

# THE CONTRIBUTION OF THE PRAGUE RULES TO PROMOTING EFFICIENCY IN INTERNATIONAL ARBITRATION

## LA CONTRIBUCIÓN DE LAS REGLAS DE PRAGA A LA PROMOCIÓN DE LA EFICIENCIA EN EL ARBITRAJE INTERNACIONAL

Gisèle Stephens-Chu\*  
Freshfields Bruckhaus Deringer  
Camille Teynier\*\*  
Freshfields Bruckhaus Deringer

*Las Reglas de Praga están dedicadas a promover la eficiencia y a reducir los costos que suponen la conducción de los procedimientos arbitrales. Las Reglas se asientan sobre las tesis de que la práctica y el proceso del arbitraje internacional están fuertemente influenciados por el sistema adversarial sobre el que descansan las jurisdicciones del common law, y que las prácticas inquisitoriales de las jurisdicciones del civil law son más oportunas para un “proceso simplificado”.*

*En este artículo, las autoras evalúan primero si esta afirmación es exacta y justa. ¿Las prácticas adversariales son la fuente de la ineficiencia en el arbitraje internacional o podemos encontrar razones en otro lado? A continuación, comparan determinadas disposiciones de las Reglas de Praga con las Reglas de la IBA sobre Práctica de Prueba e indagan cómo se diferencian ambos conjuntos de normas. De otro lado, examinan las críticas que señalan que las Reglas de Praga puedan suponer otro caso de reglamentación estéril. De hecho, se realiza una valoración crítica de las consecuencias del rol activo del tribunal arbitral en el manejo de casos y la pertinencia del uso restringido de la producción de prueba documental, la prueba testifical (especialmente en el testimonio oral) y la designación de peritos.*

**PALABRAS CLAVE:** Reglas de Praga; Reglas de la IBA; prueba; toma de decisiones; normas procesales civiles; debido proceso.

*The Prague Rules are intended to provide efficiency and reduce costs in conducting arbitration proceedings. The Rules are based on the position that the practice and procedure of international arbitration is too heavily influenced by the adversarial system found in common law jurisdictions, and that the inquisitorial judicial practices of civil law jurisdictions are more conducive to a “streamlined procedure”.*

*In this paper, the authors first consider whether this predicate is accurate and fair. Are adversarial practices the source of inefficiency in international arbitration, or can the reasons be found elsewhere? Next, they compare certain features of the Prague Rules to the IBA Rules on the Taking of Evidence, and examine how both sets of rules differ in substance. Moreover, they address the criticisms that the Prague Rules may pose yet another case of useless rule-making. In fact, the authors critically assess the consequences of an active role of arbitral tribunals in case management and the appropriateness of a controlled use of documentary production, witness evidence (particularly in oral testimony) and appointment of experts.*

**KEYWORDS:** Prague Rules; IBA Rules; evidence; decision-making; civil procedure rules; due process.

\* Lawyer. M.A. (Hons.), University of Cambridge. Counsel in the international arbitration group of Freshfields Bruckhaus Deringer, Paris, France. Solicitor, England & Wales; Avocate à la Cour, France. Email: gisele.stephens-chu@freshfields.com.

\*\* Lawyer. J.D., American University Washington College of Law ; M.A., Université Paris Nanterre ; M.A., Université Panthéon-Sorbonne. Associate in the international arbitration group of Freshfields Bruckhaus Deringer, Paris, France. Avocate à la Cour, France; Attorney-at-Law, New York. Email: Camille.TEYNIER@freshfields.com.

Authors' note: The views expressed herein are the personal views of the authors and do not reflect those of their law firm. The authors gratefully acknowledge the assistance of Tutku Bektas and Marina Mayer to this article.

Editor's note: This paper was received by the Editorial Board of THĒMIS-Revista de Derecho on 12 March, 2020 and accepted by the same on 26 June, 2020.

## I. INTRODUCTION

International arbitration is often criticised as costly and cumbersome, belying its original promise of efficient and flexible dispute resolution.<sup>1</sup> A range of initiatives have been introduced in recent years by arbitral institutions to address these concerns. For instance, expedited procedures have been introduced for cases where the amount in dispute is relatively low or where the parties agree,<sup>2</sup> providing for the appointment of a sole arbitrator,<sup>3</sup> applying reduced fees and costs of the arbitration,<sup>4</sup> removing certain procedural steps (such as the establishment of terms of reference),<sup>5</sup> shortening deadlines for the rendering of the final award,<sup>6</sup> and strictly limiting the number of written submissions<sup>7</sup> and oral hearings.<sup>8</sup> Summary determination procedures are also now available<sup>9</sup>. Finally, some institutions are targeting the often significant delays in rendering arbitral awards by inflicting costs sanctions.<sup>10</sup> Such initiatives are gaining even greater momentum as a result of the COVID-19 pandemic.<sup>11</sup>

Institutional initiatives seek to streamline the different stages in arbitral proceedings in certain cases and reduce their overall duration (and therefore cost). However, they do not focus specifically on case management and the taking of evidence, recognising that these lie within the discretion of individual arbitral tribunals. In many international arbitrations, tribunals exercise such discretion by reference to the IBA Rules on the Taking of Evidence (hereinafter the **IBA Rules**), last revised in 2010. The Rules on the Efficient Conduct of Proceedings in International Arbitration (hereinafter the **Prague Rules**), introduced in December 2018, seek to challenge this status quo.

The Prague Rules, drawn up by a Working Group, purport to encourage tribunals to take a more active role in managing arbitral proceedings, in particular with respect to the taking of evidence. Underlying the Prague Rules is the (somewhat partisan) perception that the conduct of international arbitration proceedings is influenced by common law practices, and such practices are the

<sup>1</sup> Illustrating this point, 67% of respondents to the Queen Mary / White & Case 2018 International Arbitration Survey on “The Evolution of International Arbitration” highlighted cost as one of the three worst characteristics of international arbitration. Lack of speed (34%) and lack of insight into arbitrators’ efficiency (30%) were also ranked among the worst (Queen Mary University & White & Case, 2018, p. 8).

