THE PRAGUE RULES: A REGRESSION OR A STEP TOWARDS MORE EFFICIENCY?*

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> **"***Regression? Maybe, but most likely for the better. And after all, arbitration is about parties' choices, about alternatives and about diversity*."

I - Introduction

The current state of affairs shows that international arbitration is too costly, too lengthy, and also too inefficient.[1] This is at odds with what has been the ever-since advertised hallmarks of arbitration: a speedy, flexible, and cost-efficient process managed by independent and impartial adjudicators, with strict compliance to the principles of due-process.

There are many reasons for the current scenario but perhaps the most prominent one is related to the model for the conduct of the case that adjudicators adopt. In this regard, it is not worth entering into the debate of whether arbitration is or should be less "American" (or "anglo-american"), by contrast to a more "civil law" shape.[2] This is not the occasion for a debate between these two legal cultures, if not for other reasons because, admittedly, in international arbitration the line dividing these two cultures is much more blurred than it was a few years ago.

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[1] See the last survey conducted by White & Case and Queen Mary University of London that identifies four main reasons that interviewees and respondents find to be the "worst characteristics" of international arbitration: costs (67% of replies), lack of effective sanctions during the arbitral process (45%), lack of power in relation to third parties (39%) and lack of speed (34%) - The 2018 White & Case and Queen Mary University of London Survey on International Arbitration (W&C / QMUL Survey), available at http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF, at p. 8, last accessed on 28-10-2018.

[2] See "The American Influence on International Arbitration", in 19 Ohio St. J. on Disp. Resol. 69 (2003-2004), p. 84, available at: https://scholarship.law.nd.edu/law_faculty_scholarship/562, last accessed on 28-10-2018, and George M. von Mehrem and Alana C. Jochum, "Is International Arbitration Becoming Too American?", 2 Global Bus. L. Rev. 47 (2011), available at http://engagedscholarship.csuohio.edu/gblr/vol2/iss1/6, last accessed on 28-10-2018.

The debate lies instead in the way parties want adjudicators to conduct their cases, and what is the role that the available regulation framework plays in that endeavour. Leaving aside other considerations (such as those related to the governing law or applicable institutional rules), the great divide rests on two fundamental notions of the conduct of arbitration and, consequently, of the arbitrators' role: should arbitrators be left to simply moderate the combat between the parties (adversarial model) or, conversely, must the arbitrators intervene during the fight (pro-active model)?[3]

It seems indisputable that arbitral tribunals are increasingly constricted to a religious observation of due process, and often find themselves suffering from the corresponding "paranoia". As a consequence, tribunals opt to concede in every request for production of evidence, including full-fledged discovery, lest a challenge is on the way. Several rounds of lengthy submissions are the *cornerstone* of even the simplest case, and parties see no limit in tempering witness statements and requesting cross-examination from the witnesses produced by the opposing party.

This scenario is typical to an adversarial approach on the conduct of arbitration. Admittedly, this is also the target which the coming Prague Rules aim to improve. The question that now follows is whether the existing regulation apparel (i.e. the "IBA Rules on the Taking of Evidence in International Arbitration") is also targeted by this initiative. The answer is "yes" … and "no".

II – The Prague Rules and Legal Cultural Divides

Before proceeding with the explanation, it is indispensable to introduce the Prague Rules. These Rules are a set of provisions compiled by a group of "civil law" practitioners, coming mainly from eastern European countries. This working group conducted a survey among practitioners of several "civil law" jurisdictions and subsequently drafted the "Prague Rules on the Efficient Conduct of International Arbitration", named after the European city where its final version was approved and signed by a number of individual and institutional supporters.

The drafters of the Prague Rules acknowledge the role that the IBA Rules have been playing in bridging the gap between two different legal cultures and in setting forth "nearly standardized procedures". At the same time, they pinpoint the IBA Rules as too close to one of

[3] The notion of an "inquisitorial" role, early adopted in the first drafts of the Prague Rules, but abandoned in the current version, should be avoided for its connotation to other areas of the law, particularly criminal law.

the legal cultures (i.e. the "common law"). Consistently, they advocate a more "civil law" approach in the conduct of proceedings. That way, it is assumed, most of the negative costs and time impacts on the efficiency of proceedings will be mitigated.

If so, how is this achieved? What does it mean, to have a more civil law approach?

Broadly speaking, whereas "common law" arbitrators tend to be more of spectators in an adversarial process, their "civil law" congeners are more interventive.[4] The former are more attached to a process where witnesses are the paramount means of evidence and, therefore, allow extensive examination and cross-examination. This is because, particularly in the U.S., witnesses have strong reminders that perjury is a criminal offense. To the contrary, in many "civil law" countries there are no real penalties against perjury, and witnesses are more comfortable in "forgetting" or "adapting" events to the needs of the party who produced them. Consequently, proceedings are conducted subject almost to no evidence other than documents ("documents don't lie", so they say).

