Soft law in international arbitration: the Prague Rules one year after their entry into force – a true alternative to the IBA Rules?

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International arbitration proceedings, by definition, allow parties to settle their disputes worldwide. In particular, they allow parties from different jurisdictions and with different legal backgrounds to do so. With a constantly growing number of international arbitration matters over the last decades, cases in which parties with a common law background faced parties with a civil law background became more and more frequent leading to cultural and legal clashes, since both legal traditions imply diverging approaches to the procedural conduct of the proceedings. In the following, it shall be shown how these problems were addressed by the creation of soft law in the form of the IBA Rules, available since 1999, and the Prague Rules adopted 20 years later and how these Rules are best used in practice.

The IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") were designed to precisely respond to the growing need to prevent situations of conflicting procedural approaches, which often times considerably delay the proceedings. The IBA Rules claim to be a blend of common law and civil law principles and strive to represent the best of two worlds.

However, despite the unrivalled success of the IBA Rules over two decades, a number of civil law practitioners started to question the need for this blend, in particular when dealing with disputes exclusively concerning civil law jurisdictions. Some practitioners even more felt that the IBA Rules were not the compromise solution they pretended to be, but in reality were much more common law driven and oriented.

- Obviously, common law and civil law have also different approaches as regards the law applicable to the merits of the case.
- www.ibanet.org. The original set of Rules of 1999 was revised in 2010.
- The Arbitral Tribunals facing that situation were supposed to shape procedural rules meeting the expectations of both parties, which often times proved to be a very challenging endeavour.
- The IBA Rules are often applied in arbitration proceedings, either by incorporation or by reference as a source of inspiration.

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Against this background, the Prague Rules were adopted in December 2018 by a group of civil law practitioners discussing the various issues that negatively impact arbitration, in particular the perceived problems with the IBA Rules. Thus, the Prague Rules establish evidentiary rules based primarily on civil law traditions and the inquisitorial model of procedure.

The Prague Rules were enacted on 14 December 2018 in Prague (https://praguerules.com/).

It is important to note that neither the IBA Rules nor the Prague Rules are intended to replace the arbitration rules provided by various institutions. They are designed to supplement the procedure to be agreed by parties or otherwise applied by Arbitral Tribunals in a particular dispute.

While it is, at that stage, too early to make an assessment of the future success of the Prague Rules, their key provisions continue to be the subject of passionate debates and discussions.

However, rather than trying to find out which Rules are superior to the others and which set of Rules should therefore be applied, the following elements should be borne in mind.

First, it should be noted that the Prague Rules, like the IBA Rules, provide for a maximum flexibility as regards their scope of application. Parties and Arbitral Tribunals may therefore decide to apply the Prague Rules as a binding document or as a mere guideline to all or any part of the proceedings. They may also exclude the application of any part of the Prague or IBA Rules or decide to apply only parts of them.

In practice, the IBA Rules or parts thereof are in most cases referred to as mere guidelines and source of inspiration and do therefore rarely apply as a binding document. It is likely that the same will happen with respect to the Prague Rules. In fact, although both the IBA and the Prague Rules are already quite specific, Arbitral Tribunals prefer to propose a set of Specific Procedural Rules to the parties, which are designed to meet the specific procedural requirements of the given case. It is in that context that Arbitral Tribunals have regularly taken inspiration from elements contained in the IBA Rules. They may henceforth add elements from the Prague Rules, as long as these elements are compatible and meet the parties' specific needs and expectations.

As an example, it is well conceivable that parties, albeit generally willing to take inspiration from the IBA Rules, would prefer to limit or even exclude the recourse to document production. The IBA Rules do not foresee specific guidance to that effect and Article 4 of the Prague Rules may be of help : by that provision parties are encouraged to avoid any form of document production and a concrete need of a party for document production has to be clearly set out at the very beginning of the case, i.e. at the Case Management Conference and is left to the decision of the Arbitral Tribunal.

Article 3 of the IBA Rules provides for a document production phase.

Article 4. Documentary Evidence:

"4.1. Each party shall submit documentary evidence upon which it intends to rely in support of its case as early as possible in the proceedings.
4.2. Generally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery.
4.3. However, if a party believes that it would need to request certain documents from the other party, it should indicate this to the arbitral tribunal at the case management conference and explain the reasons why the document production may be needed in this particular case. If the arbitral tribunal is satisfied that the document production may be needed, it should decide on a procedure for document production and make an appropriate provision for it in the procedural timetable.
4.4. A party can request the arbitral tribunal to order document production at a later stage of the arbitration only in exceptional circumstances. Such a request should be granted only if the arbitral tribunal is satisfied that the party could not have made such a request at the case management conference.
4.5. Subject to Articles 4.2–4.4, a party may request the arbitral tribunal to order another party to produce a specific document which: a. is relevant and material to the outcome of the case; b. is not in the public domain; and c. is in the possession of another party or within its power or control.
4.6. The arbitral tribunal, after hearing the party's view on such request, may order it to produce the requested document. […]"

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By contrast, even parties with a civil law background should be careful before agreeing to a binding application of the Prague Rules as a whole. In fact, legal traditions may be quite different between civil law countries. Thus, the proactive role of the Arbitral Tribunal laid out by Article 2 of the Prague Rules, which encompasses the issuance of a preliminary view of the case by the Arbitral Tribunal and its active role in finding an amicable settlement is, for example, uncommon in jurisdictions like France and would therefore often times not meet the expectations of parties having a French legal background.

It may be expected that the Prague Rules will in the first place serve as an additional source of inspiration for parties and Arbitral Tribunals when shaping the Specific Procedural Rules to a given case. In that respect, they can indeed be considered as an option to the IBA Rules. However, parties, even those with a civil law background, considering the application of the Prague Rules, should make sure to be fully acquainted with these Rules before agreeing to a binding application thereof.

- Article 2. Proactive Role of the Arbitral Tribunal:

"2.1. The arbitral tribunal shall hold a case management conference without any unjustified delay after receiving the case file. 2.2. 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.
2.3. If the parties' positions have not been sufficiently presented at the time of the case management conference, the arbitral tribunal could deal with the issues mentioned in Article 2.2.b at a later stage of the arbitration.
2.4. The arbitral tribunal may at the case management conference or at any later stage of the arbitration, if it deems it appropriate, 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. Expressing such preliminary views shall not by itself be considered as evidence of the arbitral tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification.
2.5. 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)."

- To be fair, it must be added that these considerations generally also apply with respect to the IBA Rules.

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