PRAGUE RULES, OK?

Ben Giaretta C.Arb considers whether a new regime based on inquisitorial practices will make its mark on international arbitration

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International arbitration has long attracted precepts, codes and other guidance. In part, this is because of the flexibility of the process and the lack of detail in arbitral rules, which have created a desire for certainty in some quarters. In part, this is because there are many institutions and other organisations that feel inspired to add to the collection of 'soft law'. And in part, it is because there are different visions of what international arbitration should be, very often informed by the cultural background of the participants.

December 2018 saw the launch of the Rules on the Efficient Conduct of Proceedings in International

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Arbitration (commonly known as the Prague Rules). These are the brainchild of a group of lawyers who come mostly from a civil law background – unusually, an informal group rather than one operating under the banner of a particular organisation. The group developed the Prague Rules over the course of 2018.

Initially, the group railed against the 'Americanisation' of international arbitration and the dominance of the common law world. Later, the tone shifted towards promoting efficient practice, while largely continuing to draw on court procedures from civil law countries.

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TRIBUNAL TAKES THE LEAD

The result of those discussions is a set of rules that places the arbitrator at the centre of the proceedings. The arbitrator is encouraged to be proactive and take the lead right from the start. For example, the Prague Rules say that the tribunal should first clarify with the parties what the arbitration is about at the case management conference. This clarification should include which facts are undisputed and which are disputed, and what the legal contentions are. The tribunal should then state expressly how it thinks the parties should proceed to present their respective cases in the arbitration. The tribunal can even tell the parties at this early stage what its preliminary views on the merits are – something that is unheard of in a typical arbitration in common law countries.

This approach continues throughout the case. The tribunal is urged to be proactive in establishing the facts, in particular by asking the parties to produce documents and present witnesses to give evidence. On the other hand, the Prague Rules cut down drastically on document disclosure by the parties. After the parties submit the documents on which they rely, the parties and the tribunal are encouraged to avoid any further document production (specific document requests may be permitted, but generally only if they are made early on, at the case management conference).

The tribunal can also do its own legal research, which includes referring to legal provisions not mentioned by the parties – meaning that at the hearing an advocate may have to anticipate and answer additional questions from the tribunal about the law falling outside the parties' written and oral submissions.

These are all practices from civil law countries, although it must be said that while placing the arbitrator at the centre like this is unusual in common law countries it is not entirely alien to arbitration statutes in them – the UK's Arbitration Act 1996, for example. Philosophically, the approach in the Prague Rules has much in common with the call in the US a few years ago for arbitrators to be more 'muscular'.

WITNESSES AND EXPERTS

Where the Prague Rules really diverge from common law practices, however, is in the treatment of witnesses. In arbitrations taking place in common law countries or those that are influenced by common law ▶

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court procedures, it is left to the parties to decide which witnesses to present and which witnesses to cross-examine. The most that a tribunal does is to ensure that a proper amount of time has been allotted for cross-examination at the hearing.

The Prague Rules are different. Here, it is the tribunal that decides which witnesses to call for examination during the hearing. It can decide on the contents of this roster by choosing from the witnesses nominated by the parties, but also from anyone else who is not called by a party but whom the tribunal believes a party might be able to present as a witness. To determine which witnesses to call, the tribunal has to consider what witness evidence is really necessary for the resolution of the dispute. If the tribunal decides that a witness should not be called, a party can still submit a statement from that witness and the other party can ask for the witness to be cross-examined. However, once the tribunal has concluded that a witness's evidence is irrelevant, that is a strong discouragement to the parties against presenting or challenging the witness's testimony. At the hearing itself, the tribunal can control the examination of witnesses and reject questions that it considers are not material to the outcome of the case.

This represents a significant shift from the typical approach in arbitration in many countries at present. It takes the control of witness evidence out of the hands of the parties and gives it to the arbitrators. It also adds another layer to the process, because the parties have to persuade the tribunal to hear a witness. The parties will need to make submissions to the tribunal for this purpose, which might add some extra time and cost, but will force the parties to consider upfront whether the testimony from particular witnesses is really going to assist their cases.

Another significant difference is the use of tribunal-appointed experts. Appointment of an expert by the tribunal has always been possible in arbitration, but rarely done in practice. The Prague Rules move this to the default position. If specialist knowledge is needed, the tribunal will appoint an independent expert (after taking soundings from the parties on an appropriate candidate). This does not preclude the parties from appointing their own experts who may also give evidence at the hearing, but a tribunal-appointed expert will inevitably set the agenda for any discussion of expert issues.

WILL THE PRAGUE RULES BE POPULAR?

It is difficult to say what the uptake of the Prague Rules will be. Undoubtedly, some parties and their advisors will use them because they will be familiar with the approach from its reflection of court procedures in their home countries. Some may give the Prague Rules a try because of the publicity they have received over the past 12 months and a desire to restrict time and costs. They might also be adopted when an arbitration is time-limited (under an expedited process, for example) and there is a special need for the arbitrators to be proactive in the design and control of the process.

But many users of arbitration may feel uncomfortable with giving up so much control over the presentation of their cases, in particular in the presentation of witness evidence. It is likely, therefore, that the broader impact of the Prague Rules will be to stimulate change in more subtle ways: encouraging arbitrators to be bolder in their procedural choices; altering the landscape of international arbitration against which courts assess procedural challenges; and placing more responsibility on parties to think actively about where they want the arbitral process to be extended and where they are happy for it to be curtailed.

SPOTLIGHT: WHAT'S NEW FOR WITNESSES?

- The tribunal decides which witnesses to call for examination during the hearing.
- This roster can draw on witnesses nominated by the parties.
- It can also include anyone the tribunal believes a party might be able to present as a witness.
- The tribunal can control the examination of witnesses and reject questions that it considers are not material to the outcome of the case.