<sup>2</sup> See 2014 ICDR International Arbitration Rules, according to which the International Expedited Procedures apply in any case in which no disclosed claim or counterclaim exceeds US \$250,000, unless the parties agree or the ICDR determines otherwise, or in other cases where the parties intend for the expedited procedure rules to apply (2014 ICDR International Arbitration Rules, Art. 1.4); 2017 ICC Arbitration Rules, the expedited procedure rules apply (i) if the amount in dispute does not exceed US \$2,000,000 unless the parties have agreed to opt out of the Expedited Procedure provisions or the Court, upon the request of a party or on its own motion, determines that it is inappropriate to apply the Expedited Procedure provisions, or (ii) if the parties so agree (2017 ICC Arbitration Rules, Art. 30).

<sup>3</sup> See 2018 HKIAC Administered Arbitration Rules, Art. 42.2(a)-(b); 2018 ICAC Rules (Ukraine), Art. 45(6); 2017 ICC Arbitration Rules, Appendix VI – Expedited procedure rules, Art. 2.1; ICAC Rules (Russia), Art. 33(2); 2016 SIAC Arbitration Rules, Art. 5.2(b).

<sup>4</sup> See 2017 ICC Arbitration Rules, Appendix III – Arbitration Costs and Fees, Art. 2.2; 2017 SCC Expedited Arbitration Rules, Art. 49(3).

<sup>5</sup> See 2017 ICC Arbitration Rules, Appendix VI – Expedited procedure rules, Art. 3.1.

<sup>6</sup> See 2018 DIS Arbitration Rules, Annex 4 – Expedited Proceedings, Art. 1; 2018 HKIAC Administered Arbitration Rules, Art. 42.2(f); 2017 ICC Arbitration Rules, Appendix VI – Expedited procedure rules, Art. 4.1; 2016 SIAC Arbitration Rules, Art. 5.2(d).

<sup>7</sup> See 2018 DIS Arbitration Rules, Annex 4 – Expedited Proceedings, Art. 3; 2018 HKIAC Administered Arbitration Rules, Art. 42.2(d); 2018 ICAC Rules (Ukraine), Art. 45(4); ICAC Rules (Russia), Art. 33(3); 2017 ICC Arbitration Rules, Appendix VI – Expedited procedure rules, Art. 3.4; 2017 SCC Expedited Arbitration Rules, Art. 30(1).

<sup>8</sup> See 2018 DIS Arbitration Rules, Annex 4 – Expedited Proceedings, Art. 4; 2018 HKIAC Administered Arbitration Rules, Art. 42.2(e); 2018 ICAC Rules (Ukraine), Art. 45(5); 2017 ICC Arbitration Rules, Appendix VI – Expedited procedure rules, Art. 3.5; ICAC Rules (Russia), Art. 33(4); 2017 SCC Expedited Arbitration Rules, Art. 33(1); and 2016 SIAC Arbitration Rules, Art. 5.2(c).

<sup>9</sup> For example, the 2018 HKIAC Administered Arbitration Rules introduce an early determination procedure allowing the arbitral tribunal, on application of one of the parties, to determine one or more points of fact or law, on the basis that it is manifestly without merit, manifestly outside the arbitral tribunal’s jurisdiction, or, in circumstances where, even if such point of law or fact is correct, no award could be rendered in favour of that party (2018 HKIAC Administered Arbitration Rules, Art. 43.1).

<sup>10</sup> For example, the ICC Court has adopted a policy allowing it to reduce arbitrators’ fees in the event of unjustifiable delays in the submission of draft awards (ICC, 2019). Similarly, recent proposals for amendment of the ICSID Rules include a postponement of payment of fees to tribunal members if applicable rules concerning time limits to render orders, decisions or awards are not met (ICSID, 2020, p. 240).

<sup>11</sup> For instance, the 2020 ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic emphasises the need for efficiency to mitigate the effects of the COVID-19 pandemic, encouraging parties and arbitral tribunals to use the procedural tools at their disposal to increase the efficiency of the proceedings (ICC, 2020).

root cause of arbitral inefficiency. Thus, the Prague Rules proffer various case management and fact-finding techniques which are said to be inspired by practices in civil law jurisdictions and purport to promote “a streamlined procedure” (Prague Rules, 2018, p. 2).<sup>12</sup>

This article critically assesses the contribution of the Prague Rules to case management and the taking of evidence in international arbitration.<sup>13</sup> It first considers whether the Prague Rules’ criticisms of current practices is fair, before reviewing its provisions in more detail in the light of current practices, including the 2010 IBA Rules.

## II. IS ARBITRAL INEFFICIENCY ROOTED IN CURRENT CASE MANAGEMENT AND EVIDENTIARY PRACTICES?

### A. The perspective of the Prague Rules

The Prague Rules were drafted over a span of four years by a group of practitioners, predominantly from civil law countries, which grew over time and formed the official Working Group. A milestone in the Prague Rules’ development was the session titled “Creeping Americanization of International Arbitration: Is it the right time to develop inquisitorial rules of evidence?”, during which the participants discussed the need for an alternative set of rules on the taking of evidence (Prague Rules news, 2017). According to the Working Group, the principal causes for user dissatisfaction with the time and costs of arbitral proceedings could be found in procedures for taking evidence inspired from the common law tradition, in particular document production, as well as the use of fact and expert witnesses and their cross-examination at lengthy hearings.<sup>14</sup> The Working Group levelled specific criticism at the IBA Rules, taking the view that “from a civil law perspective, the IBA Rules are still closer to common law traditions, as they follow a more adversarial approach regarding document production, fact witnesses and Party-appointed experts”, and “the parties’ entitlement to cross-

examine witnesses is almost taken for granted” (Draft Prague Rules, 2018).

