A Challenger Approaches: An Assessment of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration

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It is no secret that some lawyers, and perhaps civil law lawyers in particular, have felt frustration with the status quo of the evidentiary processes of international arbitration, premised primarily on the International Bar Association (IBA) Rules on Taking of Evidence in International Arbitration ('IBA Rules'). This outcry was vocalized at the Russian Arbitration Association's Conference held in Moscow in April 2017, which ultimately contributed to the formation of a Working Group that developed the Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules'). This article strives to elucidate the mechanics of the Prague Rules. An understanding of these new provisions, however, cannot be achieved in a vacuum; as such, much of the analysis will touch upon the IBA Rules and their relationship to the Prague Rules. This article provides a critical, comparative analysis of the Prague Rules.

Keywords: Evidence, International Arbitration, Prague Rules, IBA Rules, Witness Testimony, Cross Examination, Adverse inferences, Document Production, Civil Law, Common Law

1 INTRODUCTION

It is no secret that some lawyers, and perhaps civil law lawyers in particular, have felt frustration with the status quo of the evidentiary processes of international arbitration, premised primarily on the International Bar Association (IBA) Rules on Taking of Evidence in International Arbitration (the 'IBA Rules').[1] These frustrations largely stem from the perception that the IBA Rules remain rooted in the common law adversarial approach, which has often been identified as one of

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1 Klaus Peter Berger & J. Ole Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbour for Procedural Management Decisions by International Arbitrators*, 32(3) Arb. Int'l 415 (2016).

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the major causes for increased time and costs in international arbitration.[2] This outcry was vocalized at the Russian Arbitration Association's Conference held in Moscow in April 2017, which ultimately contributed to the formation of a Working Group that developed the Rules on the Efficient Conduct of Proceedings in International Arbitration (the 'Prague Rules').

As the name implies, the Prague Rules are a set of evidentiary provisions aimed at providing guidance for the efficient conduct of international arbitration proceedings but principally from a civil law perspective. They are comparable, in a sense, to the IBA Rules, which offer a similar framework for the taking of evidence in international arbitration.[3] In fact, the creators of the Prague Rules seem to welcome this comparison insofar as their public-facing drafts discuss some deficiencies they perceive in the IBA Rules.[4] While the relationship of the Prague Rules to the IBA Rules is not self-evident, it is clear that the promulgation of the Prague Rules would provide parties in international arbitration with an alternative set of guidelines for the conduct of proceedings, should they choose to select them.

On 14 December 2018, the Prague Rules were officially launched. They have since been voted the 'Best Innovation' in international arbitration as part of the annual Global Arbitration Review Awards, signalling that the Rules have already begun generating substantial interest among practitioners.[5] This article seeks to elucidate the mechanics of the Prague Rules. An understanding of these new provisions, however, cannot be achieved in a vacuum; as such, much of the analysis will touch upon the IBA Rules and their relationship to the Prague Rules.

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2 Rémy Gerbay, *Is the End Nigh Again? An Empirical Assessment of the 'Judicialization' of International Arbitration*, 25(2) Am. Rev. Int'l Arb. 223 (2014); Andreas Respondek, *How Civil Law Principles Could Help Make International Arbitration Proceedings More Time and Cost Effective*, Law Gazette, 33 (2017), www.lawsociety.org.sg/portals/0/Media%20Centre/Law%20Gazette/pdf/SLG_FEB_2017.pdf (accessed 31 Oct. 2018).

3 IBA Rules on the Taking of Evidence in International Arbitration ('IBA Rules') (29 May 2010), www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (accessed 31 Oct. 2018). The IBA Rules are a set of evidentiary guidelines prepared by the Arbitration Committee of the International Bar Association.

4 Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules'), http://praguerules.com/upload/medialibrary/9dc/9dc31ba7799e26473d92961d926948c9.pdf (accessed 12 Mar. 2018).

5 *See* The GA article of Apr. 2019 is authored by Tom Jones Global Arbitration Review Press Release, '*Paris Hosts Largest Ever GAR Awards*' (5 Apr. 2019), https://globalarbitrationreview.com/article/1189726/paris-hosts-largest-ever-gar-awards (accessed 11 Apr. 2019). *See also* Aufsatz von Annett Rombach and Hanna Shalbanava, *The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?*, 53 et seq. (SchiedsVZ: German Arbitration Journal 2019); Lukas Hoder, *Chapter II: The Arbitrator and the Arbitration Procedure, Prague Rules vs. IBA Rules: Taking Evidence in International Arbitration*, in *Austrian Yearbook on International Arbitration* vol. 2019, 157 et seq. (Klausegger et al. eds 2019); Klaus Peter Berger, *Common Law vs. Civil Law in International Arbitration: The Beginning or the End?*, J. Int'l Arb. 295 et seq. (2019); A. Panov & A. Khrapoutski, *The Prague Rules – An Alternative Approach to the Conduct of Proceedings in International Arbitration*, (1) Int'l Com. Arb. Rev. 76 et seq. (2018).

Towards this end, the article proceeds in five parts: first, this article will provide a background to the Prague Rules; second, the article will detail the fundamental differences in assumptions between the Prague Rules and the IBA; third, the article will compare and contrast the parallel provisions in both frameworks; fourth, the article will highlight some innovative features in evidentiary processes sought to be introduced under the Prague Rules. Finally, this article offers some thoughts on potential weaknesses in the framework of the Prague Rules.[6]

1.1 The genesis: Background to the creation of the Prague Rules

The first significant event leading up to adoption of the Prague Rules occurred at the previously mentioned April 2017 Russian Arbitration Association Conference, where a debate commenced on whether a 'creeping Americanization of international arbitration' was in fact underway, by which American norms and practices were imposing undue influence in the sphere of international arbitration.[7] The debate was premised on the perception that the common law approach in document production, cross-examination of witnesses, expert opinions, and other areas has led to increased time and costs in international arbitration. A strong demand was made by predominantly Russian, CIS-region, and other Eastern European lawyers to hear inputs from other civil law practitioners, and on 21 September 2017, a colloquium was convened in Minsk to respond to the concerns raised in Moscow.[8] This meeting marked one of the first presentations on the theoretical proposition of a new set of rules under a working title, the Prague Rules.

