

International Arbitration Alert

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Launch of the “Prague Rules”: an Attempt to Improve Efficiency in International Arbitration

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In December 2018 the “Prague Rules” were released, providing users of international arbitration with suggested streamlined procedures aimed at increasing speed and reducing cost. It is intended that this will be achieved largely through arbitral tribunals taking a more proactive, inquisitorial approach, through the volume of evidence being significantly curtailed and through hearings being avoided where appropriate. They are designed to be more aligned with a civil law approach than that of the common law, but they are in principle applicable to any dispute, regardless of the governing law of the underlying contract or the place of arbitration. Some commentators have expressed concerns that these measures may adversely impact the quality of arbitral outcomes, and certainly there is often a trade-off between time and cost on the one hand and reliability of decision-making on the other. Time will tell as to how widely the Prague Rules are adopted, but some of the principles suggested may merit consideration - especially for lower value and less complex disputes.

An alternative approach

The official name of the Prague Rules – the “*Rules on the Efficient Conduct of Proceedings in International Arbitration*” – indicates their aspiration: to make arbitrations more efficient, resulting in time and cost savings to the parties. They aim to do so by moving away from document disclosure, witness evidence and cross-examination to a more “civil law” or “inquisitorial” approach.

The Prague Rules will operate in conjunction with institutional arbitration rules and can be tailored to suit the requirements of individual disputes. Therefore, they can be adopted in an arbitration agreement or only once disputes have arisen, and adoption can be of the full text, only a part or a modified version, and can be binding or by way of guidelines.

The Prague Rules contain the following key provisions relating to evidence:

- **The tribunal is given a mandate to be proactive in terms of fact-finding and case management.** Much of the work should be done at the outset: the tribunal is required to hold a case management conference “without any unjustifiable delay” at which it is to be clarified what relief the parties are seeking, which facts are

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disputed/undisputed and the legal grounds on which the parties base their positions. The tribunal may also – at the case management conference or later – share preliminary views on the allocation of the burden of proof between the parties, the relief sought, the disputed issues and the weight and relevance of the parties’ evidence. Because tribunals tend to be reluctant to express preliminary views for fear of challenges, the Rules expressly state that doing so shall not indicate lack of independence or impartiality, and cannot constitute a ground for disqualification.

- **No (or limited) document production/discovery:** The Prague Rules state that “generally” there shall not be any form of document production, including e-discovery. Instead, documentary evidence will be limited to documents that each party relies on in support of its case and any documents which the tribunal has ordered should be produced pursuant to a specific document request.
- **Fact witness evidence must be relevant and material:** The Prague Rules require the parties to identify why the testimony of each fact witness it proposes to rely on will be relevant and material to the outcome of the case. The tribunal (and not the parties) decides which witnesses should appear for cross-examination and shall not call a witness whose testimony it considers “irrelevant, immaterial, unreasonably burdensome, duplicative or for any other reasons not necessary”.
- **Tribunal-appointed experts:** The primary position is that there should be tribunal-appointed experts, rather than party-appointed experts which is currently the norm. In theory, this could result in substantial cost savings because there would generally be one (rather than several) experts on a specific issue and there would not be any need for responsive reports. There is however a risk that costs may in fact become higher, because parties are not precluded from also appointing their own experts.
- **No hearings in appropriate cases:** Cases should be decided on a “document-only” basis if appropriate. If a hearing does take place, it should be as short as possible and a cost-saving measure such as video, electronic and telephone communication should be adopted if possible so to avoid unnecessary travel costs.

The Prague Rules are not only concerned with evidential matters but also include the following:

- **Amicable settlement:** Unless a party objects, the tribunal may assist the parties in settlement discussions at any stage of the arbitration. Controversially, an arbitrator may also, if the parties consent, act as a mediator.
- **Iura novit curia:** The tribunal may apply legal provisions and rely on authorities not pleaded by the parties, but only if it has sought the parties’ views on such authorities beforehand.

***The Rules on the Efficient Conduct of Proceedings in International Arbitration*, launched in Prague on 14 December 2018 in cooperation with Global Arbitration Review**