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Commentary

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Introduction

December 14 of this year will mark the five-year anniversary of the Rules on the Efficient Conduct of Proceedings in International Arbitration (the "Prague Rules"). At the 17th Century Renaissance Martinic Palace in Prague, Vladimir Khvalei, Chairman of the Board of the Russian Arbitration Association, heralded the adoption of the Prague Rules as the solution to the "Creeping Americanisation of International Arbitration."[1] That Americanization, in the eyes of the Prague Rules' drafters, was a perceived arbitral trend toward common law (as opposed to civil law) norms, which in turn was blamed, in principal part, on the increasing use of a rival set of rules known as the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (the "IBA Rules").

At the time, predictions for the success or failure of the Prague Rules varied. We are now far enough along, however, to undertake an initial assessment. While publicly available arbitration awards are incomplete, certain trends have shown themselves. By way of example, the Westlaw database of international arbitration awards includes 29 post-2018 awards that rely in whole or in part on the IBA Rules. The Prague Rules? Not one. The Jus Mundi database reveals a similar pattern, with 82 post-2018 awards that rely in whole or in part on the IBA Rules, and none that rely on the Prague Rules.[2]

So what happened? Has Americanization crept its way completely across the international arbitration world? Perhaps. But a survey of the broader literature, coupled with interviews of several international arbitration practitioners, offers some more prosaic explanations. In this commentary, we analyze certain institutional barriers to more widespread adoption of the Prague Rules to hypothesize why the Prague Rules have not yet had a major impact on international arbitrations.

Origin of the IBA Rules

In the battle between the IBA Rules and the Prague Rules, one might ask: Why doesn't each arbitral institution merely adopt its own set of rules? The answer is that some do—the International Chamber of Commerce (ICC) has a particularly well-developed set of rules[3]—but these rules are largely silent on the specifics of evidence taking. Institutional rules provide a big picture overview of the arbitral process, including jurisdictional challenge and "conduct of the arbitration," which the IBA and Prague Rules supplement by providing in depth guidance on the production of evidence, examination of witnesses, etc. Parties and

the tribunal may agree to apply either the IBA Rules or the Prague Rules at the start of the proceedings to provide the tribunal with additional guidance. Unlike the institutional rules that apply pursuant to the terms of the parties' arbitration agreement, the rules on evidence taking are rarely found in arbitration agreements themselves, making them a non-mandatory, soft set of rules.

Into this breach stepped the IBA Rules. First enacted in 1983 as the "Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration," the IBA Rules came into their present form largely in 1999, with revisions by successive committees in 2010 and 2020 (which are the IBA Rules in use today).[4] According to the Committee in the International Bar Association's Legal Practice Division which prepared them, the IBA Rules are intended "as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. The Rules provide mechanisms for the presentation of documents, witnesses of fact and expert witnesses, inspections, as well as the conduct of evidentiary hearings."[5]

At least on their face, the IBA Rules do not present themselves as a triumph of common law over civil law. To the contrary, the Rules profess to "reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures."[6] Notably, thirteen of the sixteen original drafters of the IBA Rules were from civil law countries. The 2010 Review Committee and the 2020 Review Task Force had similar membership break-downs.[7]

Introduction of the Prague Rules

In 2018 came the Prague Rules. According to the "Note from the Working Group," "[i]t has become almost commonplace these days for users of arbitration to be dissatisfied with the time and costs involved in arbitral proceedings. One of the ways to increase the efficiency of arbitral proceedings is to encourage tribunals to take a more active role in managing the proceedings (as is traditionally done in many civil law countries)."

The Prague Rules are the means toward that end. Drafted by representatives "from around 30, mainly civil law, countries," the Prague Rules are professed to arise out of "a survey on procedural traditions in international arbitration in their respective countries" along with "arbitration events all around the world, specifically in Austria, Belarus, People's Republic of China, France, Georgia, Poland, Portugal, Spain, Russia, Latvia, Lithuania, Sweden, UK, Ukraine and the US."[8]

Comparing the IBA Rules to the Prague Rules

The differences between the IBA and Prague Rules lie more in emphasis than absolutism. Specifically, the Prague Rules embody presumptions more present in common jurisdictions than civil law jurisdictions.

Civil law nations such as France, China, and most of the rest of Europe and Asia follow an "inquisitorial" system in which the tribunal takes an active role in the case. Common law jurisdictions, by contrast, such as those in the U.S., U.K., Hong Kong and Singapore, rely upon an adversarial approach in which the parties take the lead in identifying and investigating disputed issues of fact. As a consequence, civil law systems are perceived as more efficient and less litigious, albeit with less due process.

The differences between the two sets of Rules can be found in four main areas: (a) document production, (b) expert witnesses, (c) the evidentiary hearing, and (d) the role of the tribunal.

With respect to document production, Article 3 of the IBA Rules presupposes that documents will be exchanged, requiring each party to "submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies," and permitting any party to "submit to the Arbitral Tribunal and to the other Parties a Request to Produce." By contrast, Article 4 of the Prague Rules provides that: "Generally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery." (The Prague Rules do permit document discovery by leave of the tribunal.)