One of the most longstanding critiques of the common law approach is the supposed widespread use of American trial techniques in international arbitration.[9] This perception is essentially premised on the notion that 'Americanization of international arbitration' leads to longer and more expensive proceedings.[10] Specifically, two issues have repeatedly been highlighted as contributing unnecessarily to the inefficiency of the arbitral process: (1) document production, and (2)

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[6] This is not to say that the Prague Rules are uniquely problematic. There is no Platonic ideal set of evidentiary rules. This article seeks to identify potential issues with the Prague Rules, as would exist in any guide to evidentiary conduct (including the IBA Rules).

[7] Russian Arbitration Association Press Release, *The IV RAA Annual Conference and Member Meeting* (1 May 2017), https://arbitration.ru/en/press-centr/news/the-iv-raa-annual-conference-and-member-meeting-/ (accessed 11 Apr. 2019).

[8] Praguerules.com, *Meeting and Colloquium of the Working Group in Minsk* (2017), http://praguerules.com/news/meeting-and-colloquium-of-the-working-group-in-minsk/ (accessed 31 Oct. 2018).

[9] Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50 (2010).

[10] Respondek, *supra* n. 2, at 33 ('The most recent Queen Mary Survey "Improvements and Innovations in International Arbitration" reaches one conclusion again that it shares with its predecessors, ie the "lack of speed" in international arbitration proceedings. Reducing time and cost continue to be apparently in the forefront of the participants' concerns of the Queen Mary Survey.').

examination of witnesses. Critics of the IBA regime argue that the common law adversarial system encourages parties to dredge up voluminous (and perhaps immaterial) discovery documents, or attempt so-called 'fishing expeditions' to gather new information on which to base a claim.[11] Another criticism of the common law approach is the manner in which witnesses are examined. The common law tends to rely on evidence presented by live oral testimony of witnesses (fact witnesses and party-appointed expert witnesses) who are then subject to direct and cross-examinations by parties' counsel.[12] Some critics regard this form of examination of witnesses to be redundant and time-consuming in an international setting.

Both of these issues, voluminous document production and witness testimony, are linked to yet another qualm: cautious arbitrators. Critics have expressed that such cautious arbitrators may be responsible for what has come to be known as 'due process paranoia,'[13] whereby adversarial litigants can be seen abusing arbitral proceedings by making specious procedural claims, which arbitrators are loathe to reject for fear of denying a party its due process rights.[14] Arbitrators often fear that their rulings will be overturned or appealed if they do not grant procedural requests that touch upon the parties' due process rights.[15] These represent some of the core concerns that fomented the creation of the Prague Rules.

The Working Group on the Prague Rules, while recognizing that the aim of the IBA Rules was to 'bridge a gap between the common law and civil law traditions of taking evidence,' perceives the existing model as 'still closer to the common law traditions, as [it] follow[s] a more adversarial approach with document production, fact witnesses[,] and party-appointed experts.'[16] Explaining that such 'procedural features are not known or used to the same extent in non-common law jurisdictions,' the Working Group on the Prague Rules expressed 'dissatisf[action] with the time and costs involved in the proceedings' and questioned the efficiency of the adversarial nature of the IBA Rules.[17] In this way, the Prague Rules are designed to be a challenger to the status quo—a new set of evidentiary rules 'based on the inquisitorial model of procedure [that]

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11 Duarte G. Henriques, *The Prague Rules: Competitor, Alternative, or Addition to the IBA Rules on the Taking of Evidence in International Arbitration*?, (2) ASA Bull. 354 (2018).
12 Claudia Solomon, *Obtaining and Submitting Evidence in International Arbitration in the United States*, 25(3) Am. Rev. Int'l Arb. 223 (2014).
13 Henriques, *supra* n. 11, at 351.
14 *Ibid.*, at 354.
15 Berger & Jensen, *supra* n. 1, at 420.
16 Prague Rules, at 2.
17 *Ibid.*

would enhance [a] more active role of the tribunals [and] contribute to increasing efficiency in international arbitration.'[18]

The first draft of the rules appeared on 28 February 2018, followed by a second draft on 11 March 2018,[19] a third draft on 1 September 2018, and the final version on 14 December 2018.[20] The official titles of the first and second drafts were substantially the same: 'Inquisitorial Rules on the Taking of Evidence in International Arbitration.'[21] But, interestingly, with the issuance of the latest draft of the Prague Rules, the drafters have struck the word 'inquisitorial' and 'taking of evidence' and the title now stands as 'Rules on the Efficient Conduct of Proceedings in International Arbitration,' perhaps with a view towards creating a more neutral title and focusing on issues broader than just evidentiary matters.[22]

1.2 The drafters

Admittedly, the true measure of the extent to which principles of the common law were baked into the IBA Rules (or, vice versa, the civil law premises into the Prague Rules) would come from an investigation of the provisions themselves, as opposed to an investigation by proxy of national and professional affiliations. However, given the backlash against the common law assumptions in international arbitration discussed above, which led to the development of the Prague Rules, it is perhaps not greatly surprising that the drafting committee which developed the Rules is represented mostly by lawyers from Russia and other civil law countries.

