Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)

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Note from the Working Group

It has become almost commonplace these days for users of arbitration to be dissatisfied with the time and costs involved in arbitral proceedings.

One of the ways to increase the efficiency of arbitral proceedings is to encourage tribunals to take a more active role in managing the proceedings (as is traditionally done in many civil law countries).

With this in mind a Working Group was formed with representatives from around 30, mainly civil law, countries. The list of Working Group members is enclosed as Appendix I to the Prague Rules. The members of the group conducted a survey on procedural traditions in international arbitration in their respective countries. The list of respondents who filled in and returned the questionnaire is given in Appendix II of the Prague Rules. On the basis of this research the Working Group prepared the first draft of the Rules, which was released in January 2018.

The draft Rules inspired a vigorous debate among arbitration practitioners, and discussions of the draft Rules were held at arbitration events all around the world, specifically in Austria, Belarus, People's Republic of China, France, Georgia, Poland, Portugal, Spain, Russia, Latvia, Lithuania, Sweden, UK, Ukraine and the US. These discussions also revealed that the Rules, initially intended to be used in disputes between companies from civil law countries, could in fact be used in any arbitration proceedings where the nature of the dispute or its amount justifies a more streamlined procedure actively driven by the tribunal, a practice which is generally welcomed by arbitration users.

The feedback received from arbitration practitioners allowed further improvement of the draft Rules and they were made available for signing on 14 December 2018 in Prague. The Working Group wants to thank Assen Alexiev, Hans Bagner, Prof. Dr. Klaus Peter Berger, David Böckenförde, Miroslav Dubovský, Prof. Dr.Cristina Ioana Florescu, Duarte G. Henriques, Alexandre Khrapoutski, Vladimir Khvalei, Dr. Christoph Liebscher, Andrey Panov, Olena Perepelynska, Asko Pohla, Roman Prekop and José Rosell, who made a significant contribution to the draft document.

Preamble to the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration

The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration ("**Prague Rules**") are intended to provide a framework and/or guidance for arbitral tribunals and parties on how to increase efficiency of arbitration by encouraging a more active role for arbitral tribunals in managing proceedings.

The Prague Rules are not intended to replace the arbitration rules provided by various institutions and are designed to supplement the procedure to be agreed by parties or otherwise applied by arbitral tribunals in a particular dispute.

Parties and arbitral tribunals may decide to apply the Prague Rules as a binding document or as guidelines to all or any part of the proceedings. They may also exclude the application of any part of the Prague Rules or decide to apply only part of them.

Arbitral tribunals and parties may also modify the provisions of the Prague Rules by taking into account the particular circumstances of the case.

Article 1. Application of the Prague Rules

1.1. The parties may agree on the application of the Prague Rules before arbitration is initiated or at any stage of the arbitration.

1.2. The arbitral tribunal may apply the Prague Rules or any part thereof upon the parties' agreement or at its own initiative after having heard the parties.

1.3. In all cases, due regard must be given to the mandatory legal provisions of the *lex arbitri* as well as to the applicable arbitration rules and the procedural arrangements of the parties.

1.4. At all stages of the arbitration and in implementing the Prague Rules, the arbitral tribunal shall ensure fair and equal treatment of the parties and provide them with a reasonable opportunity to present their respective cases.

Article 2. Proactive Role of the Arbitral Tribunal

2.1. The arbitral tribunal shall hold a case management conference without any unjustified delay after receiving the case file.

2.2. During the case management conference, the arbitral tribunal shall:

a. discuss with the parties a procedural timetable;

b. clarify with the parties their respective positions with regard to:

i. the relief sought by the parties;

ii. the facts which are undisputed between the parties and the facts which are disputed; and

iii. the legal grounds on which the parties base their positions.

2.3. If the parties' positions have not been sufficiently presented at the time of the case management conference, the arbitral tribunal could deal with the issues mentioned in Article 2.2.b at a later stage of the arbitration.

2.4. The arbitral tribunal may at the case management conference or at any later stage of the arbitration, if it deems it appropriate, 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 – the 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 positions;

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 defence;

e. its preliminary views on:

   i. the allocation of the burden of proof between the parties;

   ii. the relief sought;

   iii. the disputed issues; and

   iv. the weight and relevance of evidence submitted by the parties.

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.

2.5. When establishing the procedural timetable, the arbitral tribunal may decide – after having heard the parties – to determine certain issues of fact or law as preliminary matters, limit the number of rounds for exchange of submissions, the length of submissions, as well as fix strict time limits for the filing thereof, the form and extent of document production (if any).