With respect to expert witnesses, Article 5 of the IBA Rules follows the common law practice of relying principally upon party-appointed experts, while Article 6 also allows for tribunal-appointed experts "after consulting with the Parties." By contrast, Article 6 of the Prague Rules follows the civil law practice of

relying principally upon tribunal-appointed experts, while also providing that: "The appointment of any expert by the arbitral tribunal does not preclude a party from submitting an expert report by any expert appointed by that party."

With respect to the evidentiary hearing, Article 8 of the IBA Rules provides for the proceeding to be conducted similar to that in a court of law, albeit with the potential inclusion of witness statements and, of course, no jury. By contrast, Article 8 of the Prague Rules provides that: "In order to promote cost-efficiency and to the extent appropriate for a particular case, the arbitral tribunal and the parties should seek to resolve the dispute on a documents only basis." However, it also permits that: "If one of the parties requests a hearing or the arbitral tribunal itself finds it appropriate, the parties and the arbitral tribunal shall seek to organise the hearing in the most cost efficient manner possible …"

As the above provisions reflect, while the IBA Rules and the Prague Rules start from differing presumptions as to documents, experts, and the evidentiary hearing, the two sets of Rules can nevertheless end up in the same place. The same, however, cannot be said for the role of the tribunal. The IBA Rules, throughout, envision a traditional, more passive role for arbitrators, whereas the Prague Rules envision a more "inquisitorial" and "muscular" role. Significantly, Article 2 of the Prague Rules provides that the tribunal shall hold a case management conference after receiving the case file, at which it shall "clarify with the parties their respective positions with regard to the relief sought by the parties, the facts which are undisputed between the parties and the facts which are disputed, and the legal grounds on which the parties base their positions." Further, Article 3 states that the tribunal is "entitled and encouraged to take a proactive role in establishing the facts of the case which it considers relevant for the resolution of the dispute" including, *inter alia*, "at any stage of the arbitration and at its own initiative," requesting evidence and fact witnesses, appointing experts, and ordering site inspections, etc.

Why the Prague Rules Haven't Caught On

Numbers don't lie; the Prague Rules have not yet had a major impact on international arbitrations. In our review of nearly five thousand post-2018 arbitration awards (including final, partial, interim, and emergency awards), we were unable to find a single award that cited to the Prague Rules, whereas the IBA rules continue to be consistently relied on across different arbitral institutions. Among the available awards issued by the International Chamber of Commerce (ICC), for example, cases using the IBA Rules outnumbered those using the Prague Rules 32 to 0. The question is why.

Oftentimes the simplest explanation is the correct one. Here, the Prague Rules are only five years old. As one practitioner told us: "It is hard to dislodge an existing set of rules, especially ones so widely used." Two arbitration law professors at the University of Pennsylvania Carey Law School remarked that they do not recall the Prague Rules being used in any of the cases that they have dealt with thus far.

Beyond that, based on our interviews with practitioners, and consistent with what has been written in many commentaries,[9] there appears to be an understandable reluctance by users of arbitration to give up control over the presentation of their cases, in particular with respect to witness evidence. "Coming from a common law system, I feel more comfortable with the adversarial system than the inquisitorial way of managing the case," remarked one practitioner. Another sentiment expressed in commentaries is that the Prague Rules and the IBA Rules, in their practical application, actually are not all that different, such that the original proponents of the latter might have been "tilting at windmills."[10]

Others have speculated that arbitrators themselves might not be so keen on the Prague Rules, which potentially require a much greater time commitment on their part. As one commentator put it: "It is not unusual for Tribunal members to be appointed to multiple arbitrations running broadly in parallel and so a greater involvement in one or more as a consequence of the adoption of the Prague Rules may give rise to a number of practical difficulties for a Tribunal member juggling a full diary."[11]

Lastly, there are concerns about what some have called "the creeping and ever-growing paranoia on due process."[12] One of the principal benefits of international arbitration is ease of enforcement under the New York Convention, which only permits refusal of

enforcement in limited circumstances. One of those, however, is found in Article V(1)(b), which provides, in relevant part that: ""Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked," if "[t]he party against whom the award is invoked … was otherwise unable to present his case." Article V(1)(b) claims are among the most frequently cited grounds to resist enforcement.[13]

There is no question that the Prague Rules follow civil and not common law norms as to due process. There is an understandable concern that an arbitration award brought about in a proceeding run under the Prague Rules, if thereafter sought to be enforced in a common law jurisdiction, might be particularly susceptible to challenge. While our research has not uncovered any successful challenge of a Prague Rules arbitration on this ground, we are still very early in the process.

Conclusion

Five years ago, the passage of the Prague Rules was considered big news in the international arbitration community and was welcomed by civil law practitioners as a revolutionary step to increase the efficiency of oftentimes drawn-out arbitration proceedings. Five years later, it appears that practitioners–and arbitrators–are less excited to use the Prague Rules in practice than they were to enact them on paper. While time may bring greater adoption, at least for now, the Prague Rules do not rule.

Endnotes

1. Cristina Ioana Florescu, In *Pursuit of the Cherished Notion of Efficiency through the New Prague Rules*, 13 Romanian Arbitration Journal (2019).

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5. 2020 IBA Rules, Foreword (available at: https://www.ibanet.org/resources).

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