It is worth pointing out that thirteen of the sixteen drafters of the IBA Rules – more than 80% of the participants – self-identified with a civil law country. That is, the Working Group that developed the IBA Rules certainly had major input from individuals hailing from civil law countries. Indeed, the drafters explicitly '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.'[23] By comparison, only three out of forty-eight of the Prague Rules Working Group members are based in a common law country, and one of these three listed both 'UK and

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18 *Ibid.*
19 Praguerules.com, *Publications* (2018), www.praguerules.com/publications/ (accessed 31 Oct. 2018).
20 Praguerules.com, *Current Draft* (2018), www.praguerules.com/prague_rules/ (accessed 31 Oct. 2018).
21 Technically, the first draft was called 'Inquisitorial Rules of Taking Evidence … ' whereas the second corrected for grammar with 'Inquisitorial Rules *on the* Taking *of* Evidence.'
22 Praguerules.com, *supra* n. 19.
23 IBA Rules, Preamble.

Russia' as the country. Thus, the Prague Rules seem to have been – as advertised – written by individuals who overwhelmingly affiliated with civil law countries. But the takeaway from this comparison is not simply confirmation that the drafters of the Prague Rules were civil law lawyers, but rather that, by appearances, the IBA Rules drafters also had considerable representation from civil law lawyers.

2 FUNDAMENTAL DIFFERENCES IN UNDERLYING ASSUMPTIONS BETWEEN THE IBA RULES AND PRAGUE RULES

2.1 Difference in legal systems and the primary allocation of responsibility in the resolution of disputes

Since 1983, the IBA Rules have enjoyed their status as the only set of guidelines on the taking of evidence in international arbitration that supplements the arbitration agreement between parties and the applicable institutional or ad hoc rules in relation to the conduct of international arbitration.[24] Most recently amended in 2010, these Rules were created with the goal of achieving common ground among practitioners from differing legal systems.[25]

The development of the Prague Rules signals a clash within the international arbitration realm between two prominent legal systems: civil law and common law. As illustrated by the map in Figure 1,[26] civil law jurisdictions outnumber common law jurisdictions. While the common law system is used in Commonwealth countries and the United States, the supporters and drafters of the Prague Rules have a numeric argument in favour of adopting rules grounded in the inquisitorial system. Whereas variations exist among countries within each tradition, 'civil law' countries generally refer to those with an inquisitorial system that relies on the active role of the adjudicator, and 'common law' countries to those which rely on parties' autonomy and reflect an adversarial approach with regard to fact-finding and presenting legal arguments.[27].

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[24] Sameer Sattar, *Document Production and the 2010 IBA Rules on the Taking of Evidence in International Arbitration: A Commentary*, 14(6) Int'l Arb. L. Rev. 210 (2011).

[25] IBA Rules, Forward, provides that the rules 'may be particularly useful when the parties come from different legal cultures.'

[26] Sylvia Edwards Davis, *Understanding the French Legal System: Civil vs Common Law*, www.frenchentree.com/french-property/law/why-is-the-french-legal-system-so-complicated-civil-law-and-common-law/ (accessed 28 Sept. 2018).

[27] Guilherme Rizzo Amaral, *Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills – Part I*, Kluwer Arbitration Blog (5 July 2018), http://arbitrationblog.kluwerarbitration.com/2018/07/05/prague-rules-v-iba-rules-taking-evidence-international-arbitration-tilting-windmills-part/ (accessed 31 Oct. 2018)

Figure 1 Map Comparing Civil and Common Law Countries (JuriGlobe-World Legal Systems, University of Ottawa March 2009), www.juriglobe.ca/eng/index.php (accessed 24 Dec. 2018)

The distinction between these two systems essentially lies in the allocation of power between the parties and the tribunal and the approach adopted by the tribunal in the taking of evidence. In common law jurisdictions, a party-initiated adversarial approach for the disclosure process is considered pivotal to dispute resolution.[28] As such, the common law approach focuses on party autonomy, viewing the adversarial process as a necessary and fair way of ensuring due process to parties. In contrast, civil law jurisdictions follow an inquisitorial approach that seeks to empower the court/tribunal to control the process of taking evidence and further empowers the court/tribunal to carry out its independent investigation of facts and applicable law. The underlying idea is that instead of allowing cases to be controlled by biased arguments of the parties, an inquisitorial process would enable a highly qualified tribunal to conduct its own due diligence. Courts/tribunals in civil law jurisdictions also tend to be more encouraging of settlement possibilities between parties as compared to those in common law jurisdictions.[29]

[28] Gary Born, *International Commercial Arbitration* 1984 (Kluwer Law International 2009).
[29] Henriques, *supra* n. 11, at 354.

2.2 Assumptions inherent in the Prague Rules: Proactive role of arbitral tribunals

The emergence of the new system raises questions as to whether and to what extent the Prague Rules would adequately address the supposed inefficiencies created by the more adversarial IBA Rules. Under the Prague Rules, the tribunal may play an active role in three principal aspects: (1) the tribunal's broad and inquisitorial powers to conduct proceedings, including its ability to proactively inquire into facts and witnesses it deems relevant[30] and to provide preliminary views on particular aspects of the dispute[31]; (2) the tribunal's right to invoke, on its own motion, the applicable law even if not put forth or pleaded by the parties (*iura novit curia*)[32]; and (3) the tribunal's ability to encourage settlements.[33]

3 COMPARING PARALLEL PROVISIONS UNDER THE TWO SETS OF RULES

While various disparities situate the two rules in their respective legal traditions, the IBA Rules and the Prague Rules share many similarities as well. In particular, both sets encourage tribunals to take initiative in identifying relevant factual or legal issues[34]; exclude witness testimony considered irrelevant to the case[35]; limit the number of questions posed to witnesses[36]; and draw adverse inferences.[37] The differences in these apparent similarities lie in *the degree* to which tribunals are empowered to take on an active role in controlling arbitral proceedings and the underlying assumptions. A juxtaposition of the two frameworks illustrates how different the civil law aspects of the Prague Rules are from the common law qualities of the IBA Rules. Specifically, the two frameworks differ along three parallel provisions, highlighted in Table 1, concerning (1) fact witnesses; (2) expert witnesses; and (3) document production. Additionally, the Prague Rules contain rules regarding adverse inferences and cost allocation that aim to increase procedural efficiency.[38]

