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TAKING OF EVIDENCE IN
INTERNATIONAL ARBITRATION:
IBA RULES VERSUS PRAGUE RULES

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FOREWORD

Arbitration is often regarded as providing advantages over national court litigation for resolving disputes.

IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) were first published in 1999 as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration. IBA Rules have been revised in 2010 and in late 2020, having gained wide acceptance within the international arbitral community.

However, due to complaints raised by the arbitration community regarding arbitral proceedings inefficiency in terms of time and costs, another working group drafted Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (“Prague Rules”), which were released in December 2018.

In this paper, we intend to provide an overview on the main differences and similarities between IBA Rules and Prague Rules.

I. GENERALITIES ABOUT IBA RULES AND PRAGUE RULES

IBA RULES

In international arbitration, it is common for litigants to come from very different legal systems.

As such, IBA Rules are a comprehensive set of rules which are intended to *provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions* (Preamble I).

The main goal of IBA Rules is to fill the gap between all different legal systems rules on the taking of evidence, and more specifically to minimize the differences and find the balance between “common law” and “civil law” origin practitioners, particularly relating to evidentiary matters.

IBA Rules have often been adopted by parties and arbitral tribunals, more as guidance in determining evidential matters rather than as mandatory rules.

IBA Rules have the advantage of allowing a more transnational approach and avoiding discussions about the applicability of evidential rules.

PRAGUE RULES

Prague Rules were drafted by a working group predominantly formed by representatives of civil law jurisdictions.

As such, Prague Rules seek to promote procedural efficiency in international arbitration by adopting procedures more akin to a civil law inquisitorial litigation style.

The distinction between the inquisitorial approach and the adversarial approach rests on the distribution of burdens and powers between parties and arbitrators.

An inquisitorial proceeding relies on an active role of the arbitrator, who may take initiative both in fact-finding (production of evidence) and in the ascertainment of the law.

In turn, the adversarial approach burdens the parties with those activities and confers upon the arbitrator a more passive stance.

Prague Rules consist of 12 articles, which deal with the arbitral tribunal's proactive role, fact finding, documentary evidence, fact witnesses, experts and assistance in amicable settlements.

2. MAIN DIFFERENCES AND SIMILARITIES

Proactive Approach and Case Management

Prague Rules expressly state that *the arbitral 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* (Article 3.1.).

The arbitral tribunal is given the power to indicate, at the case management conference, its preliminary views on the issues in dispute, the relief sought and the evidence submitted (Article 2.4(e)).

Although IBA Rules have no mandatory rule for the arbitral tribunal to adopt an active role, Article 2.3. of IBA Rules also authorizes the arbitral tribunal to unveil to the parties the issues it deems relevant, as well as the factual and evidential material it considers necessary to the resolution of the dispute.

Hearings

Prague Rules even suggest not having a hearing, and when possible resolving the dispute on a document basis only (Article 8.1). Parties must request a hearing, but the rules are silent on whether the tribunal retains discretion over the decision to hold a hearing following such a request or whether any request must be automatically granted (Article 8.2).

In turn, the IBA Rules contain detailed provisions for conducting the final evidentiary hearing (Article 8).

Document Production

Prague Rules limit document production, with the arbitral tribunal and the parties being "*encouraged to avoid any form of document production, including e-discovery*" (Article 4.2).

Under IBA Rules (Article 3.2.) parties shall submit all documents available and relevant to the dispute.

Number of Witnesses

Under Prague Rules, the arbitral tribunal will have the final say regarding the number of witnesses to be heard throughout the proceedings (Article 5). After having read the witness's written statements and considered the facts of the case, the arbitral tribunal may reject calling certain witnesses for examination, if it deems their testimony irrelevant or unnecessary to the resolution of the dispute.

Similarly, under Article 8.2. of IBA Rules, *the arbitral tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2.*

3. MAIN DIFFERENCES AND SIMILARITIES (CONT.)

Examination of Witnesses and Witness Statements

Under Prague Rules, examination of witnesses is made through a cross-examination process, which *shall be conducted under the direction and control of the arbitral tribunal* (Article 5.9.).

IBA Rules follow the same cross-examination approach, as set forth in Article 8.3.

Prague Rules do not stipulate the content of witness statements nor admit their additional submission or revision, contrarily to Articles 4.5. and 4.6. of IBA Rules.

Experts

Under Prague Rules, the arbitral tribunal may appoint an expert or a joint expert commission, at its own initiative or at request, after hearing the parties (Article 6.1.).

Under the IBA Rules, tribunal-appointed experts are a possibility, but party-appointed experts are more common (Article 5).

Settlement

Under Prague Rules, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the proceedings, unless the parties object (Article 9). Further, upon the prior written consent of all parties, any arbitrator may act as a mediator to assist in the amicable settlement of the dispute.

If a settlement is not achieved, the arbitrator who acted as a mediator requires the written consent of all parties in order to continue to act as an arbitrator in the proceedings.

IBA Rules make no provision for members of the arbitral tribunal to act as mediators of the parties.

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Under Prague Rules, the arbitral tribunal may determine the applicable law on its own initiative and apply legal provisions that were not set out by the parties (Article 7). Notwithstanding, the arbitral tribunal is obliged to hear the parties on the legal provisions it intends to apply.

IBA Rules do not include this principle.

4. CONCLUSIONS

Arbitration is very often a preferred type of dispute resolution because of its flexibility and openness to the parties' choices regarding most procedural issues.

Despite its differences, Prague Rules are not wildly different from IBA Rules, because they have some procedural aspects in common.

The underlying difference between the two is that IBA Rules are more aligned with common law, and offer an adversarial approach to arbitration when compared to Prague Rules.

Prague Rules, on the other hand, openly adopt a more inquisitorial approach more in line with the civil law tradition.

Whether or not to adopt IBA Rules or Prague Rules in whole or in part in an arbitration proceeding mainly depends on what the parties deem most practical according to their own legal traditions.

IBA Rules intend to harmonize the arbitration practice by finding a compromise between civil law and common law, whereas Prague Rules are relatively new and are more exclusively tailored for civil law.

IBA Rules might be more suitable to a party domiciled in a common law country. In turn, Prague Rules offer a more comprehensive approach to arbitration for civil law parties.

The choice of the applicable rules can have an impact on the costs and duration of the proceedings but also on the parties' right to be heard, so these factors must be taken into consideration by the parties when choosing the procedural rules for their dispute.

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ABOUT US

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