LAW GAZETTE

FEATURE - December 2019

New Frontiers in International Arbitration? – The Prague Rules

11 min read
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The Prague Rules were drafted by lawyers with a Civil Law background and were officially introduced in December 2018. Their goal is not to override any existing arbitration or procedural rules but rather to provide parties with another choice of how to conduct their proceedings, thereby enhancing the flexibility of international arbitration proceedings. The Prague Rules contain some novel approaches to conduct international arbitration proceedings by assigning a stronger managerial role to arbitration tribunals. In which manner the Prague Rules will enhance the efficiency of international arbitration proceedings remains to be seen.

It is rather interesting with what degree of emotional engagement the so-called “Prague Rules” are viewed in different publications. One author compares the drafters of the Prague Rules to Don Quixote and submits that “*they mistake windmills for giants.*” [1] Another one entitles his article as a Linked-in post, *“*Why Civil Lawyers Do Not Need the Prague Rules*”*. [2]

The Prague Rules are the product and result of a working group consisting of 46 international arbitration experts [3] from all sections of the arbitration arena including scholars, professors, lawyers etc. Especially in arbitration circles following the Civil Law tradition, voices were raised in favour of an alternative to the currently existing international arbitration regulations. [4] However, the idea of drafting a completely new set of rules is not a result of only their own dissatisfaction with the current state of arbitration proceedings. In fact, the dissatisfaction with time and costs in arbitral proceedings seems to be an international phenomenon and a recurring complaint as evidenced in the 2018 Queen Mary University of London survey on international arbitration. [5]

But what is the cause of the rather emotional reactions to the Prague Rules? Do some authors just overreact after a reasoned analysis or is this just a prejudice? Is some of the (harsh) critique really justified and what is the reason why some of the authors argue in such a “militant way” against the Prague Rules?

Purpose of the Prague Rules

The draft of the Prague Rules was released on 8 April 2018. After the Prague Rules were discussed – with different undertones – at various events such as the China Arbitration Summit 2018 in Beijing and in several publications around the world, they were officially adopted on 14 December 2018 in Prague (hence the name "Prague Rules"). The conference where the set of rules was officially signed hosted more than 150 arbitration practitioners, experts and inhouse lawyers. [6] The Prague Rules' draft, which was a product of almost four years of preparatory work, was translated into English, Russian, Portuguese and Spanish. [7] It consists of 12 articles, which deal with the tribunal's proactive role, fact finding, documentary evidence, fact witnesses, experts and assistance in amicable settlements. [8] The Note from the Working Group states that originally, the Rules were intended to serve disputes between companies from Civil Law countries. [9] As a consequence of various debates in countries ranging from the United States of America to China over the draft rules, the working group expanded their horizons and also aimed to provide a guideline for international arbitration proceedings in which the tribunal takes a more proactive role. [10]

A Divided World

In a world with two main different legal systems – Common Law and Civil Law – it is not easy to define and set commonly accepted procedural rules, which satisfy both "camps" and could be considered a workable compromise. However, building a bridge between these two legal traditions for cross-border disputes is necessary as the effects of globalisation are increasingly felt and consequently more and more disputes between parties from both legal backgrounds are clearly on the increase. The overarching common goal of both legal systems regarding arbitration proceedings was from the beginning and should ultimately be – to safeguard and focus on the efficiency of international arbitration proceedings also with a view to costs. There seems to be a growing consensus among practitioners that arbitration can only keep its prominent place and continue to be a preferred mode of dispute resolution if the traditional arbitration advantages (flexibility, speed etc.) can be maintained.

Discussing the historical background as well as similarities and differences of both legal traditions in detail is not intended here. Nevertheless it is crucial to summarise the main differences between the two differing legal traditions especially with a view to a specific procedural area where the contrast between the two legal systems is probably the strongest, ie, the taking of evidence: while evidence taking in Civil Law follows an "*inquisitorial system*" – where the judge or arbitrator makes inquiries –, evidence taking in Common Law countries rather follows an "*adversarial-system*". [11] It is up to the parties to prepare their evidence and witnesses where the court/tribunal will seldom interfere. In the Common Law tradition, the judge or arbitrator is more like an umpire, who listens to both parties and does not follow a proactive role in evidence taking. An intervention in this system is often considered to be an infringement of judicial powers. Hence, from a Civil Law perspective, certain techniques in evidence taking used in Common Law jurisdictions, for example cross-examinations, are seen as rather unusual and may even be classified as an attempt to intimidate the parties. In short, one of the main differences between the two legal traditions is that in the Civil Law system the judge or arbitrator take a more active managerial role in conducting the proceedings. This is of course an over-simplification but is a good starting point to characterise major differences between the two legal systems.