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30 Prague Rules, Art. 3.
31 *Ibid.*, Art. 2.4(e).
32 *Ibid.*, Art. 7.
33 *Ibid.*, Art. 9.
34 *Ibid.*, Art. 3.1; IBA Rules, Art. 2.3.
35 Prague Rules, Arts 5.2 & 5.3; IBA Rules, Art. 9.2.
36 Prague Rules, Art. 5.6; IBA Rules, Art. 8.2.
37 Prague Rules, Art. 10; IBA Rules, Arts 9.5 & 9.6.
38 *See also* Hoder, *supra* n. 5, at 157 et seq.

Table 1 Comparison of Parallel Provisions

Parallel Provisions	*IBA Rules*	*Prague Rules*
Fact witnesses	• Parties' virtually unlimited right to introduce fact witnesses (Article 4). • Presumption of cross-examination of fact witnesses (Article 8).	• More of a tribunal-controlled process for introducing fact witnesses (Article 5). • Cross-examination may be permitted if the tribunal decides 'after having heard the parties' (Article 5.9).
Expert witnesses	• Expert witnesses can be appointed by the parties (Article 5) or the tribunal (Article 6). • The tribunal, either party, or any party-appointed experts can pose questions to the tribunal-appointed experts (Article 8.3(d)).	• Emphasis on the authority of arbitral tribunals to appoint experts (Article 6). • Appointment of expert(s) does not preclude a party from submitting its own expert report
Production of evidentiary documents	• Presumption in favour of document production (Article 3). • Emphasis on consultation between tribunals and parties regarding the requirements and procedures for producing evidentiary documents (Article 2.2(c)).	• Aim of significantly limiting document production, including e-discovery format (Article 4). • Emphasis on the relevance and materiality of the requested documents with the goal of streamlining the production procedures (Article 4).

3.1 Fact witnesses

3.1[a] *IBA Rules*

The IBA Rules provide a broad right of parties to introduce witnesses of fact, and no right for tribunals to appoint fact witnesses on their own motion. Article 4.1 provides that '[w]ithin the time ordered by the Arbitral Tribunal, each party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.'[39] Article 4.2 further opens the door to fact witnesses by allowing '[a]ny person [to] present evidence as a witness, including a Party or a Party's officer, employee or other representative.'[40] There is an assumption of written witness statements per Article 4.4.[41] The IBA Rules also include an 'adverse inference' provision in Article 4.7, instructing tribunals to disregard the statements of witnesses whose appearances have been requested but 'fail … without a valid reason to appear for formal testimony at an Evidentiary Hearing.'[42]

Further comporting with the common law tradition, the IBA Rules provide a presumption of cross-examination under Article 8.[43] It should be noted, however, that the IBA Rules include checks to prevent complete, unfettered party autonomy. Under Article 8.2, '[t]he Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing.'[44] This control includes the ability of the tribunal to 'limit or exclude any question to, answer by[,] or appearance of a witness'[45] that it considers 'irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise [objectionable].'[46] Thus, while the IBA Rules are grounded in the common law tradition of allowing in party-appointed fact witnesses, they also place appropriate controls to ensure that the tribunal still has authority to preside over proceedings.

3.1[b] *Prague Rules*

The Prague Rules, in contrast, require a more structured, tribunal-controlled process when parties wish to present fact witnesses. Under Article 5.1, parties must first identify the witnesses and the factual circumstances surrounding the subject of their testimonies for review by the tribunal and the opposing party.[47]

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39 IBA Rules, Art. 4.1.
40 *Ibid.*, Art. 4.2.
41 *Ibid.*, Art. 4.4.
42 *Ibid.*, Art. 4.7.
43 *Ibid.*, Art. 8.
44 *Ibid.*, Art. 8.2.
45 *Ibid.*
46 *Ibid.*
47 Prague Rules, Art. 5.1.

After having heard the parties, the tribunal will decide which witnesses will be called for examination.[48] The tribunal is further allowed to decline to call a fact witness if it considers such a witness to be 'irrelevant, immaterial, unreasonably burdensome, duplicative or for any other reasons not necessary for the resolution of the dispute.'[49] This provision contributes to efficiency in the proceedings by making it possible to shorten the duration of hearings, or not have a hearing at all unless there are material witnesses to examine.[50] This does not, however, preclude the party from submitting a witness statement for that witness.[51]

In line with the inquisitorial approach of the civil law system, the 'cross-examination' portion of the hearing is to be 'conducted under the direction and control of the Arbitral Tribunal.'[52] Under Article 5.6, the tribunal is free to reject questions posed to the witnesses if the tribunal finds the questions irrelevant, duplicative, or not material to the outcome of the case.[53] The tribunal may also impose other restrictions, including limitations on time and the type of questions for the examination.[54] While these portions of the rules do not seem substantially different from Article 8.2 of the IBA Rules, the Prague Rules place more overall emphasis on empowering the arbitral tribunal to exercise full control of proceedings.

