, the Arbitration Rules of the Singapore International Arbitration Centre (Article 26)²⁶, the Hong Kong International Arbitration Centre Administered Arbitration Rules (Article 25)²⁷, and the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (Article 34)²⁸.

It is well known, however, that the expert appointment on the part of the tribunal is uncommon, as it is preferred to have parties-appointed experts (expert witnesses) under Article 5 of the IBA Rules²⁹.

On the contrary, the default rule under the Prague Rules is the expert appointment by the arbitral tribunal.

²³ As noted by Peter Rees, QC, *Arbitration – Elastic or Arthritic?*, on Asian Arbitration Review, 2017, p. 104 ff., and also available at <https://www.harbourlitigationfunding.com/wp-content/uploads/2017/07/Arbitration-Elastic-or-Arthritic-P-Rees-QC.pdf> - last accessed on 14 June 2019.

²⁴ It is worth mentioning that the said arbitration centres are the five most preferred arbitration institutions according to the 2018 international arbitration survey published by the Queen Mary University of London (available at <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf> - last accessed on 14 June 2019).

²⁵ Available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx - last accessed on 14 June 2019.

²⁶ Available at <http://www.siac.org.sg/our-rules/rules/siac-rules-2016> - last accessed on 14 June 2019.

²⁷ Available at <https://www.hkiac.org/arbitration/rules-practice-notes/hkiac-administered-2018> - last accessed on 14 June 2019.

²⁸ Available at <https://sccinstitute.com/dispute-resolution/rules/> - last accessed on 14 June 2019.

²⁹ For instance, this is the position expressed by Christopher Harris, QC during the annual conference of the Swiss Arbitration Association of 2 February 2018 (presentation available at <https://www.arbitration-ch.org/asset/b9abbe5d174a4ed35584e9c3a1908566/Christopher%20Harris%20-%20Presentation.pdf> - last accessed on 14 June 2019).

According to the Prague Rules, the expert is appointed by the arbitral tribunal „at the request of a party or on its own initiative and after having heard the parties” (Article 6.1).

The tribunal, in order to appoint the expert, shall seek the parties’ suggestion and, on the basis of these suggestions, it will face three options (Article 6.2). It can appoint a candidate proposed by a party or identified by the tribunal itself. As an alternative, it could create an expert commission composed by the candidates proposed by the parties³⁰. Eventually, it could seek a proposal from a neutral organisation. In this respect, the Prague Rules indicate, as examples of neutral organisations, a chamber of commerce or a professional organisation; it could be maintained that the arbitral institution possibly administering the arbitration proceedings is also a neutral organisation that could address a proposal to the arbitral tribunal.

The appointment of an expert by the tribunal does not prevent the submissions of reports by party-appointed experts, nor their examination at the hearing (Article 6.5).

The expert appointment by the arbitral tribunal (or the State Court) on its own initiative is a procedural tool well known in many civil law jurisdictions.

For instance, Italian State Courts, as well as arbitral tribunals sitting in Italy (both in domestic and international arbitration proceedings), are entitled to appoint experts, even on their own initiative.

In this respect, the Arbitration Rules of the Chamber of Arbitration of Milan expressly set forth that „At the request of the parties or by its own initiative, the Arbitral Tribunal may appoint one or more expert witnesses or delegate the appointment to the Chamber of Arbitration” (Article 29.1). On this topic, the Chamber of Arbitration of Milan also published a soft law tool: a note, issued in July 2015, concerning the best practices on expert witnesses in Italian domestic and international arbitration proceedings³¹.

It is worth noting that, from the Italian perspective, the appointment of an expert on behalf of the Court (or the arbitral tribunal) is not inconsistent with the adversarial nature of ordinary civil proceedings.

³⁰ In that case, the experts could organise – and it would be desirable that they organise – their activities using the procedure outlined in Article 6 of the CI Arb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (available at <https://www.ciarb.org/media/1273/partyappointedexpertsinternationalarbitration.pdf> - last accessed on 14 June 2019), possibly even before the exercise on the part of the tribunal of its powers under Article 6.7 of the Prague Rules.

³¹ Available at <https://www.camera-arbitrale.it/upload/documenti/centro%20studi%20pubblicazioni/CTU-CAM-note-consulenza-tecnica.pdf> - last accessed on 14 June 2019.