In "common law" jurisdictions, an arbitrator may never raise a point of law (or fact) not pleaded by the parties.[5] In "civil law" jurisdictions, arbitrators may apply a provision not pleaded by the parties ("iura novit curia"), provided that the parties are granted the opportunity to be heard.[6]

A "common law" arbitrator will never share her or his preliminary views with the parties, let alone suggest a settlement, whereas a "civil law" arbitrator would be at ease in doing so (provided, of course, she/he does not render a "decision" in that process). In some "civil law"

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[4] However, within the realm of the "domestic" arbitration in the U.S., there has been some calls for a more "muscular" approach. See Harvey J. Kirsh, "Pitfalls, Perceptions, and Processes in Construction Arbitration", 2012, http://www.cccl.org/Featured%20article%20-%20November%202012.pdf, last accessed on 2 November 2018. Also, "Protocols for Expeditious, Cost Effective Commercial Arbitration", Thomas J. Stipanowich, Editor-in-Chief, Curtis E. von Kann and Deborah Rothman, Associate Editors, 2010, available at http://apps.americanbar.org/litigation/committees/corporate/docs/2011-cle-materials/10-Prevent-the-Runaway/10c-protocols-expeditious.pdf, last accessed on 2 November 2018.

[5] Very recently, the Commercial High Court of England and Wales set aside an ICC award on the basis of a "serious irregularity" due to the arbitrator's decision on a claim that had not been sought by any of the parties - see *RJ and another v HB [2018] EWHC 2833 (Comm), available at* https://www.bailii.org/ew/cases/EWHC/Comm/2018/2833.html, last accessed on 2 November 2018.

[6] See the decision of the Swiss Federal Tribunal 4A_554/2014 of 15 April 2015, ASA Bull. 2/2015, p. 411.

jurisdictions, such as Brazil, the arbitrator has a fundamental duty to "seek the conciliation between the parties".[7]

More significantly, a "common law" arbitrator, and more particularly, a US arbitrator will find it hard to conciliate the principles of the equitable process with a decision that denies a request for discovery, including by electronic means. A "civil law" arbitrator, however, will order the opposing party to produce only those documents that are conspicuously targeted by the requesting party as relevant to the case and material to its outcome.

III – Most Salient Features of the Prague Rules

With this landscape in mind, the Prague Rules encourage arbitrators to adopt (and parties to accept) a more interventive role. This backdrop is expressed in the following fundamental features:

- The tribunal is entitled and encouraged to take an active role in finding facts, and may request documents from the parties, appoint experts, perform site inspections, and take any other actions it deems appropriate. In so doing, the tribunal may impose a cut-off date to produce evidence. (Art. 3)
- The tribunal may order the sbmission of documents that are relevant and material to the outcome of the case, are not in the public domain or are in the possession of the opposing party or third-parties. It shall in any case avoid extensive document production, including any form of e-discovery (Art. 4)
- The tribunal may decide not to call witnesses it considers irrelevant, immaterial, unreasonably burdensome, duplicative or for any other material reasons not necessary for the resolution of the dispute before them. The tribunal shall conduct the examination of witnesses and may reject questions that are irrelevant, immaterial, or redundant. The tribunal may also impose other restrictions on the examination, such as time limits, order of deposition, or types of questions that are allowed (Art. 5).
- The tribunal may appoint experts with specialized knowledge. When parties appoint their experts, the tribunal may instruct them to establish a joint table of contents for their reports, covering the issues they consider relevant, and it may also instruct the experts to render a joint report. (Art. 6)

[7] See Art. 21(4) of the Law Nr. 9.307 of 23 September 1996, amended by Law Nr. 13.129 of 26 May 2015: "The arbitrator or the arbitral tribunal shall, at the beginning of the procedure, try to conciliate the parties, applying, to the extent possible, Article 28 of this Law".

- If the tribunal deems appropriate, it may apply legal provisions not pleaded by the parties, including public policy rules, provided that the parties are given the opportunity to present their views. (Art. 7)
- The hearing will only take place if one of the parties so requests or the tribunal finds it appropriate. When that happens, the hearing shall take place in the most cost-efficient manner, with the reduction of its duration and the use of electronic means, if possible. (Art. 8).
- Unless one of the parties objects, the tribunal shall assist the parties in reaching a settlement. In so doing, the tribunal may express its preliminary views (if neither party objects), and the tribunal or one of its members may act as mediator with the written consent of all parties. If mediation fails, the arbitrator in question will only resume her/his office if all the parties expressly consent to that. (Art. 9).

More importantly, arbitrators are encouraged to hold a case management conference without undue delay, where they shall:

> *"a. clarify with the Parties their respective positions with regard to:*
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> *i. the relief sought by the Parties;*
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> *ii. the facts which are undisputed between the Parties and the facts which are disputed;*
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> *iii. the legal grounds on which the Parties base their positions; and*
>
> *b. fix a procedural timetable."* (Art. 2)

Further, the tribunal may 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 – 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 position;*
>
> *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 defense; and/or*
>
> *e. its preliminary view on the allocation of the burden of proof between Parties."* (Art. 2)

The tribunal may share its preliminary views "with regard to the burden of proof or the relief sought, the disputed issues, and the weight and relevance of evidence submitted by the Parties"

(Art. 2.5). The tribunal is also "entitled and encouraged to take an active role in establishing the facts of the case which it considers relevant for the resolution of the dispute" (without relieving the parties from their burden of proof – see Art. 3.1).