3.2 Expert witnesses

3.2[a] *IBA Rules*

Under the IBA Rules, two types of expert witnesses may be introduced: party-appointed and tribunal-appointed. Article 5.1 provides that a 'Party may rely on a Party-Appointed Expert as a means of evidence on specific issues.'[55] Consistent with the common law tradition of allowing adverse inferences to be drawn, Article 5.5 instructs tribunals to disregard reports prepared by experts who are requested to appear but fail to do so without valid reason.[56] The IBA Rules also provide the option for tribunals to appoint expert witnesses under Article 6. While this may appear contradictory to the traditional notions of party autonomy and the more

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48 *Ibid.*, Art. 5.2.
49 *Ibid.*, Art. 5.3.
50 Luiza Dutra, *Taking Evidence in International Arbitration: IBA Rules v. Prague Rules*, Changing Perspectives (19 Dec. 2018), www.changing-perspectives.legal/taking-of-evidence-in-international-arbitration-iba-rules-v-prague-rules/# (accessed 21 Dec. 2018).
51 Prague Rules, Art. 5.4.
52 *Ibid.*, Art. 5.9.
53 *Ibid.*
54 *Ibid.*
55 IBA Rules, Art. 5.1.
56 *Ibid.*, Art. 5.5.

passive role of adjudicators in the common law system, Article 6 still embodies these principles by qualifying the tribunal's appointment power with an 'after consult[ation] with the Parties' requirement.[57] The IBA Rules extend this common law mindset to cross-examinations of tribunal-appointed experts in evidentiary hearings. Per Article 8.3(d), the tribunal, either party, or any party-appointed experts are free to question tribunal-appointed experts on issues raised in the experts' reports, the parties' submissions, or party-appointed expert reports.[58]

3.2[b] *Prague Rules*

Under Article 6 of the Prague Rules, it is the primary responsibility of tribunals, not parties, to appoint experts. Under Article 6.1, the tribunal may appoint experts '[a]t the request of a Party or on its own initiative and after having heard the Parties.'[59] While Article 6 begins with language that suggests a general respect afforded to parties, the subsequent provisions illustrate a tribunal-centred expert appointment power. For instance, Article 6.2 details the procedure for appointment of an expert witness which includes soliciting suggestions from parties, even though the tribunal is 'not … bound by the candidates proposed'[60] and the tribunal may instead appoint a candidate of its own choosing under Article 6.2a(i)(b).[61] Further, Article 6.4 permits examination at the hearing at the request of a party or at the tribunal's own initiative.[62]

At the same time, there is a provision permitting party-appointed experts. Article 6.5 states 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' and 'such party-appointed expert shall be called for examination during the hearing.'[63] It is worth emphasizing the usage of the word 'shall,' indicating that it is a mandatory provision.

3.3 Production of evidentiary documents

3.3[a] *IBA Rules*

Under the IBA Rules, there is recognition of at least some form of document production and an emphasis on consultation between tribunals and parties on the

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57 *Ibid.*, Art. 6.1.
58 *Ibid.*, Art. 8.3.
59 Prague Rules, Art. 6.1.
60 *Ibid.*, Art. 6.2(a).
61 *Ibid.*, Art. 6.2(i)(b).
62 *Ibid.*, Art. 6.4.
63 *Ibid.*, Art. 6.5.

'requirements, procedure[,] and format applicable to the production of Documents.'[64] Article 3 requires a party to 'submit all documents available to it on which it relies' to the other party and the tribunal.[65] Additionally, a party may further submit a 'Request to Produce' documents from the other party.[66] This rule of inclusion, however, also includes limiting provisions presumably intended to prevent any 'fishing expeditions.' Article 3.3 requires, inter alia, that parties request the production of only a 'narrow and specific requested category of Documents that are reasonably believed to exist,'[67] and that are relevant to the case and material to its outcome.[68] In the case of documents in electronic form, the same subsection requires for production in an 'efficient and economical manner.'[69]

The IBA Rules also allow the tribunal to request documents from either party. Under Article 3.10, at any time prior to the conclusion of the arbitration, the tribunal may '(i) request any Party to produce Documents, (ii) request any Party to use its best efforts to take, or (iii) itself take, any step that it considers appropriate to obtain Documents from any person or organisation.'[70] Upon such a request, parties may object and seek to exclude documents on grounds identified in Article 9.2,[71] including, inter alia, lack of sufficient relevance,[72] legal impediment or privilege,[73] unreasonable burden of production,[74] and loss or destruction upon a showing of reasonable likelihood.[75]

3.3[b] *Prague Rules*

The Prague Rules envision a circumscribed role for document production. Article 4.1 of the Prague Rules contains a provision similar to Article 3 of the IBA Rules, in that it requires that '[e]ach party shall submit documentary evidence upon which it intends to rely in support of its case as early as possible in the proceedings.' Article 4.2, however, seeks to limit the scope of document production by specifically stating that the tribunal and the parties 'are encouraged to avoid any form of document production, including e-discovery.'[76] Further, tribunals are encouraged

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64 IBA Rules, Art. 2.2(c).
65 *Ibid.*, Art. 3.1. This excludes documents already submitted by the other party.
66 *Ibid.*, Art. 3.2.
67 *Ibid.*, Art. 3.3(a)(ii).
68 *Ibid.*, Art. 3.3(b).
69 *Ibid.*, Art. 3.3(a)(ii).
70 *Ibid.*, Art. 3.10.
71 *Ibid.*
72 *Ibid.*, Art. 9.2(a).
73 *Ibid.*, Art. 9.2(b).
74 *Ibid.*, Art. 9.2(c).
75 *Ibid.*, Art. 9.2(d).
76 Prague Rules, Art. 4.1.

to impose 'cut-off' dates after which document production would not be accepted, 'save for under exceptional circumstances' that are left undefined by the rules.[77]

One way in which the Prague Rules aim to streamline the document production proceedings is by focusing on the relevance and materiality of the requested documents. As per Article 4.3, when a party is seeking specific documents from the other party, it must first request an order from the tribunal,[78] whereas under the IBA Rules, the request for production of documents must be addressed to the other party. Further, the specific documents requested must be relevant and material to the outcome of the case, not in the public domain, and already in the possession of the other party.[79] The Prague Rules are more restrictive than the IBA Rules in this regard, limiting production to actual specific documents as opposed to a category of documents as provided under the IBA Rules.[80] One issue with such a provision is that requesting parties may often be able to identify only the category to which the documents belong, rather than any documents in particular.[81]

The limitations imposed by the Prague Rules must not be interpreted as a complete disposal of document production. There is a difference between controlling the documents brought before the tribunal and wholly restricting the parties' ability to request or introduce documents. Still, the prohibition of certain production methods, such as e-discovery, restrains the amount and types of documents that parties are able to request and must produce.