Indeed, under Italian law the expert is a kind of Court officer („ausiliario del Giudice”) entrusted with the task to evaluate the evidence submitted by the parties in the light of her/his scientific and/or specialist knowledge and/or expertise³².

As a consequence of the above, Italian case law does not allow the Court-appointed experts to seek and/or examine documents other than the documents already submitted by the parties before her/his appointment (Italian Supreme Court, decision No. 8403 of 27 April 2016). This general rule only suffers a minority of exceptions. For instance, the expert is allowed to seek and examine „new” documents in case of accounting investigations, provided that all the parties agree (Article 198 of the Italian Code of Civil Procedure). Similarly, in proceedings concerning IP matters (Italian Supreme Court, decision No. 31182 of 3 December 2018); or if the disputed facts, because of their nature, may only be ascertained by an expert (Italian Supreme Court, decision No. 21487 of 15 September 2017)³³.

However, in domestic and international arbitration proceedings in Italy, the expert could theoretically examine documents submitted by the parties after her/his appointment, since, as a general rule, in Italian arbitration proceedings there are no strict time limits to submit evidence.

Nonetheless, the already mentioned best practices of the Chamber of Arbitration of Milan lay down, with respect to experts in domestic and international arbitration proceedings, the same rule applied before Italian State Court. Indeed, according to the said best practices, „unless otherwise provided for by the law or the arbitral tribunal and without prejudice to the parties’ right to present their case” the expert „is not entitled to receive from the parties documents not already submitted in the arbitration proceedings”.

The Prague Rules adopted a different approach.

Indeed, on the one hand, the arbitral tribunal is entitled to fix strict time limits, amongst other things, for the submission of evidence (Article 3.3). On the other hand, it is also entitled to „*request the parties to provide the expert appointed by the arbitral tribunal with all the information and documents he or she may require to perform his or her duties in connection with the expert examination*” (Article 6.2).

³² As noted by Italian scholars’ opinion, „*the expert report is not a piece of evidence, since its purpose, at least directly, is not that of satisfying the Court that certain facts are true or not, but that of providing the Court [...] with the support of technical knowledge it does not usually have*” (Mandrioli, *Diritto Processuale Civile*, Torino, 2012, p. 209, original text in Italian).

³³ The requirements to meet the last-mentioned exception are very strict and usually Italian Courts hold that this exception does not apply if the parties were able to submit relevant documents (Italian Supreme Court, decision No. 8989 of 19 April 2011).

The Italian texts of all the mentioned Italian Supreme Court decisions are available at the Supreme Court’s website (<http://www.italgiure.giustizia.it/sncass/> - last accessed on 14 June 2019).

In other words: the submissions of documents possibly precluded by expiry of the strict time limit fixed under Article 3.3 could be made because they are ordered by the tribunal under Article 6.2.

The practical application of the Prague Rules will let us better understand the relationship between the strict time limits under Article 3.3 and the order for production of documents under Article 6.2.

4. The *Iura Novit Curia* principle

The Prague Rules also address application of *Iura Novit Curia* principle in international arbitration proceedings³⁴.

In most civil law jurisdictions arbitral tribunals have the power (or even the duty) to apply the legal principles they deem appropriate, even though parties did not plead them.

With respect to the Italian jurisdiction, it is worth mentioning that Italian case law assumes that the *Iura Novit Curia* principle also applies in arbitration proceedings, as it applies in State Court proceedings³⁵, and holds that its application cannot amount to a violation of due process, except in particular circumstances. For instance, in a recent, although controversial, decision, the Court of Appeal of Milan rejected the request to set aside an arbitral award for an alleged violation of due process, purportedly arising out of the fact that the arbitral tribunal applied a law rule not pleaded by the parties³⁶. In this respect, the Court of Appeal of Milan referred to the settled case law of the Italian Supreme Court (concerning the proceedings before State Courts). This case law, in fact, holds that the Court is allowed to apply legal provisions not pleaded by the parties and that the exercise of the Court's discretion in identifying the applicable law does not amount to a violation of due process, provided that application of the Court-identified law does not entail examination of non-pleaded facts.

Similar rules also apply in other civil law jurisdictions: for instance, the *Iura Novit Curia* principle also applies to arbitration proceedings in Switzerland.

In this respect, the leading case is a decision issued by the Swiss Federal Tribunal on 30 September 2003 (Tvornica decision)³⁷. In this decision, the Swiss

³⁴ On this matter, for instance, see Ferrari, Cordero-Moss (eds.), *Iura Novit Curia in international arbitration*, JurisNet, 2018.