A first significant milestone to close the gap between both legal traditions were the "*International Bar Association (**IBA**) Rules on the Taking of Evidence*" that were introduced in 2010. [12] They are a revised version of the IBA Rules on the Taking on Evidence in International Commercial Arbitration. The original rules were introduced in 1983 and further amended. From the beginning these rules played an important role in providing arbitral tribunals with the necessary power to conduct the proceedings in a cost-saving and efficient manner. Pursuant to the foreword of the IBA Rules of Evidence, they were issued "*as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration"*. [13] There is no doubt that these rules were very successful and are often used by tribunals all over the world. [14] If one considers the composition of the experts who worked on the IBA Rules, the "Members of the IBA Rules of Evidence Review Subcommittee" and the fact that members who were influenced by Civil Law equally participated in the drafting, one cannot directly assume that the unambiguous Common Law "imprint" was originally planned or intended. Nevertheless the IBA Rules seem to be rooted more in the Common Law tradition than in the Civil Law tradition. For a party domiciled in continental Europe, Latin America, various parts of Asia or the Middle East, these traditions are not in line with their own legal traditions.

Therefore, it seems fair to say that one of the main drivers of the draftspersons behind the Prague Rules was a certain dissatisfaction of civil law rooted parties and arbitration practitioners with predominantly common law inspired international arbitration rules and proceedings. Going back to the original advantages of arbitration over proceedings in state courts, it was always the parties' intention to save not only time but also costs. And whether these goals can be achieved with arbitration proceedings that increasingly seem to mimic American-style court room proceedings seems rather questionable. [15] Going back to the taking of evidence and witness examinations one point that often comes up is the appointment of expert witnesses in common law style arbitrations: with all due respect, how likely is it that a party appointed expert witness will provide any findings in their expert statements that are at variance with the interests of the party that pays for the services of the expert witnesses?

It is arguable that tribunal appointed expert witnesses could provide more objective expert witness statements. It is in this respect that the Prague Rules intend to delegate a more active procedural role to the Tribunal, which is undoubtedly inspired by Civil Law traditions. As the experts of the working group pointed out, a main point of criticism towards the IBA Rules and the established international arbitration practice was the examination of witnesses. The Prague Rules for example delegate the decision regarding the number of witnesses to be heard to the Tribunal according to Article 5.2:

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> *"Subject to any requirement provided by the applicable law, the Arbitral Tribunal, after providing the other Party(lies) with an opportunity to comment, will decide which witnesses are to be called for examination during the hearing in accordance with Article 5.3-5.6 below."*

Pursuant to Article 5.9:

> “
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> *“At the hearing, the examination of any fact witness shall be conducted under the direction and control of the arbitral tribunal. The arbitral tribunal can reject a question posed to the witness if the arbitral tribunal considers it to be irrelevant, redundant, not material to the outcome of the case or for other reasons. After having heard the parties, the arbitral tribunal may also impose other restrictions, including setting the order of examination of the witnesses, time limits for examination or types of questions to be allowed or hold witness conferences, as it deems appropriate.”*

Another point to shorten the proceedings is that under Article 4.2 of the Prague Rules, the parties cannot request a “*category of documents*” anymore, but only specific documents:

> “
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> *“Generally, the Arbitral Tribunal shall avoid extensive production of documents, including any form of e-discovery.”*

Different from what was discussed in the original draft of the Prague Rules, the experts of the working group went one step further. [16] Contrary to the free handling of the tribunal with regard to document production, the parties must already indicate their need to obtain a particular document at the case management conference. [17] Consequently, it is not possible for the parties, as often found in Common Law influenced proceedings, to frequently request documents of a certain category.

“Old Wine in New Bottles”

To understand why some authors discuss the Prague Rules in such an emotional manner, it may be helpful to scrutinise their positions on the basis of their legal background. Actually, from a Civil Law perspective it is hard to understand why there is such an emotional discussion about the Prague Rules. It rather seems like a *“cold war battle*” which is fought between Civil Law and Common Law supporters. Still, the discussion about the Prague Rules should not end up in a dispute about the possible shortfalls of one legal tradition or another. The discussion should only focus on the actual procedural needs and how these needs are addressed by the rules and the will of the parties for the circumstances of their specific case.

The Prague Rules’ working group itself was formed with experts from around 30 countries with mainly civil law backgrounds. [18] They confirmed not only that the Prague Rules were not intended to replace any other existing arbitration rules but also that each case should take the particular circumstances into account while using the Prague Rules. [19] It is up to the parties to use these rules in order to customise their arbitration proceedings according to their needs. Parties can certainly decide to only apply parts of the Prague Rules or to modify these Rules. [20] It is also possible for the parties’ legal advisors to incorporate the respective legal circumstances and traditions from the outset. Therefore, the

implementation of the Prague Rules should not be seen as an attack on the adversarial system, which is used in Common Law but rather as a new alternative for parties that are more familiar with the Civil Law traditions.

The authors believe that the Prague Rules are a novel approach to improve arbitrational proceedings and provide parties with a new choice for their proceedings. Since arbitration is primarily rooted in party autonomy it should be up to the parties to decide among various options. In this sense the Prague Rules should be considered as an enrichment of the arbitral "toolkit". Only time will tell how and to what extent international arbitration practitioners will accept these rules.