Article 3. Fact Finding

3.1. 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. This, however, shall not release the parties from their burden of proof.

3.2. In particular, the arbitral tribunal may, after having heard the parties, at any stage of the arbitration and at its own initiative:

a. request any of the parties to submit relevant documentary evidence or make fact witnesses available for oral testimony during the hearing;

b. appoint one or more experts, including on legal issues;

c. order site inspections; and/or

d. for the purposes of fact finding, take any other actions which it deems appropriate.

3.3. The arbitral tribunal shall consider imposing a cut-off date for submission of evidence and not accepting any new evidence after that date, save for under exceptional circumstances.

Article 4. Documentary Evidence

4.1. Each party shall submit documentary evidence upon which it intends to rely in support of its case as early as possible in the proceedings.

4.2. Generally, the arbitral tribunal and the parties are encouraged to avoid any form of document production, including e-discovery.

4.3. However, if a party believes that it would need to request certain documents from the other party, it should indicate this to the arbitral tribunal at the case management conference and explain the reasons why the document production may be needed in this particular case. If the arbitral tribunal is satisfied that the document production may be needed, it should decide on a procedure for document production and make an appropriate provision for it in the procedural timetable.

4.4. A party can request the arbitral tribunal to order document production at a later stage of the arbitration only in exceptional circumstances. Such a request should be granted only if the arbitral tribunal is satisfied that the party could not have made such a request at the case management conference.

4.5. Subject to Articles 4.2–4.4, a party may request the arbitral tribunal to order another party to produce a specific document which:

a. is relevant and material to the outcome of the case;

b. is not in the public domain; and

c. is in the possession of another party or within its power or control.

4.6. The arbitral tribunal, after hearing the party's view on such request, may order it to produce the requested document.

4.7. Documents shall be submitted or produced in photocopies and/or electronically. The submitted or produced documents are presumed to be identical to the originals unless disputed by the other party. However, the arbitral tribunal may, at the request of a party or on its own initiative, order the party submitting or producing the document to present the original of the document for examination by the arbitral tribunal or expert review.

4.8. Any document submitted or produced by a party in the arbitration and not otherwise in the public domain shall be kept confidential by the arbitral tribunal and the other party, and may only be used in connection with that arbitration, save where and to the extent that disclosure may be required of a party by the applicable law.

Article 5. Fact Witnesses

5.1. When filing a statement of claim or defence, or at any other stage of the arbitration which the arbitral tribunal considers appropriate, a party shall identify:

a. each fact witness (if any), on whose testimony the party intends to rely in support of its position;

b. the factual circumstances on which the respective fact witness intends to testify; and

c. the relevance and materiality of the testimony for the outcome of the case.

5.2. The arbitral tribunal, after having heard the parties, will decide which witnesses are to be called for examination during the hearing in accordance with Articles 5.3–5.9 below.

5.3. The arbitral tribunal may decide that a certain witness should not be called for examination during the hearing, either before or after a witness statement has been submitted, in particular if it considers the testimony of such a witness to be irrelevant, immaterial, unreasonably burdensome, duplicative or for any other reasons not necessary for the resolution of the dispute.

5.4. If the arbitral tribunal decides that the witness should not be called for examination during the hearing prior to any witness statement being submitted, this does not, by itself, preclude a party from submitting a witness statement for that witness.

5.5. The arbitral tribunal may also, if it deems it appropriate, itself invite a party to submit a written witness statement of a particular witness before the hearing.

5.6. If a written witness statement is submitted by a party by virtue of Article 5.4 or at the invitation of the arbitral tribunal by virtue of Article 5.5, the arbitral tribunal, upon having heard the parties, may decide that such witness nonetheless should not be called for examination at the hearing.

5.7. However, if a party insists on calling a witness whose witness statement has been submitted by the other party, as a general rule, the arbitral tribunal should call the witness to testify at the hearing, unless there are good reasons not to do so.

5.8. Any decision not to call a witness who has submitted a witness statement does not limit the arbitral tribunal's authority to give as much evidential value to the written witness statement as it deems appropriate.

5.9. At the hearing, the examination of any fact witness shall be conducted under the direction and control of the arbitral tribunal. The arbitral tribunal can reject a question posed to the witness if the arbitral tribunal considers it to be irrelevant, redundant, not material to the outcome of the case or for other reasons. After having heard the parties, the arbitral tribunal may also impose other restrictions, including setting the order of examination of the witnesses, time limits for examination or types of questions to be allowed or hold witness conferences, as it deems appropriate.