3.4 Adverse inference and allocation of costs

Though not rooted in differences between civil and common law traditions, the Prague Rules and IBA Rules diverge slightly in their treatment of adverse inferences and cost allocation. Article 10 of the Prague Rules provides that, where a party fails to follow the order of the tribunal, an adverse inference may be drawn.[82] Article 11 provides that, in deciding how to allocate the costs of an award, the tribunal may take into account the conduct of the parties, including any cooperation.[83] These basic notions, adverse inference and cost allocation, are not entirely novel – Article 9 of the IBA Rules contains sections that enable the arbitral tribunal to make similar rulings.

Table 2 juxtaposes the relevant rules.

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77 *Ibid.*, Art. 3.3.
78 *Ibid.*, Art. 4.3.
79 *Ibid.*, Arts 4.5(a)–(c).
80 IBA Rules, Art. 3.3.
81 Michal Kocur, *Why Civil Law Lawyers Do Not Need the Prague Rules*, LinkedIn (20 June 2018), www.linkedin.com/pulse/why-civil-law-lawyers-do-need-prague-rules-michal-kocur/ (accessed 31 Oct. 2018).
82 Prague Rules, Art. 10.
83 *Ibid.*, Art. 11.

Table 2 Comparing the Prague Rules and the IBA Rules

Issue	*IBA Rules*	*Prague Rules*
Adverse inference	Articles 9.5, 9.6 'If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.'	Article 10 'If a Party does not comply with the arbitral tribunal's order(s) or instruction(s), without justifiable grounds, the arbitral Tribunal may draw, where appropriate, an adverse inference with regard to such Party's respective case or issue.'
Cost allocation	Article 9.7 'If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.'	Article 11 'When deciding on the allocation of costs in an award, the arbitral tribunal may take into account the parties' conduct during the arbitral proceedings, including their co-operation and assistance (or the lack thereof) in conducting the proceedings in a cost-efficient and expeditious manner.'

As seen above, the adverse inference sections of the Prague Rules and the IBA Rules are substantially similar. The Prague Rules widen the scope of possible scenarios where the tribunal may draw an adverse inference insofar as they do not explicitly allow the parties an opportunity to rebut the adverse inference with a 'satisfactory explanation.' Further, the Prague Rules do not limit the adverse inference to the production of evidence – as do the IBA Rules – but instead allow the tribunal to draw an adverse inference from disobedience to any order or instruction.

The more interesting comparison to be made, however, concerns the allocation of costs. The IBA Rules limit the tribunal's ability to allocate costs to instances where parties conduct themselves in bad faith.[84] The Prague Rules allow for broader discretion on this point, allowing the tribunal to allocate costs based on the parties' conduct – positive or negative. While such power may be implicit under the IBA Rules, the Prague Rules explicitly allow for costs to be allocated in such a way that reflects the positive behaviour of the parties. Under the Prague Rules, lower costs may be allocated to parties who demonstrate a commitment to cost-efficiency throughout the arbitration. Until the Prague Rules are deployed, the range of possible measures parties can take to telegraph a cost-efficient posture will remain not fully known.

4 SPECIAL FEATURES OF THE PRAGUE RULES

As seen above, some of the articles in the Prague Rules contain provisions which overlap with the guidelines laid out in the IBA Rules, with varying degrees of congruence. However, a number of the articles in the Prague Rules introduce case management tools and evidentiary provisions which have no correspondence to the IBA Rules. Indeed, the explicit intention of the drafters of the Prague Rules was to propose a new, innovative set of evidentiary rules that might mitigate what they perceived as undue influence and inefficiencies from the common law legal tradition.[85] In an effort to understand the major ways in which the Prague Rules and the IBA Rules differ, this article provides an exegesis of the novel features introduced by the Prague Rules.

4.1 Articles 2 and 3: Proactive role of the tribunal and fact finding

Article 2.1 introduces the concept of a 'case management conference,' which is required to be held by the tribunal upon receiving a case file. However, some

[84] IBA Rules, Art. (7).
[85] Rizzo Amaral, *supra* n. 27.

commentators have noted that before the inception of the Prague Rules, case management had existed as an uncontroversial norm in international arbitration.[86] For instance, the International Chamber of Commerce Arbitration Rules ('ICC Rules') contain an entire article devoted to case management and procedural timetables.[87] While the IBA Rules do not explicitly mention case management, nothing in the IBA provisions precludes the notion of case management. The IBA Rules encourage the tribunal to identify the parties, as well as issues that may be relevant to the case and material to its outcome or that otherwise may justify a preliminary determination.[88] Nevertheless, coupled with Article 3 of the Prague Rules (discussed below), Article 2's encouragement of proactivity on the part of the tribunal can be viewed as a new concept meant to facilitate the evidentiary process. For instance, Article 2.4 provides that:

> The arbitral tribunal may … indicate to the parties:
>
> (1) the facts which it considers to be undisputed between the parties and the facts which it considers to be disputed;
> (2) with regard to the disputed facts – the type(s) of evidence the arbitral tribunal would consider to be appropriate to prove the parties' respective positions;
> (3) its understanding of the legal grounds on which the parties base their positions;
> (4) 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 defence;
> (5) its preliminary views on (1) the allocation of the burden of proof between the parties; (2) the relief sought; (3) the disputed issues; and (4) the weight and relevance of evidence submitted by the parties.[89]

Article 2.4(e) is significant because it permits the tribunal to express its preliminary views on contentious points in dispute as opposed to the generally accepted view that a tribunal should be a neutral observer at such an early stage of the proceeding. Article 3 further advances the concept of proactive tribunals envisaged under Article 2 by granting the arbitrators the ability to take a 'proactive role in establishing the facts'[90] by requesting that the parties produce evidence; instructing the

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[86] Kocur, *supra* n. 81 ('These norms are uncontroversial and do not warrant any new set of rules. There is nothing in this respect that would contradict the IBA Rules.').