It is hard to understand why then – according to one author – the application of the Prague Rules and especially the more active role of the Tribunal should result in *"lower quality of arbitral awards"* and shall be seen as an affront to party autonomy? [21]

First of all, the application of the Prague Rules is subject to the parties and therefore just enhances the parties' available options regarding international procedural rules. It can hardly be seen as an "affront to party autonomy" when the parties decide to use a more Civil Law based rule model in their arbitration proceedings. This is especially true in view of the fact that it seems natural for parties with a Civil Law background to use a legal framework which is modelled on a legal system they are more familiar with.

Moreover, it could be argued that the quality of arbitral awards will rather increase by assigning the Tribunal a more active role. Otherwise this would also mean that decisions from a Civil Law court or Civil Law rooted Tribunal could never have a high quality, which seems rather far-fetched. The quality of decisions will not decrease when the Tribunal can focus on the core legal issues of the case and will not be side-tracked by endless discovery motions and long lists of (expert) witnesses, who often cannot really contribute.

It seems also astonishing that some authors see the Prague Rules as an attempt to "attack" or "override" the IBA Rules. Such criticism seems rather unfounded. Taking a look at the "*Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*" shows, that an inquisitorial role of the Tribunal is already possible also under the IBA Rules:

> "
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> *"Inquisitorial powers of the arbitral tribunal follow from the lex arbitri of the seat of the arbitration. Inquisitorial powers may also follow from the arbitration rules agreed by the parties."* [22]

Moreover, it is already possible for the Tribunal under Article 9 (2) IBA Rules to deny a party's request for document production:

> “
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> *“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons (…).”*

Consequently, even though seldom applied, Tribunals that follow the IBA Rules have various possibilities to take a more active role in shaping the proceedings. In this context, the “Note of the Working Group” points out, that “*many arbitrators are reluctant to actively manage arbitration proceedings, including earlier determination of issues in dispute and the disposal of such issues, to avoid the risk of a challenge*”. [23] It is not convincing when “Prague-Rules-opponents” simply assume that under the Prague Rules, parties will give free rein to the Tribunal and lose their entire autonomy. This rather extreme opinion is at variance with everyday realities practiced in Civil Law countries.

In addition, it should also be noted that even under the IBA Rules the conduct of the proceedings regarding the matter of the examination of witnesses lies in the hand of the Tribunal as stated in Article 8.2 of these IBA Rules:

> “
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> *“The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. (…).”*

Some authors already highlighted the current interplay of the articles in relation to the existing power of the Tribunal. [24] It cannot be denied that the synthesis of Article 8.2 of the IBA Rules and Article 8.3, which inter alia grants the Tribunal the right to “*ask questions to a witness at any time*”, empowers the arbitral tribunal already with a leading role in the proceedings.

Even with regard to the possibility of modifying each set of rules, the IBA Rules and the Prague Rules do not differ. In the same manner as the experts of the working group, the Co-Chairs of the Arbitration Committee point out in the Foreword of the IBA Rules of Evidence that “*parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, at the commencement of the arbitration, or at any time thereafter. They may also vary them or use them as guidelines in developing their own procedures*”. [25]

Conclusion

There is no doubt that some procedural aspects contained in the Prague Rules are also already enshrined under the IBA Rules. But this does not diminish the value of the Prague Rules as not only the

duplication aspects or certain parts should be considered when attempting to assess the practical value of the Prague Rules, but rather the Prague Rules should be viewed in their entirety.

The Prague Rules are drafted by arbitration practitioners that are rooted in Civil Law and seek to provide parties with a new alternative to the existing rules in order to enable parties from civil law backgrounds to work with rules that are closer to their own legal traditions. How the market will ultimately judge or use the Prague Rules still remains to be seen.

As emphasised by the "Note of the Working Group" preceding the text of the Prague Rules, "*developing the rules on taking evidence, which are based on the inquisitorial model of procedure and would enhance more active role of the tribunals, would contribute to increasing efficiency in international arbitration.*" [26] Detached from any choice of a particular legal system, the increase in efficiency and cost reduction can only be seen as a legitimate goal. [27] Should the application of the Prague Rules in fact lead to an increase in efficiency, the critiques of the Prague Rules should actually become mute. It is easy to claim that "*a lack of robust case management […] is the main culprit behind delayed proceedings*." [28] Case management is surely one thing, but the other contributing factor is certainly the actual conduct of the proceedings. A "lack of a good case management" is not something experts and drafters can work on. As also pointed out by the "Note of the Working Group" the draft of the Rules has at least inspired a vigorous debate in countries all over the world and debates and discussions are always a welcome chance to reach new frontiers.

Last but not least, as some authors have pointed out, arbitration is also a preferred mode of dispute resolution because of its flexibility and openness to the parties' choices regarding most procedural issues. [29] The *2018 Queen Mary University of London Survey on International Arbitration* states that at the moment, "*99% of the respondents would recommend international arbitration to resolve cross-border disputes in the future*". [30] The Prague Rules might contribute to this goal. Wouldn't it be nice to keep it that way?

Endnotes

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Tags: ARBITRATION PROCEDURAL RULES, CIVIL LAW INSPIRED ARBITRATION RULES, NEW PROCEDURAL RULES FOR ARBITRATION, PRAGUE RULES, PROCEDURAL RULES

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