³⁵ The *Iura Novit Curia* principle routinely applies in State Court proceedings when the applicable law is the Italian law (for instance, see Italian Supreme Court, decision No. 20957 of 8 September 2017); it also applies with respect to foreign law under Article 14 of Italian law No. 218 of 31 May 1995.

³⁶ Court of Appeal of Milan, 16 August 2018, commented by Villa, *Arbitrato e decisione della 'terza via'*, on *Giurisprudenza arbitrale*, 2018, p. 239 ff.

³⁷ Swiss Fed. Trib., 30 Sept. 2003 (4P.100/2003/ech), on *ASA Bulletin*, 2004, p. 574.

Supreme Court stated that the arbitral tribunal has full discretion to apply the law, under the *Iura Novit Curia* principle, adding that the tribunal is not even bound to inform the parties of the legal arguments that it considers/will consider decisive from a legal point of view. The sole exception to that general rule is that the tribunal shall not catch the parties by surprise. In other words, if the tribunal intends to rely on a legal argument the parties did not plead (or only marginally pleaded) and the parties are not in a position reasonably to expect that this argument would be decisive for the outcome of the proceedings, the arbitral tribunal has the duty to inform the parties and hear them³⁸.

The requirements to meet the said exception are, however, quite strict. As the same Swiss Federal Tribunal pointed out, it usually shows restraint in applying the exception at hand, also to avoid the unsuccessful party in arbitration raising an argument concerning an alleged „surprise” to seek a possible review of the award on the merits³⁹.

In light of the above framework, it seems that Article 7 of the Prague Rules sets forth interesting provisions, capable of limiting the concerns to which a straightforward application of the *Iura Novit Curia* principle could give rise.

First of all, Article 7.1 of the Prague Rules reiterates that parties bear the burden of proof with respect to their legal position (Article 7.1).

In addition, the Prague Rules do allow the tribunal to apply legal provisions not pleaded by the parties or refer to legal authorities not submitted by the parties, but in such cases the tribunal „shall seek the parties’ views” and give the parties „an opportunity to express their views”.

In other words: it appears that, with respect to the application of *Iura Novit Curia* principle, due process is more safeguarded under the Prague Rules than under certain *lex arbitri*, including those of reputed arbitration-friendly jurisdiction, such as Switzerland.

5. Conclusions

As already mentioned, the Prague Rules do not seem to constitute a revolutionary tool of soft law. Most principles they incorporate are already laid down by other pieces of soft law, or by arbitration rules of reputed arbitral institutions.

³⁸ For a more detailed analysis of the Tvornica decision, see Gaillard, Schlaepfer, Pinsolle, Degos (eds.), *Towards a Uniform International Arbitration Law?*, JurisNet, 2005, in particular p. 100 ff.

³⁹ Swiss Fed. Trib., 3 Aug. 2010 (4A.254/2010), available at <http://www.swissarbitrationdecisions.com/claim-of-violation-of-due-process-denied-no-unforeseen-legal-arg> - last accessed on 14 June 2019.

Nonetheless, it would be disproportionate to conclude that the Prague Rules are impractical. They may be useful indeed, since they constantly shift in favour of the tribunal the balance of powers in international arbitration proceedings, looking for more efficiency and lower costs.

Some specific rules might appear too „aggressive” in the eyes of certain Western arbitration practitioners. However, these most controversial rules are also the most flexible ones (they invariably state that the tribunal may carry out certain activities). The discretion and appreciation of the arbitral tribunals that will be appointed and exercise their powers under the Prague Rules in the most appropriate manner will allow the parties to present their cases and avoid an excessive inquisitorial attitude that could cause an advantage for a party.

It seems that arbitration proceedings under the Prague Rules were already ongoing in January 2019⁴⁰, the month after their official presentation. The application of the Prague Rules in these proceedings, and in other proceedings to be instated, will let us know whether they are actually useful, as they appear, and also point out their downsides and the provisions that possibly need to be amended.

⁴⁰ As reported by Tevendale, *The Prague Rules: a brand new approach to arbitration?*, available at <https://www.herbertsmithfreehills.com/latest-thinking/the-prague-rules-a-brand-new-approach-to-arbitration> - last accessed on 14 June 2019.

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