IV – The Prague Rules and due process

This summary raises two fundamental questions. On the one hand, where does fair and equitable treatment, or due process, stand in the Prague Rules? On the other, where lies the duty of the parties to put the proceeding in motion? These questions are pertinent because one of the central features of the Prague Rules is the duty of the tribunal to act in a proactive manner.

However, the Prague Rules do not relieve the parties from the burden of proof, and much less do they allow the tribunal to subrogate in the parties' duties (and rights) to present and make their case.

Secondly, there is no power of the arbitral tribunal that could be exercised without giving the parties the opportunity to present their views. Due regard must always be given to mandatory provisions of the "lex arbitri" (Art. Art. 1.3).

Lastly but surely not the least, the Prague Rules cannot apply to an arbitration where the parties have agreed on its exclusion, and the arbitral tribunal can only apply the Prague Rules after hearing the parties (Art. 1.1 and 1.2). That is what it takes to stay in strict compliance with due process.

In this regard, it is worth mentioning that the parties may opt to apply the Rules, or any part thereof, or even exclude any particular provision (such as Art. 4 related to *"prohibition"* on discovery), and may do so in the arbitration agreement or later on, at any stage during the proceedings. Flexibility and tailor-making are the keywords: parties may apply them, exclude them, and apply (or exclude) particular provisions thereof. The arbitral tribunal may, however, apply the Prague Rules—in whole or just in part—when the parties do not reach an agreement in that respect, but in any case only after having heard them.

V – The Prague Rules and the IBA Rules on the Taking of Evidence in International Arbitration

These observations lead us to question what is so fundamentally different in the Prague Rules and the IBA Rules on the Taking of Evidence. Indeed, in the latter one can see that arbitral

tribunals enjoy the same powers as they do under the Prague Rules, with minor exceptions or slightly nuanced provisions.[8] More to the point, the IBA Rules also provide room for a more "muscular" approach, and for a more flexible manner in the conduct of the cases. In other words, under the IBA Rules, arbitral tribunals may also take an active role and conduct the case more efficiently by exercising broad powers.

However, if one reads both Rules in a careful and dispassionate manner, and concedes to a premise drawn from actual experiences that one thing is what has been written in the IBA Rules and the other totally different is the practice that they have been subject to, the contrast could not be more staggering. Also, reading the IBA Rules, one quickly concludes that there is a lack of a "broad mandate" given to tribunals to act more proactively, which is precisely one of the essential messages of the Prague Rules.

VII – The overarching mindset of the Prague Rules

In exercising its powers, the arbitral tribunal is *encouraged* to actively manage the case, and to push towards a swift and cost-efficient proceeding. This is the overarching mindset of the Prague Rules and the linchpin around which every provision of the Prague Rules revolves. In sum, the Prague Rules are enshrined by a mandate that the IBA Rules do not provide and that the players fear to use under that setting.

Inasmuch as the Prague Rules aim at providing alternatives to "standardized" practices in international arbitration, they represent a regression, if regression is the proper word to classify more options to the parties, more proactiveness, and thus more efficiency in the conduct of arbitrations.

It is also imperative to bear in mind that the Prague Rules are not meant to compete with the IBA Rules but should instead be seen as an addition or alternative to them.[9] It merely means more choices to the parties.

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[8] See a comparison chart by Guillermo Argerich, Sol Argerich, Francisco da Silva Esteves, and Juan Jorge, Reglas de Praga: nuevas normas de soft law para procedimientos en el arbitraje internacional, Part I & II, accessible at praguerules.com/upload/iblock/71f/71f1e3c3798c732265837fa883de2043.pdf and http://praguerules.com/upload/iblock/602/6029a88fc922b016349dfec3147b86d1.pdf

[9] See Duarte G Henriques, "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?", in ASA Bull. 2/2018, 351 et seq.

All in all, one should concede that the Prague Rules are not on any side of the fence of the debate between "civil law" and "common law", and not even on a "no man's land" between these two cultures. This is most likely a misplaced debate. By the same token, the Prague Rules are not on the side of "flexibility" against "predictability" that the IBA Rules may represent. As suggested earlier, it should not be taken for granted that the IBA Rules will never be applied in a "non-standardized" manner by a "*rebel"* tribunal. In many ways, the IBA Rules may also bear a certain level of unpredictability in themselves, depending mostly on the decision maker applying them. All things considered, what really matters is the level of knowledge the parties may have about the adjudicator.

The debate should rather be placed between standards—and perhaps crystallized practices—and a proactive efficiency. Indeed, the tenet of the Prague Rules is precisely that the use of powers in a more proactive fashion will lead to cost and time savings and will enhance efficiency on the arbitration proceeding. Tribunals will not waste their time in lengthy submissions, needless hours of cross-examinations, and countless volumes of documents. All this with a view to revamp the efficiency of the old days of arbitration, providing the parties with one more option on the way their case should be conducted.

Regression? Maybe, but most likely for the better.

And after all, arbitration is about parties' choices, about alternatives and about diversity.