The Working Group’s criticisms on the IBA Rules may seem surprising, given that the IBA Rules were drafted by a group of both common law and civil law practitioners, and their stated objective was to provide an expedient process for the taking of evidence in international arbitrations between parties from different legal traditions (IBA Working Party / IBA Rules of Evidence Subcommittee, 2010, p. 1). Regarding document production specifically, the Commentary to the IBA Rules states that one of the guiding principles for the establishment of the rules on document production was to avoid “expansive American –or English– style discovery”, considered “inappropriate in international arbitration” (IBA Working Party / IBA Rules of Evidence Subcommittee, 2010, p. 7). Moreover, nothing in the IBA Rules stipulates that a document production phase, or the cross-examination of witnesses, is mandatory or appropriate for every arbitral proceeding.

### B. The role played by arbitral tribunals in guaranteeing procedural efficiency

What the comments of the Prague Rules Working Group reveal is that, for some civil law practitioners, certain evidentiary procedures have become entrenched and are a source of inefficiency and cost. But is it truly the procedures themselves that cause inefficiencies, or the way in which they are conducted by arbitral tribunals?

At the outset of the proceedings, arbitrators are faced with the difficulty of establishing a procedural framework on the basis of preliminary submissions and limited evidence. As a result, they have to rely on the parties to communicate what evidence will be required and available to establish the facts of the case. Unfortunately, at this stage, the parties are already at war, with each side seeking to adapt the procedure to its individual advantage. A respondent, for instance, may

<sup>12</sup> The Note from the Working Group states that the Prague Rules, initially intended to be used in disputes between companies from civil law countries, 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. (Prague Rules, 2018, p. 2)

<sup>13</sup> This article does not address the provisions of the Prague Rules concerning the arbitral tribunal’s role in facilitating an amicable settlement (Prague Rules, 2018, Art. 9).

<sup>14</sup> See the Note from the Working Group in previous drafts of the Prague Rules on 14 February, 11 March, 26 March and 11 April 2018:

It has become almost commonplace these days that users of arbitration are dissatisfied with the time and costs involved in the proceedings. The procedures for taking evidence, particularly document production, and using multiple fact and expert witnesses and their cross-examination at lengthy hearings are, to a large extent, reasons for this dissatisfaction. (Drafts to the Prague Rules, 2018)

The last draft of 1 September 2018 mentioned the same concerns, adding “the time it may take for an award to be issued” (Draft Prague Rules, 2018).

be inclined to drag out proceedings for as long as possible, while either party may seek to use the inconvenience of certain procedural steps (memorials, document production, the hearing) as a means to leverage a settlement. Thus, parties' submissions on matters of procedure may not be driven by considerations of procedural economy and efficiency, leaving arbitrators to determine these matters without a full picture of the key issues to be determined and the available evidence. As a consequence, arbitrators may be tempted to resort to pro forma procedural orders, and to be over-inclusive when it comes to the presentation of evidence. Document production is a good example of this. Too often, it is included in the proceedings as a matter of course, without considering the specificities of the case, such as its financial magnitude, or evidence of the parties' intent with respect to the availability of discovery.

During the subsequent stages of the proceedings, arbitrators are able to learn more about the issues to be determined by reading the parties' submissions and evidence. However, arbitrators' diligence varies, and some may not study the case properly before the final hearing. In any event, even the most diligent arbitrator may have difficulty understanding key issues on the basis of the parties' written submissions, without the benefit of addressing questions to the parties. It is often only at the final hearing that certain critical issues emerge. This hampers the ability of arbitrators to take a firm position on certain issues earlier on in the proceedings, such as document production requests.

In contrast, the civil procedure rules in many jurisdictions, both common law and civil law, provide judges with the ability to identify key issues and evidence well ahead of trial, through interlocutory hearings, case management conferences and distinct evidentiary phases. To illustrate, French judges have a discretionary power to decide whether to order evidentiary measures requested by the

parties, some judges being more proactive than others in this regard (Code of Civil Procedure [CPC], 2007, Art. 144). In England, judges have a duty to further the overriding objective of dealing with cases justly and at proportionate cost (Civil Procedure Act [CPR], 1997, Pt 1.1) by "actively managing cases" (CPR, 1997, Pt 1.4). To this end, they are given a range of case management powers (CPR, 1997, Pt 3.1)<sup>15</sup> and powers to control evidence. In this regard, the court may give directions as to the issues on which it requires factual evidence, the nature of the evidence which it requires to decide those issues, and the way in which the evidence is to be placed before the court (CPR, 1997, Pt 32.1). In addition, the court has a duty to restrict expert evidence "to that which is reasonably required to resolve the proceedings" (CPR, 1997, Pt 35.1) and no party may submit expert evidence without the court's permission (CPR, 1997, Pt 35.4). In some jurisdictions, such as Switzerland and Germany, judges even have the power to provide the parties with a preliminary assessment of the issues in the case (Code of Civil Procedure [ZPO], 2005, Section 139; Swiss Civil Procedure Code, 2008, Art. 226; Baechler & Richers, 2019, p. 4; Weibel & Walz, 2017, para. 16).<sup>16</sup> These rules are precisely designed to facilitate the efficient resolution of the dispute.

The legal culture of individual arbitrators may have an impact on the way in which they manage arbitral proceedings. For instance, some common law lawyers may be more inclined to order expansive document production because that is what they are used to, rather than what the case calls for. Conversely, a civil lawyer may be less directive with respect to the submission of witness testimony, or its striking out on grounds such as irrelevance or argumentation.

Finally, and most critically, so-called "due process paranoia" also impacts the efficient conduct of arbitral proceedings (Queen Mary University & White & Case, 2018, p. 24).<sup>17</sup> In order to protect

<sup>15</sup> A non-exhaustive list of these powers is set out at Pt 3.1(2) and include, inter alia, powers to decide the order in which issues are to be tried, to exclude an issue from consideration and to dismiss or give judgment on a claim after a decision on a preliminary issue.