[87] ICC International Court of Arbitration, *Rules of Arbitration: Article 24 'Case Management Conference and Procedural Timetable'* (2017).

[88] IBA Rules, Art. 2.3.

[89] Prague Rules, Art. 2.4. This article also provides an important clarification to avoid arguments that a tribunal has prejudged the issue: 'Expressing such preliminary views shall not by itself be considered as evidence of the arbitral tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification.'

[90] Prague Rules, Art. 3.1.

parties to appoint experts; and ordering site inspections.[91] Taken together, these rules represent a departure from the common law's adversarial model of litigation where the adjudicator tends to play a more passive role, and party autonomy takes precedence in determining the evidence-taking process in the proceedings.[92] Moreover, Article 2.5 gives arbitrators the power to limit the number and length of submissions made by the parties, and this provision is absent from the IBA Rules.

Interestingly, in the now-outdated March 2018 version of the Prague Rules, Article 2 contained a provision which stated that '[t]he Arbitral Tribunal and the Parties are encouraged to hold a case management conference by means of electronic communication.'[93] This provision is now deleted, but Article 8, which concerns hearings, still promotes the use of cost-efficient communication, explicitly including 'electronic communication.'[94]

4.2 Article 7: *Jura novit cura*

Perhaps the most noteworthy provision of the Prague Rules is that which enables the arbitral tribunal to raise and resolve legal issues entirely of its own volition. This rule, which is known by the Latin phrase *jura novit curia* ('the court knows the law') is introduced by Article 7 of the Prague Rules. In brief, Article 7 provides that, while the burden of proof rests on the parties, 'the arbitral tribunal may apply legal provisions not pleaded by the Parties if it finds it necessary,' but only after first consulting with the parties.[95]

Article 7 also indicates that this power to raise and resolve legal issues can be invoked on the basis of 'public policy' considerations.[96] As indicated above, the proactivity of the tribunal is greatly enhanced when it is charged not only with leading the fact-gathering process, but also with 'knowing the law.' Although the *jura novit curia* principle is not new to the realm of international arbitration, it is new vis-à-vis the IBA Rules because there is no such parallel provision under the IBA Rules.

At first glance, this provision appears to run counter to efficiency, one of the core values espoused by the drafters of the Prague Rules. After all, Article 7 does not absolve the parties from 'doing their homework' as they 'cannot rest on the assumption that the arbitral tribunal will supplement the parties' negligence or

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91 *Ibid.*, Art. 3.2.
92 Henriques, *supra* n. 11, at 356.
93 Prague Rules (Mar. 2018), Art. 3.2.
94 Prague Rules, Art. 8.1.
95 *Ibid.*, Art. 7.2.
96 *Ibid.*

laziness.'[97] Thus, under the Prague Rules, all three agents – the two parties and the tribunal – may be conducting their own investigations of the relevant law. What is more, parties will be incentivized to keep in mind the *jura novit curia* function of the tribunal when preparing their cases, thus broadening their search for potentially relevant legal provisions.[98] In this sense, one might expect that the *jura novit curia* provisions of the Prague Rules will lead to more thorough analysis of the potentially applicable law. But this is only true if the law in question is clear and 'knowable' in the way that facts are knowable.[99] Often, however, the substance of law may not be clear because the legal subject matter is itself opaque, or because the parties' international perspectives create room for dissention. For common law lawyers, resolving a legal question entirely *sua sponte* is cause for concern, especially when the parties' legal and national backgrounds admit room for disagreement over what the law means. For a common lawyer, *jura novit curia* implicates due process concerns and the right to be heard because a tribunal can make findings without hearing the parties. The reality is that Article 7.2 of the Prague Rules might address common law concerns because this provision expressly requires the tribunal to ensure that 'the parties have been given an opportunity to express their views in relation to such legal authorities.'[100]

Finally, while the circumstances in which an arbitral tribunal might apply law on the basis of public policy are not abundantly clear, this provision certainly enhances the power of the tribunal and forces it to be 'stronger' than it would be in a common law context.

4.3 Article 9: Assistance in amicable settlement

Another noteworthy feature of the Prague Rules is that they encourage the tribunal to 'assist the parties in reaching an amicable settlement of the dispute,'[101] and even enable the tribunal to 'act as a mediator' to further this goal.[102] This provision is in line with the approach that arbitrators from civil law systems tend to adopt, in that they play an active role in encouraging and facilitating settlement discussions between parties.

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97 Henriques, *supra* n. 11, at 360.

98 Frédéric Gilles Sourgens, Kabir Duggal & Ian A. Laird, *Evidence in International Investment Arbitration* Ch. 7 (Oxford University Press 2018), Iura Novit Curia & Proof of Law (2018) ('As a practical matter, *iura novit curia* therefore forces parties to seek out and address uncomfortable but salient areas of law head on.'), para. 7.35.

99 *Ibid.*, para. 7.03 ('[Investor-state arbitration participants] cannot simply assume that a tribunal knows "the law" in the same way that it knows basic arithmetic.').

100 Prague Rules, Art. 7.2.

101 *Ibid.*, Art. 9.1.

102 *Ibid.*, Art. 9.2.