Article 6. Experts

6.1. At the request of a party or on its own initiative and after having heard the parties, the arbitral tribunal may appoint one or more independent experts to present a report on disputed matters which require specialised knowledge.

6.2. If the arbitral tribunal decides to appoint an expert, the arbitral tribunal shall:

a. seek suggestions from the parties as to who should be appointed as an expert. For this purpose, the arbitral tribunal may establish the requirements for potential experts, such as qualification, availability, costs, and communicate them to the parties. The arbitral tribunal shall not be bound by the candidates proposed by either party and may:

   i. appoint a candidate:

      a) proposed by any one of the parties; or

      b) identified by the arbitral tribunal itself;

   ii. create a joint expert commission consisting of the candidates proposed by the parties; or

   iii. seek a proposal for a suitable expert from a neutral organisation, such as a chamber of commerce or a professional association;

b. after having heard the parties, approve the terms of reference for the tribunal-appointed expert;

c. request the parties to pay an advance on costs to cover the expert's work in equal proportion. If a party refrains from advancing its share of the costs, this share shall be advanced by the other party;

d. request the parties to provide the expert appointed by the arbitral tribunal with all the information and documents he or she may require to perform his or her duties in connection with the expert examination;

e. monitor the expert's work and keep the parties informed regarding its progress.

6.3. The tribunal-appointed expert shall issue his or her report to the tribunal and the parties.

6.4. At the request of a party or on the arbitral tribunal's own initiative, the expert shall be called for examination at the hearing.

6.5. 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. At the request of any other party or on the arbitral tribunal's own initiative, such party-

appointed expert shall be called for examination during the hearing.

6.6. After having heard the parties, the arbitral tribunal may instruct any party-appointed and/or the tribunal-appointed experts to establish a joint list of questions on the content of their reports, covering the issues that they consider necessary to be reviewed.

6.7. After having heard the parties, the arbitral tribunal may instruct the party-appointed and the tribunal-appointed experts, (if any), to have a conference and to issue a joint report in order to provide the arbitral tribunal with:

a. a list of issues on which the experts agree;

b. a list of issues on which the experts disagree; and

c. if practicable, reasons why the experts disagree.

Article 7. *Iura Novit Curia*

7.1. A party bears the burden of proof with respect to the legal position on which it relies.

7.2. However, the arbitral tribunal may apply legal provisions not pleaded by the parties if it finds it necessary, including, but not limited to, public policy rules. In such cases, the arbitral tribunal shall seek the parties' views on the legal provisions it intends to apply. The arbitral tribunal may also rely on legal authorities even if not submitted by the parties if they relate to legal provisions pleaded by the parties and provided that the parties have been given an opportunity to express their views in relation to such legal authorities.

Article 8. Hearing

8.1. In order to promote cost-efficiency and to the extent appropriate for a particular case, the arbitral tribunal and the parties should seek to resolve the dispute on a documents-only basis.

8.2. If one of the parties requests a hearing or the arbitral tribunal itself finds it appropriate, the parties and the arbitral tribunal shall seek to organise the hearing in the most cost-efficient manner possible, including by limiting the duration

of the hearing and using video, electronic or telephone communication to avoid unnecessary travel costs for arbitrators, parties and other participants.

Article 9. Assistance in Amicable Settlement

9.1. Unless one of the parties objects, the arbitral tribunal may assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration.

9.2. Upon the prior written consent of all parties, any member of the arbitral tribunal may also act as a mediator to assist in the amicable settlement of the case.

9.3. If the mediation does not result in a settlement within an agreed period of time, the member of the arbitral tribunal who has acted as mediator:

a. may continue to act as an arbitrator in the arbitration proceedings after obtaining written consent from all parties at the end of the mediation; or

b. shall terminate his/her mandate in accordance with the applicable arbitration rules if such written consent is not obtained.

Article 10. Adverse Inference

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 it considers appropriate, an adverse inference with regard to such party's respective case or issue.

Article 11. Allocation of Costs

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.

Article 12. Deliberations

12.1. The arbitral tribunal shall use its best efforts to issue the award as soon as possible.

12.2. The arbitral tribunal shall conduct internal discussions on the case before the hearing and hold deliberations as soon as possible thereafter. In the event of documents-only arbitration, the arbitral tribunal shall hold deliberations as soon as possible after all documents have been submitted.

Appendix I. Working Group members

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