<sup>16</sup> See Code of Civil Procedure or Zivilprozessordnung [ZPO] (2005, Section 139):

(1) To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions [...] (4) Notice by the court as provided for by this rule is to be given at the earliest possible time, and a written record is to be prepared. [...]. (translation at [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html))

Similarly, Swiss courts may make preliminary assessments about legal and factual issues of a case during instruction hearings held to "discuss the matter in dispute with the parties, to complete the facts if needed, to attempt to reach an agreement between the parties and to prepare the main hearing" (Swiss Civil Procedure Code, 2008, Art. 226) (translation at <https://www.admin.ch/opc/en/classified-compilation/20061121/index.html>).

<sup>17</sup> According to users, it continues to be one of the main issues that is preventing arbitral proceedings from being more efficient (Queen Mary University & White & Case, 2018, p. 24).

their award from an action for annulment by one of the parties on grounds of lack of equal treatment or due process, arbitrators may feel compelled—sometimes under explicit threat from the parties—to grant parties’ requests for extensions of deadlines, requests for late admission of evidence, unsolicited submissions or endless rights of reply, late introduction of new claims or late requests for the rescheduling of a hearing. This can cause significant delays and substantial additional cost (Berger, 2019, pp. 306-307; Berger & Jensen, 2016, p. 420). Yet, it is rare for arbitrators’ decisions on such matters to rise to a breach of due process and arbitrators should feel free to exercise their discretion robustly and in a manner that promotes the efficiency of the proceedings as an overriding consideration, if need be by applying monetary sanctions for dilatory tactics, according to the opinion of some users (Queen Mary University & White & Case, 2018, p. 27).

It is arguably less the existing case management and evidentiary procedures that cause delay and inefficiency than their practical implementation by arbitrators (McIlwrath, 2018). While the partisan criticisms of the Prague Rules’ Working Group regarding the IBA Rules and adversarial procedures appear misconceived, the Prague Rules offer various innovative means to facilitate more active case management and robust decision-making by arbitral tribunals, as discussed in the next section.

### III. KEY FEATURES OF THE PRAGUE RULES

#### A. Case management techniques

The title of Article 2, “Proactive role of the arbitral tribunal”, emphasises the need for active case management by arbitrators. The first three provisions contain fairly typical rules regarding the case management conference and what it must cover (namely, the establishment of the procedural timetable and the clarification of the parties’ respective factual and legal positions) (Prague Rules, 2018, Arts. 2.1 to 2.3). However, Article 2.4 is more of an innovation: it empowers the tribunal, if it deems appropriate, to provide early indications to the parties as to:

- 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 relied on by the parties;
- d. the actions that could be taken by the parties and the arbitral tribunal to ascertain the factual and legal basis of the claim and the defence; and
- 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, noting that expressing such preliminary views shall not by itself be considered as evidence of the tribunal’s lack of independence or impartiality and cannot constitute grounds for disqualification (Prague Rules, 2018, Art. 2.4).

Thus, the arbitral tribunal, in the context of the case management conference and throughout the proceedings, can steer the parties with respect to its understanding of the key issues in dispute and the gathering and presentation of evidence. This can be contrasted with Article 2.1 of the IBA Rules, which merely provides for the tribunal to consult with the parties and invite them to consult with each other on the appropriate process for the taking of evidence, thus leaving the initiative largely to the parties.<sup>18</sup>

The powers granted to arbitral tribunals by Article 2.4 of the Prague Rules have attracted criticism. Some commentators consider that, by providing early views on the disputed issues and the evidence, tribunals expose themselves or their awards to the risk of challenges (McIlwrath, 2018; Javin-Fisher & Saluzzo, 2019, p. 2). By taking a position early on in the proceedings, tribunals may be seen as pre-judging the merits of the case, based on an incomplete understanding of the case (Henry, 2019, p. 8) and may have difficulty in changing their minds for fear of appearing weak or indecisive (Rombach & Shalbanava, 2019, p. 56). Anticipating this risk, Article 2.4.e provides that expressing preliminary views “shall not by itself be considered as evidence of the arbitral tribunal’s

<sup>18</sup> See 2010 IBA Rules, Art. 2.1: “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”.

lack of independence or impartiality, and cannot constitute grounds for disqualification". However, some commentators are sceptical as to the effectiveness of this disclaimer: insofar as it constitutes a waiver of the right to invoke a violation of obligations of independence and impartiality it may not be valid under many arbitration rules and national laws (Khvalei et al., 2019, pp. 4-5; Henry, 2019, p. 9). Others consider that it is impractical to expect an arbitral tribunal to be in a position, at the outset of a case, to express preliminary views on the case, and that it is for the parties to determine what evidence to put forward (Berger, 2019, p. 308).

In the light of these criticisms, it is important to distinguish between the different elements of Article 2.4. Articles 2.4.a. and 2.4.c invite arbitrators to provide early indications to the parties of their understanding of the disputed issues and the legal grounds alleged. Such indications are designed to clarify the issues to be determined, by synthesising and drawing together the parties' summaries of their respective positions. They can hardly be viewed as a prejudgment of the merits of the case, and neither can indications as to the evidence that tribunals would find useful to determine the dispute, as provided in Articles 2.4.b and 2.4.d. In many arbitration proceedings, such indications are implicitly given in the context of discussions about witness or expert evidence, or through the tribunal's decisions on parties' document production requests. The objective of these indications is to ensure that parties' submissions address the key issues and evidence, and are appropriately focused. Crucially, however, none of these indications preclude parties from addressing other issues or submitting additional evidence.