It is notable that there is no such provision in the IBA Rules.[103] However, Appendix IV to the ICC Rules of Arbitration (2017) discusses settling all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC Mediation Rules.[104] An earlier draft of the Prague Rules allowed the tribunal, with the parties' approval, to 'express its preliminary views with regard to the Parties' respective positions'[105] for the purpose of assisting in an amicable settlement of the dispute. This provision has been deleted from the final version of the Prague Rules.

These provisions may be helpful in expediting the proceedings because, on the one hand, parties may feel compelled to focus only on the key issues, and on the other hand, arbitrators may be able to identify claims that are ripe for settlement at the very beginning and assist the parties in reaching an amicable settlement. It is also worth considering whether enabling arbitrators to play an active role in facilitating settlement discussions blurs the boundaries between the processes of arbitration and mediation, where pursuant to Articles 9.2 and 9.3 an arbitrator can also serve as the mediator subject to the prior written consent of all parties involved.[106]

5 POTENTIAL ISSUES WITH THE PRAGUE RULES

As the previous section demonstrates, the Prague Rules seek to introduce a number of novel concepts that are intended to serve as improvements from the current regime of taking evidence and related procedures in international arbitration. From a position of neutrality, this article will attempt to identify potential weaknesses inherent in the Prague Rules. As with all legal provisions, the innovations featured in the Prague Rules cut both ways, positively and negatively.

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[103] The IBA Rules notwithstanding, the topic is expressly addressed in another IBA setting: IBA Guidelines on Conflicts of Interest in International Arbitration, Standard (4) Waiver by the Parties: 'An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such a process, or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to the final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration.'

[104] ICC Rules of Arbitration (2017), App. IVh(i).

[105] Prague Rules, Art. 9.2.

[106] *Ibid.*, Arts 9.2–9.3.

5.1 Allocation of power

Perhaps the most striking feature of the Prague Rules is the way in which they allocate power between the tribunal and the parties. By shifting much of the responsibility to the arbitral tribunal, the Prague Rules may limit the ability of the parties to take decisions. The Prague Rules envision that the arbitral tribunal will lead the case and will be prepared, with a sophisticated level of detail, to guide the process at an early stage of the proceeding. Indeed, the pleadings by the parties are often fairly sparse at the beginning of a dispute. But the Prague Rules still envision much more from a tribunal at such early stage.

The same kind of critique follows on the subject of the *jura novit curia* provision of the Prague Rules as discussed above.

5.2 Perverse incentives

While the Prague Rules seek to improve the efficiency in conducting arbitral proceedings under an inquisitorial approach, it is important to recognize that there are constraints to this approach and several critiques could be raised against it. The premise of the inquisitorial approach is based upon the arbitrator in the case being fully competent and adequately prepared for the proceedings. However, if the arbitrator is not as prepared as envisaged under such an approach or does not possess the required expertise in a matter, the arbitration proceedings may in fact suffer more delays In other words, much more is hanging on an arbitrator's level of preparedness than is, in the adversarial system, hanging on a single party's preparedness: in the adversarial system, if one party is less prepared, the other party can still serve to ensure the arbitrator is properly prepared, a safety net that does not exist in an inquisitorial proceeding.

Further, the Prague Rules not only enable the tribunal to encourage the parties to settle, but they go so far as to allow the arbitrators to act as mediators. In allowing, or even encouraging, arbitrators to act as mediators, pursuant to Articles 9.2 and 9.3, even if all parties consent, it is possible that the lines between arbitration and mediation might become blurred and could result in unanticipated decisions as the decision-maker changes hats (e.g. an offer to settle may indirectly impact how much damages a tribunal might award based on prior knowledge from the mediation process).

5.3 Ambiguous role of public policy considerations

There is something to be said about the curious inclusion of the 'public policy' language in Article 7 (*iura novit curia*), though until the provision is actually

deployed, it is difficult to predict how it will ultimately be used because the article envisions that all parties will consent. Perhaps one of the first questions that is raised by the provision is: what is public policy? Presumably the Prague Rules here refer to 'international public policy,' which is at best a relatively vague and contested group of values.[107] But the real question is when, if ever, it would be appropriate for a tribunal to apply a law that is different than the one that the parties have asserted even if the parties have consented. For instance, the potential value of allowing a tribunal to *sua sponte* raise legal arguments that serve to plug clear gaps in the parties' arguments may be apparent. However, the merits of a tribunal concluding that a given provision must be applied to the arbitration as a matter of public policy due to its status as customary international law, when the parties do not agree, are less certain.

6 CONCLUSION

Born of discontent among lawyers from the civil law tradition who feel that the IBA Rules draw too heavily from common law conventions, it is still unclear whether the Prague Rules may rival the IBA Rules in terms of usage. On the one hand, the Prague Rules provide an attractive alternative to the IBA Rules for parties seeking a stronger tribunal presence – a prospect likely to entice parties (and parties' counsel) familiar with the civil law tradition. On the other hand, given that the drafters of the Prague Rules were open about their desire to create a set of rules less influenced by the common law tradition, it seems unlikely that the Rules will be widely adopted in disputes where one side is represented by a non-civil lawyer and the other side is represented by civil law attorneys. While proponents of the IBA Rules can point to the considerable input that civil law attorneys contributed to the development of those Rules as evidence that the Rules will be fair to both parties, those favouring the Prague Rules cannot similarly claim that they are representative of both groups (it might actually be that the Prague Rules never intended to be representative). This does not mean that the Prague Rules will not become an important component of international arbitration. Instead, the Prague Rules represent a needed addition to the suite of options available to disputants that was previously unavailable – even if the use of the Rules is ultimately confined to a particular subset of disputes.

[107] Of course, there are certain universal values: murder and bribery, for instance, are condemned internationally. Yet, undoubtedly a grey area persists.