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A Critical Look at the Prague Rules: Rules on the Efficient Conduct of Proceedings in International Arbitration

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Due to the increasingly popular dissatisfaction regarding the inefficiency of arbitral proceedings, the Rules on the Efficient Conduct of Proceedings in International Arbitration, also known as the Prague Rules, was launched in December 2018, with the purpose of increasing the efficiency of arbitral proceedings by encouraging arbitral tribunals to take a more proactive role in conducting their procedures. In this article, the provisions of the Prague Rules are examined, in light of those of the IBA Rules on the Taking of Evidence in International Arbitration, in order to determine the efficacy of the Prague Rules on enhancing the efficiency in arbitral proceedings.

The author concludes that more specific and detailed provisions, with respect to what the Rules means by such a "proactive arbitral tribunal," should have been explicitly included in light of the Rules' repeated emphasis on such. Also, the prospective outlook on the Prague Rules is not entirely clear as the text does not appear to fill in the gaps in other widely utilized arbitration rules or to supplement them in a satisfying way. However, given that only a short amount of time has passed since the launch late last year, only time will reveal how effective the Prague Rules will be in increasing the efficiency of arbitral proceedings, in accordance with its intended effect.

Key Words : The Prague Rules, the IBA Rules on the Taking of Evidence in International Arbitration, efficiency in arbitral proceedings, role of arbitral tribunals, exchange of documents in arbitration.

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Ⅰ. Introduction

In light of the increasingly common dissatisfaction among users of arbitration regarding the time and costs associated with arbitral proceedings, the Rules on the Efficient Conduct of Proceedings in International Arbitration, also known as, and hereinafter the "Prague Rules," were officially launched on December 14 of 2018 in an effort to increase the efficiency of arbitral proceedings. The aim of the Prague Rules is to provide guidelines to arbitral tribunals and parties to increase the efficiency of arbitral proceedings by essentially encouraging arbitral tribunals to take more of a proactive role in managing their proceedings.[1)]

Meanwhile, the IBA (International Bar Association) Rules on the Taking of Evidence in International Arbitration (hereinafter the "IBA Rules of Evidence")[2)] are well-known as they have gained a wide acceptance in the international arbitration community, and therefore, parties and arbitral tribunals often use the IBA Rules of Evidence as guidelines and/or apply them as binding rules as to the taking of evidence in their arbitral proceedings.

As the Preamble to the Prague Rules clearly states that the Prague Rules are not intended to replace institutional arbitration rules but are designed to supplement the procedure agreed to by the parties, and also that parties and arbitral tribunals may decide to apply such Rules as a binding document or as guidelines to all or any part of arbitral proceedings, it is quite clear that these Rules run parallel to, as well as an alternative to the IBA Rules of Evidence with respect to exchange and submission of documents and other evidentiary issues, at the very least.[3)]

Therefore, in determining the efficacy of and the prospective outlook on success of the Prague Rules, it is necessary to carefully examine their provisions and characteristics,

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

2) On May 29, 2010, the IBA adopted the IBA Rules on the Taking of Evidence in International Arbitration, a revised version of the original 1999 version which, in turn, had replaced the IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration of 1983.

3) It may be worthy to note that an earlier version of the Prague Rules, of March 11, 2018, was entitled “Inquisitorial Rules on the Taking of Evidence in International Arbitration.” Anke Sessler, Max Stein, “The Prague Rules: Problem Detected, But Imperfectly Solved,” 37 Alternatives to High Cost Litig. 67 (2019).

especially in light of those of the IBA Rules of Evidence. In doing so, in section II, the main principles underlying and the specific provisions of the Prague Rules are examined in detail and those of the IBA Rules of Evidence are discussed in section III, with analysis and commentary on the Prague Rules in section IV, and finally, concluding remarks in section V.

Ⅱ. The Prague Rules

1. The main principle of the Prague Rules: A proactive arbitral tribunal

The main idea underlying the Prague Rules, which is manifest from the Note by the Working Group, the Preamble to the Rules, and throughout the text of the Rules, is that current arbitral proceedings are inefficient in terms of time and costs, and therefore, if arbitral tribunals took a more proactive role in managing their proceedings, the efficiency in the arbitral proceedings would be improved. However, there are no specific provisions indicating how an arbitral tribunal is to be more proactive. Nonetheless, it is noted that the more proactive role occupied by the decision-making authority is traditionally more common in civil law countries,[4] and the Working Group for promulgation of the Prague Rules was formed with representatives from around 30 predominantly civil law countries.[5]

2. Specific provisions of the Prague Rules

In this section, the specific provisions of the 12 Articles of the Prague Rules are examined in detail for a comprehensive overview. First and foremost, the Prague Rules make it clear that the arbitral tribunal may apply the Rules or any part of the Rules

4) Note from the Working Group, para. 2

5) According to Appendix I of the Prague Rules, the Working Group members came from the following countries: Turkey, Bulgaria, Belarus, Hungary, Lithuania, Sweden, Czech Republic, Germany, France, Russia, United Kingdom, Romania, Switzerland, Slovenia, Poland, Armenia, Norway, Portugal, Kazakhstan, Finland, Azerbaijan, Albania, Austria, Brazil, Georgia, Serbia, Ukraine, Slovak Republic, Estonia, Malaysia, New Zealand, and Latvia.

upon parties' agreement, or at its own initiative, after having heard the parties.[6] The Prague Rules provide that at all stages of the proceedings, the parties must be treated fairly and equally and be given a reasonable opportunity to present their cases.[7]

Article 2 is entitled "Proactive role of the arbitral tribunal." The Prague Rules charge arbitral tribunals with a duty to hold a case management conference "without any unjustified delay after receiving the case file." During the case management conference, the arbitral tribunal is to discuss a procedural timetable with the parties, clarify with parties as to the relief sought by them, the undisputed and disputed facts, and the legal grounds on which the parties base their positions.[8] Also, when establishing the procedural timetable, the tribunal may decide, after having heard the parties, to determine certain issues of fact or law as preliminary matters, limit the number of rounds of exchange of submissions, the length of submissions, and fix the time limits for filing, the form and extent of document production.[9]

Additionally, according to Article 2.4, whenever the arbitral tribunal deems appropriate, it may 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 defense; and (e) its preliminary views on allocation of the burden of proof between the parties, the relief sought, the disputed issues, and the weight and relevance of evidence submitted by the parties.