Article 2.4.e. of the Prague Rules is admittedly more controversial. The tribunal's power to share preliminary views on the disputed issues and evidence submitted should be exercised with care, given the incomplete nature of the record and submissions at the outset, and the need to test evidence at the hearing. According to one commentator, Article 2.4.e should principally be used as a means of encouraging parties to abandon hopeless allegations, thus disposing of certain issues early on in the process (Henry, 2019, p. 9). However, this approach is arguably too restrictive. With the appropriate caveats, tribunals can express preliminary views in order to clarify their understanding of the case and invite submissions on certain points from the parties. This process gives parties the opportunity to explain points that have not been understood by or did not convince the tribunal, abandon hopeless arguments and limit submissions on issues that are already clear (Khvalei, 2018). Thus, rather than acting as a con-

straint on the parties, it gives them an opportunity to present their respective cases more effectively.

In any event, the practice of certain state courts suggests that awards are unlikely to be set aside solely on the basis that a tribunal has expressed preliminary views. For example, in the decision of *A. v. S.* (2015) in the Higher Regional Court of Munich, the Court dismissed a challenge against an arbitral tribunal on the ground of lack of impartiality or independence where the tribunal had presented its views to the parties on the factual and legal interpretation of the case, without making it explicitly clear that such views were preliminary and subject to further submissions from the parties (Wilske et al., 2016). The Court found that it could not be assumed that the tribunal had definitively decided on the disputed issues, given that the assessment had been provided at a very preliminary stage and that it was clear that there would be a discussion about the tribunal's assessment at the oral hearing. The Court pointed out that the assessment was simply meant to give the parties an opportunity to thoroughly prepare for the hearing "in order to be able to react fully to the reasoning presented by the arbitral tribunal" (Wilske et al., 2016). Along the same lines, the Swiss Supreme Court dismissed an application to set aside an arbitral award on the ground of lack of impartiality of the chairman who had given his opinion about one of the key issues to be decided by the arbitrators at the first hearing. In its decision, the Swiss Supreme Court emphasised that the opinion was only provisionally given after an analysis of the parties' first submissions, and that it was not prejudging the issue to be decided (*W. Ltd. v. D. GmbH and E. GmbH*, 2004).

While these decisions originate from jurisdictions that are familiar with the process of preliminary indications, they illustrate the practical ways in which arbitrators can provide such indications without falling foul of the requirements of independence and impartiality. More generally, the provisions of Article 2.4 are evidently inspired from the procedural tools available to judges under many rules of civil procedure, as discussed in the previous section. There is no obvious reason why arbitrators should not avail themselves of similar tools at the outset of and over the course of the proceedings, instead of leaving the detailed consideration of the parties' submissions and evidence to the final hearing.

## B. Documentary evidence

Reflecting the criticisms of the Working Group, Article 4 of the Prague Rules (2018) seeks to make the document production phase an exception

rather than the general rule. Article 4.2 encourages tribunals and parties “to avoid any form of document production, including e-discovery”. A party may, at the case management conference, request a document production process, but is expected to provide reasons for this. Moreover, the Prague Rules envisage requests for “specific documents” (2018, Art. 4.5) as opposed to “narrow and specific categories of documents” as under the IBA Rules (2010, Art. 3). Under the Prague Rules, the arbitral tribunal has complete discretion as to the appropriate procedure to follow (Art. 4.3) and is the direct recipient of the document production requests, in contrast with the prevailing practice where parties exchange Redfern Schedules and only approach the tribunal with objections, in accordance with Articles 3.4 et seq. of the IBA Rules.

It remains to be seen how the differences between Article 4 of the Prague Rules and Article 3 of the IBA Rules will play out in practice (Javin-Fisher & Saluzzo, 2019, p. 2). However, some commentators consider that the limits placed on document production requests are excessive. The main concern raised is with the requirement to identify specific documents, which makes it virtually impossible to access documents held by the other side (Hoder, 2019, p. 162). This could lead parties to make false statements since the probability of being forced to disclose incriminating documents decreases under the Prague Rules (Hoder, 2019, p. 162; Kocur, 2018), especially since arbitral tribunals lack coercive powers to compel a party or a third party to submit evidence. Additionally, the prospect of document production can have the effect of facilitating a settlement of the dispute in certain circumstances, as noted recently by one participant in the session “Are new rules changing arbitration and is it time to revisit the arbitral proceedings?” of the 7<sup>th</sup> Annual GAR Live Paris in 2019 (Hennessee et al., 2019).

Although the avoidance of fishing expeditions is a legitimate goal, the provisions of Article 3.3(a)(ii) of the IBA Rules, if applied properly by tribunals, provide adequate safeguards. Parties requesting documents must provide a description of a narrow and specific category of documents and an explanation as to why it believes that those documents exist and are relevant and material to the outcome of the case. This draws a clear line between legitimate and reasoned requests and fishing expeditions, and should suffice to limit the scope of the document production in order to avoid “US-style discovery”.

On the other hand, there is increasing support for the view that document production should not be ordered as a matter of course. For instance, Appen-

dix IV(d)(ii) of the ICC Rules on case management techniques recommends “avoiding requests for document production when appropriate in order to control time and cost” (2012). The Commentary to the IBA Rules themselves noted that requests for documents should be “carefully tailored to issues that are relevant and material to the determination of the case” (IBA Working Party / IBA Rules of Evidence Subcommittee, 2010, p. 7).

As explained above, all too often, tribunals allow a phase of document production without first considering whether it is a useful and proportionate means of gathering evidence in light of the issues to be determined and the overall magnitude of the case. By requiring parties to request document production and provide specific reasons for this request, the Prague Rules seek to instigate a salutary debate on the appropriateness of document production in the context of the individual case.

### C. Fact witnesses and experts

In line with the Working Group’s criticisms, the Prague Rules seek to ensure that arbitral tribunals exert greater control over the use of witness and expert testimony. The costs involved in submitting such evidence and examining witnesses can be very substantial indeed, depending on the magnitude and complexity of the issues addressed. Such evidence can also cause a drain on internal resources, contributing to the unpopularity of international arbitration within the relevant organisation.

