PRAGUE rules

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The Prague Rules: An Attack on Perceived Common Law or "American" Discovery Excesses?

BY JEREMY M. GOODMAN

The Rules on the Efficient Conduct of Proceedings in International Arbitration (the "Prague Rules") were signed in Prague in December, 2018.[1] While they bear many similarities to other international arbitration rule sets, they differ in important ways that arbitral parties should consider. In particular, some view the Prague Rules as a direct attack on perceived "discovery" excesses. It remains to be seen whether the Prague Rules will have that effect, or even obtain widespread adoption by international parties. But, either way, it is worth the time for neutrals and parties to understand them and, more importantly, the reason some parties think they are necessary.

Arbitration is by design a voluntary party-driven process. Parties agree, mostly in advance and before a dispute arises, exactly how an eventual dispute will be resolved. This is typically done with an eye towards ensuring that the resolution of disputes will be as fair, cost-effective, and expeditious as possible. How the parties will exchange information, or conduct "discovery" in U.S. terms, is a critical consideration—especially in international arbitration when parties are from different countries and may have very different norms for information exchange.

There is a perception among many international parties that U.S. or "American-style" discovery, with its common law origins, has permeated international arbitration and contributed to significant and unnecessary cost and delays.[2] While there are certainly counterpoints, and arguments that the parties themselves rather than the rules create this problem, this perception has at least some merit. In fact, setting aside arbitration, civil litigators have long complained about this very problem in U.S. courts themselves. In 2015, the U.S. amended its Federal Rules of Civil Procedure to ensure greater "proportionality" in civil discovery to address these very concerns (to what actual effect, if any, is a subject for another article).

This perception is especially worrisome for parties from many civil law backgrounds where "discovery" is often much more limited and where judges regularly exercise much greater control. Enter the Prague Rules, which some authors cleverly coined "'Civil' War On The Evidence In International Arbitration."[3]

The Prague Rules were drafted by a working group made up of formed of representatives from predominantly civil law jurisdictions.[4] There were forty-six members of the group, representing thirty-one countries.[5] Notably absent from the list of representative jurisdictions was the U.S. While perhaps not an intentional slight, it seems abundantly clear what the intended outcome was: something different and very non-U.S.

Ultimately, there are many similarities between the Prague Rules and other international arbitral rules frequently used, including the commonly used IBA Rules on the Taking of Evidence in International Arbitration. There are also important differences, primarily those actively encouraging the arbitral tribunal to take a more proactive role in fact finding and limitation of discovery. Article 4.2 even goes so far as encouraging parties and tribunals to "avoid any form of document production, including e-discovery."[6]

This author believes it unlikely that the Prague Rules will receive widespread use and acceptance. However, it is a mistake to ignore the reasons they were designed. Parties are dissatisfied. They have told us time and time again that the exchange of information in arbitration, or "discovery", needs to be quicker, more efficient, more tailored, and more proportional—or the arbitral goals of fair, cost-effective, and expeditious proceedings may pass us by. So far, enough parties have felt sufficiently ignored that they thought the Prague Rules were necessary. If we are to give the parties what they bargained for, we need to keep those concerns in mind, regardless of whether we are operating under the Prague Rules or some other rules construct.

Plus, the Prague Rules are not the only way to accomplish something better. Decisive neutrals, with effective case management skills, unconstrained by the occasionally irrational fear of offending parties for denying some piece of discovery or vacatur for denying the introduction of some evidence, are entirely capable of accomplishing the same thing that the Prague Rules envision. And they can do it under already existing international arbitral rule sets. Perhaps what we really need is more neutrals like that and not a wholesale change of the rules. ADR

ENDNOTES

1. https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (English version)(last visited April 11, 2020.
2. For a discussion regarding perceived "Americanization" of international arbitration, see, George M. von Mehrem and Alana C. Jochum, *Is International Arbitration Becoming Too American?*, 2 Global Bus. L. Rev. 47 (2011), available at https://engagedscholarship.csuohio.edu/gblr/vol2/iss1/6 (last visited April 11, 2020).
3. https://www.dlapiper.com/en/europe/insights/publications/2019/01/the-prague-rules/ (last visited April 11, 2020).
4. https://praguerules.com/working_group/ (last visited April 11, 2020).
5. Id.
6. https://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (last visited April 11, 2020).