It is typical for arbitral tribunals to leave it to the parties to determine which fact witnesses should be presented and called for direct or cross-examination. However, under the Prague Rules (2018), the parties are expected, when filing a statement of claim or defence (or at any other stage which the arbitral tribunal considers appropriate) not only to identify the nature and content of the witness testimony on which the party intends to rely, but also its relevance and materiality for the outcome of the case (Art. 5.1). The tribunal then decides which fact witnesses should be called for examination, after hearing the parties. Irrespective of whether a written statement has been submitted, the tribunal may decline to call a witness if it considers that witness’ testimony to be “irrelevant, immaterial, unreasonably burdensome, duplicative or for any other reasons not necessary for the resolution of the dispute” (Art. 5.3). However, the parties’ ability to cross-examine the other side’s witnesses is to a large extent preserved: Article 5.7 provides that where a party insists on the other side’s witness being called, the tribunal should call the witness unless there are “good reasons” not to do so (2018).

In sum, the Prague Rules empower the tribunal to control the submission of witness evidence, but also ensure that witnesses will generally be made available for cross-examination. This strikes an effective balance between preserving parties' rights and limiting the use of witness evidence to what is strictly necessary for the resolution of the dispute. By requiring the parties to justify the relevance and materiality of witness evidence, tribunals can ensure that duplicative or unnecessary evidence is not presented and does not lead in turn to the submission of equally dispensable witness evidence in response. If a party is unable to provide compelling reasons for the relevance and materiality of the witness evidence it presents, it is likely not to be of great assistance to the tribunal in resolving the dispute.

More controversially, the Prague Rules (2018) seek to minimise the importance of oral testimony. Thus, the fact that a witness is not called for oral testimony does not preclude a party from submitting a written statement for that witness (Art. 5.4), or from giving that statement as much evidential value as the tribunal deems appropriate (Art. 5.8). This runs counter to the general assumption in international arbitration (implicit in Article 4 of the IBA Rules)<sup>19</sup> that witnesses will give oral testimony at the hearing and that this is necessary for their evidence to be given any real weight.

Critics have raised concerns that the Prague Rules place excessive restrictions on the availability of cross-examination and that deciding issues based on written statements alone presents a risk for fairness and due process. They note that cross-examination is key to test the credibility of the witness and the strength of his or her testimony (Hoder, 2019, p. 169; Rombach & Shalbanava, 2019, p. 57). However, concerns about due process appear misplaced. The ability to cross-examine a witness is not an inherent feature of fairness and due process. Many legal systems do not accommodate it, nor is it a prerequisite of the right to a fair

trial under Article 6 of the European Convention on Human Rights.<sup>20</sup> Indeed, even the hearing can be dispensed with under many institutional rules, which allow expedited arbitration procedures with an award made on the basis of documentary evidence only and without an oral hearing –and consequently without examination of witnesses.<sup>21</sup> It is thus highly unlikely that a decision by an arbitral tribunal to rely on documentary or written witness evidence only could lead to the setting aside of an award, absent any evidence of actual unfairness.

With respect to expert evidence, the Prague Rules (2018) explicitly favour the use of tribunal-appointed experts. Tribunal experts can be appointed at the request of a party or on the tribunal's own initiative after having heard the parties (Art. 6.1). Articles 6.2 to 6.4 address the manner in which the tribunal expert is to be appointed and remunerated, interactions with the parties and the expert's eventual oral examination. While the parties' ability to appoint their own experts is preserved (Art. 6.5), Article 6 presents tribunal experts as the default solution. This approach contrasts with the IBA Rules, which mention party-appointed experts (2018, Art. 5) before tribunal-appointed experts (2018, Art. 6) and present the two types of experts on an equal footing. That distinction aside, both sets of rules contain broadly similar provisions, although the IBA Rules are more detailed on the content of expert evidence. Common features include the possibility for the arbitral tribunal to direct experts to meet and prepare a joint report identifying issues on which they agree and disagree (Prague Rules, 2018, Art. 6.7 and IBA Rules, 2012, Art. 5.4), a procedural mechanism that is quite often used in practice by tribunals to attempt to narrow down the issues in dispute.

The Prague Rules seek to avoid the commonly-raised concern that party-appointed experts may be like "ships passing through the night", taking fundamentally incompatible approaches to the same question or even disagreeing on the question itself

<sup>19</sup> See in particular 2010 IBA Rules, Arts. 4.7 to 4.9.

<sup>20</sup> All the European Court of Human Rights requires in that respect is that the proceedings are "fair" (*Dombo Beheer B.V. v. the Netherlands*, 1993, § 31). This implies that courts must give sufficient reasons when they refuse requests to have witnesses called, instead of doing so arbitrarily, and that the refusal does not amount to a disproportionate restriction of the litigant's ability to present arguments in support of his case (*Wierzbicki v. Poland*, 2002, § 45; European Court of Human Rights Guide on Article 6, 2019, para. 346). The Court also accepts differences of treatment with respect to the hearing of the parties' witnesses provided these differences do not place a party at a substantial disadvantage vis-à-vis their opponent (*Ankerl v. Switzerland*, 1996, p. 1565, § 34; European Court of Human Rights, 2019, para. 346).

<sup>21</sup> For instance, 2018 HKIAC Arbitration Rules, Article 42.2(e): "The arbitral tribunal shall decide the dispute on the basis of documentary evidence only, unless it decides that it is appropriate to hold one or more hearings"; 2017 SCC Expedited Arbitration Rules, Art. 33 (1): "A hearing shall be held only at the request of a party **and** if the Arbitrator considers the reasons for the request to be compelling" (emphasis added); 2016 ACICA Expedited Arbitration Rules, Art. 13.3: "There shall be no hearing unless: (a) exceptional circumstances exist, as determined by the Arbitrator; **and** (b) either the Arbitrator or the parties require a hearing to take place" (emphasis added).

(Van Houtte, 2013, p. 84; LCIA, 2018). Tribunal-appointed experts can facilitate the handling of expert evidence, by assisting the tribunal in understanding the evidence and providing a view that is not partisan (or at least, not coloured by the instructions of the parties). However, it may be challenging to identify experts that combine the necessary independence from the parties and the requisite expertise (indeed in some fields, there may only be a limited number of recognised experts). Moreover, a tribunal may find it more difficult to disassociate itself from the opinions of a tribunal-appointed expert than from those of party-appointed experts (Van Houtte, 2013, p. 84). Even where a tribunal expert is appointed, parties that can afford to are likely to appoint their own experts in order to attempt to weigh in on the tribunal expert's views, resulting in even higher costs overall.

Therefore, in practice, the provision for tribunal-appointed experts as the default is realistic only for cases that involve relatively simple or clearly-defined technical or economic matters. In most other cases, parties will appoint their own experts, and adding a tribunal expert risks further complexity and cost. It may therefore be more efficient for the tribunal to resort to other means to bridge the gap between party-appointed experts, such as joint reports, as mentioned above, or witness conferencing (or so-called "hot tubbing"), where witnesses are questioned at the same time and in confrontation with one another (2010 IBA Rules, Art. 8.3(f)). Another technique to consider (although still rarely used) is "expert teaming", in which the tribunal appoints an "expert team", composed of experts nominated by each of the parties, that work together with the tribunal and the parties to establish a protocol, followed by a preliminary report and a final report implementing the tribunal's and the parties' comments, before being questioned at the hearing by everyone involved (Sachs, 2010, p. 11). In a similar vein, it has been suggested that the tribunal ensure at the beginning of the proceedings that party-appointed experts use the same methodology and answer the same questions, and that, after closing submissions, the tribunal and quantum experts work together on a confidential basis (Kaplan, 2019, p. 108). These various techniques all seek to facilitate a confrontation, in real time, of the experts' views, and should assist in narrowing down the key issues in dispute, as well as in assessing the credibility of the experts' respective opinions.

#### IV. CONCLUSION

The Prague Rules correctly identify the need for more active case management and robust decision-making by arbitrators. For arbitrations to pro-

ceed efficiently, it is critical for tribunals to seek out the information and submissions required to tailor the procedure to the individual case, and to allow them to make properly-informed procedural orders, free from excessive concerns about due process. While arbitrators already have the necessary powers and discretion under most rules, the Prague Rules present such powers in a manner that is deliberately conceived to encourage active case management and steering of the evidence by the arbitral tribunal. In so doing, the Prague Rules promote the adoption of procedures that are properly tailored to each individual case. It remains to be seen how often the Prague Rules will be adopted, given the much broader consensus achieved by the IBA Rules. At the very least, however, the Prague Rules have the merit of challenging the status quo, and may, in the longer term, bring about a change in the culture and practice of international arbitration. 

#### REFERENCES

- Baechler, R. & Richers, R., *Conducting Litigation in Switzerland*, Lexology (2019, July 25), <https://www.lexology.com/library/detail.aspx?g=5b2e9830-0730-4518-b3e4-d2c2214d84c1>
- Berger, K. B. & Jensen, J. O. (2016). Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators. *Arbitration International*, 32(3), 415–435. <https://doi.org/10.1093/arbint/aiw020>
- Berger, K. B. (2019). Common Law vs. Civil Law in International Arbitration: The Beginning or the End. *Journal of International Arbitration*, 36(3), 295–314. <https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration/36.3/JOIA2019014>
- European Court of Human Rights (2019, August 31). *European Court of Human Rights Guide on Article 6 of the European Convention on Human Right: Right to a fair trial (civil limb)*. [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)
- Hennessee, K., Fessas, A., Khvalei, V., & Michou, I. (2019, November 27). Are new rules changing arbitration and is it time to revisit the arbitral proceedings? [Conference session]. *7<sup>th</sup> Annual GAR Live Paris*, Paris, France. <http://gar.live/paris2019>
- Henry, M. (2019). Les Prague Rules: ou comment le vent d'est pourrait insuffler une dynamique vertueuse à l'arbitrage. *Revue de l'arbitrage*, 1,

- 315-328. <https://www.pragerules.com/upload/iblock/6b6/6b62d3155c66415476fe127a2f80eab0.pdf>
- Hoder, L. (2019). Prague Rules vs. IBA Rules: Taking Evidence in International Arbitration. In C. Klaussegger, P. Klein, F. Kremslehner, A. Petsche, N. Pitkowitz, I. Welser, G. Zeiler (Eds.), *Austrian Yearbook on International Arbitration 2019* (pp.157-177), Manz'sche Verlags- u. Universitätsbuchhandlung.
- IBA Working Party / IBA Rules of Evidence Subcommittee (2010). *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*. [https://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#takingevidence](https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence)
- ICC – International Chamber of Commerce (2019, January 1). *Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration*. <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>
- (2020, April 9). *2020 ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*. <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>
- ICSID – International Centre for Settlement of Investment Disputes (2020). *Schedule 2: Memorandum on fees and expenses in ICSID proceedings (Working Paper 4, Volume 1)*. ICSID, World Bank Group. [https://icsid.worldbank.org/en/Documents/WP\\_4\\_Vol\\_1\\_En.pdf](https://icsid.worldbank.org/en/Documents/WP_4_Vol_1_En.pdf)
- Javin-Fisher, R., & Saluzzo, E. (2019, January 25). Prague Rules on evidence in international arbitration: a viable alternative to the IBA Rules? *Humphries Kerstetter LLP*. [https://www.humphrieskerstetter.com/wp-content/uploads/2019/01/Prague\\_Rules\\_on\\_evidence\\_in\\_international\\_arbitration\\_25.01.19.pdf](https://www.humphrieskerstetter.com/wp-content/uploads/2019/01/Prague_Rules_on_evidence_in_international_arbitration_25.01.19.pdf)
- Kaplan, N. (2019). The Arbitrator and the Arbitration Procedure, Innovating in Arbitration: Options for Greater Efficiency. In C. Klaussegger, P. Klein, F. Kremslehner, A. Petsche, N. Pitkowitz, I. Welser, G. Zeiler (Eds.), *Austrian Yearbook on International Arbitration 2019* (pp. 99-110), Manz'sche Verlags- u. Universitätsbuchhandlung.
- Khvalei, V. (2018, November 22). The Prague Rules – dispelling misconceptions. *Global Arbitration Review*. <https://globalarbitrationreview.com/article/1177181/the-prague-rules-%E2%80%93-dispelling-misconceptions>
- Khvalei, V., Teder, M., Andreea Nica, L. P., & Valdivia Pizarro, J. P. (2019, May 22). Compatibility, Novelty, Practical Corollary? A Collective Analysis of the Prague Rules. *Kluwer Arbitration Blog*. <http://arbitrationblog.kluwerarbitration.com/2019/05/22/compatibility-novelty-practical-corollary-a-collective-analysis-of-the-prague-rules/>
- Kocur, M. (2018, June 20). Why Civil Law Lawyers Do Not Need the Prague Rules [Post]. *LinkedIn*. <https://www.linkedin.com/pulse/why-civil-law-lawyers-do-need-pragerules-michal-kocur/>
- LCIA – London Court of International Arbitration (2018, January 17). *Experts in International Arbitration*. <https://www.lcia.org/News/experts-in-international-arbitration.aspx>
- McIlwrath, M. (2018, December 12). The Prague Rules: The Real Cultural War Isn't Over Civil vs Common Law. *Kluwer Arbitration Blog*. <http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law/>
- Prague Rules news (2017, April 20). *Is it time for a change?* <https://pragerules.com/news/is-it-time-for-a-change/>
- Queen Mary University & White & Case (2018). *2018 International Arbitration Survey: The Evolution of International Arbitration*. <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>
- Rombach, A. & Shalbanava, H. (2019). The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing? *SchiedsVZ*, 17(2), pp. 53-60.
- Sachs, K. (2010). Protocol on Expert Teaming: A New Approach to Expert Evidence. In Berg, A. (Ed.), *Arbitration Advocacy in Changing Times* (Vol. 15, pp. 135-148). Kluwer Law International. <https://www.lawlibrary.ie/rss/CPDArbitration09072011/15SachsProtocolOnExperts.pdf>
- Van Houtte, H. (2013). Document Production Master and Experts' Facilitator. In B. Berger & M. E. Schneider (Eds.), *Inside The Black Box: How*

*Arbitral Tribunals Operate And Reach Their Decisions* (pp. 83-86). Juris Publishing.

Vos, G. (Ed.) (2020). *The White Book Service 2020: Civil Procedure* (Vol 1). Sweet & Maxwell Ltd.

Weibel, T. & Walz, C. (2017, June 29). GAR know how, Switzerland. *Global Arbitration Review*. <https://globalarbitrationreview.com/jurisdiction/1000228/switzerland>

Wilske, S., Krapfl, C., & Lutz, G. (2016, January 19). Higher Regional Court of Munich on arbitrator challenge based on tribunal's preliminary assessment. *Practical Law*. <https://uk.practicallaw.thomsonreuters.com/6-523-9833?transitionType=Default&contextData=sc.Default&firstPage=true>

#### STATUTES, CASE LAW AND OTHER DOCUMENTS

A. v. S. Oberlandesgericht München [OLG] [Higher Regional Court of Munich] Nov. 14, 2015, 34 SchH 5/15 (Ger.).

Ankerl v. Switzerland. Reports of Judgement and Decisions 1996-V. App. no. 17748/91 (E. Ct. H. R. 1996).

Civil Procedure Act 1997 [CPR] Mar. 4, 1997 (Eng. & Wales).

Code de procédure civile [CPC] [Code of Civil Procedure] Dec. 21, 2007 (Fr.).

Code de procédure civile [CPC], Schweizerische Zivilprozessordnung [ZPO], Codice di diritto processuale civile svizzero [CPC] [Swiss Civil Procedure Code] Dec. 19, 2008, SR 272 (Switz.).

Draft Prague Rules (2018, September 1). <https://praguerules.com/upload/medialibrary/b2e/b2e26123ac310b644b26d4cd11dc67d8.pdf>

Drafts to the Prague Rules (2018, February 14, March 11, March 26 and April 11). [https://praguerules.com/prague\\_rules/previous\\_drafts/](https://praguerules.com/prague_rules/previous_drafts/)

Dombo Beheer B. V. v. the Netherlands. App. no. 14448/88. Series A, no. 274 (E. Ct. H. R. 1993).

W. Ltd. v. D. GmbH and E. GmbH. Tribunal fédéral [TF] 1<sup>re</sup> Cour civile. [Swiss Federal Supreme Court] Jan. 7, 2004, 4P.196/2003 (Switz.).

Wierzbicki v. Poland. App. no. 24541/94 (E. Ct. H. R. 2002).

Zivilprozessordnung [ZPO] [Code of Civil Procedure] Dec. 5, 2005 as amended Oct. 10, 2013 (Ger.).

IBA Rules on the Taking of Evidence (IBA Rules on the Taking of Evidence in International Arbitration), adopted on 29 May 2010.

2014 International Centre for Dispute Resolution, International Arbitration Rules (International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) of the International Centre for Dispute Resolution).

2016 SIAC Arbitration Rules.

2017 ICAC Rules.

2017 ICC Arbitration Rules.

2017 SCC Expedited Arbitration Rules.

2018 DIS Arbitration Rules.

2018 HKIAC Administered Arbitration Rules.

2018 ICAC Rules (Ukraine).

2018 Prague Rules.