The Prague Rules make it clear that arbitral tribunals are "entitled and encouraged to take a proactive role in establishing the facts of the case which the tribunal considers relevant for the resolution of the dispute."[10] At the same time, it is also clear that parties still bear the burden of proof. While there is no specific definition of what it means to take a "proactive role," Article 3.2 provides a non-exhaustive list of what

6) Art. 1.2 of the Prague Rules.
7) Art. 1.4 of the Prague Rules.
8) Art. 2.2 of the Prague Rules.
9) Art. 2.5 of the Prague Rules.
10) Art. 3.1 of the Prague Rules.

arbitral tribunals may do, as suggested by the wording in Art. 3.2(d), "take any other actions which it deems appropriate," after having heard the parties, for the purposes of fact finding.

With respect to documentary evidence, which Article 4 addresses, generally, arbitral tribunals and the parties are encouraged to avoid any form of document production, including e-discovery under the Prague Rules.[11] However, if a party believes that it needs to request certain documents from the other party, it should indicate such to the arbitral tribunal at the case management conference with supporting reasons for the document production. Then, the arbitral tribunal decides on whether to grant requests for document production.[12] The intended effort to reduce the involved time and costs is manifest in the Prague Rules' limitation on document production to early stages of the proceedings, except for under exceptional circumstances, in which the tribunal is satisfied that the party could not have made such a request for document production at the case management conference.[13]

The party may request the tribunal to order another party to produce a specific document which is relevant and material to the outcome of the case, is not in the public domain, and is in the possession of another party, or within its power or control.[14] However, there is no specific definition of what may be deemed "relevant and material to the outcome of the case."

As to fact witnesses, the Prague Rules provide in Article 5 that arbitral tribunals, after having heard the parties, will decide which witnesses are to be called for examination during the hearing. For instance, an arbitral tribunal may decide that a certain witness should not be called for examination during the hearing, if it considers that the testimony of such a witness is irrelevant, immaterial, unreasonably burdensome, duplicative, or for any other reasons not necessary for the resolution of the dispute.[15] Even if the arbitral tribunal decides that a certain witness should not be called for examination, this does not preclude a party from submitting a witness statement for that witness regardless of the arbitral tribunal's decision.[16] However, the Rules provide

11) Art. 4.2 of the Prague Rules.
12) Art. 4.3 of the Prague Rules.
13) Art. 4.4 of the Prague Rules.
14) Art. 4.5 of the Prague Rues.
15) Art. 5.3 of the Prague Rules.
16) Art. 5.4 of the Prague Rules.

that the arbitral tribunal may still decide, after having heard the parties, that such witness should not be called for examination at the hearing, after a written witness statement has been submitted.[17] Even still, if the 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.[18]

Generally, arbitral tribunals maintain control over examination of any fact witness at the hearing. Thus, 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. Also, tribunals may impose other restrictions, such as setting the order of examination of witnesses, time limits for such examination, among others, as they deem appropriate, after having heard the parties.[19]

Article 6 deals with experts, and in particular, Article 6.7 provides that the tribunal may instruct the party-appointed and the tribunal-appointed experts to have a conference and to issue a joint report in order to provide the tribunal with a list of issues on which the experts agree and disagree, and reasons for disagreement. This provision is notable as it encourages correspondence among the experts in order to streamline the issues, before the tribunal needs to address them.

Article 7.2 provides that arbitral tribunals may rely on legal authority that is 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 authority. Additionally, arbitral tribunals may apply legal provisions that have not been pleaded by the parties if the arbitral tribunals find such application necessary.[20]

Article 8.1 of the Prague Rules explicitly encourages arbitral tribunals to seek to resolve disputes on a documents-only basis, for cost-efficiency. However, upon a party request to have a hearing, or on its own initiative if the arbitral tribunal determines that a hearing is appropriate, then it shall seek to organize the hearing in the most cost-efficient manner possible, such as a hearing enabled by means of video,

17) Art. 5.6 of the Prague Rules.
18) Art. 5.7 of the Prague Rules.
19) Art. 5.9 of the Prague Rules.
20) Art. 7.2 of the Prague Rules.

electronic, or telephone communication, and others in order to avoid unnecessary travel costs for involved parties and arbitrators.[21]

Another notable provision of the Prague Rules is Article 9, in which arbitral tribunals are encouraged to assist parties in reaching an amicable settlement of the dispute at any stage of the arbitral proceeding. Any member of the arbitral tribunal may also act as a mediator to assist in amicable settlement of the dispute, with prior written consent of all parties, according to Article 9.2. If mediation fails to reach a settlement of the dispute in the agreed period of time, the arbitrator who has acted as the mediator may continue to act as an arbitrator for the dispute upon written consent from all parties at the end of the mediation, or he/she shall terminate his/her mandate in accordance with the applicable arbitration rules, if no written consent is given by all parties.[22]

The Prague Rules also provide that arbitral tribunals may draw adverse inferences and/or allocate costs in their arbitral awards, taking into account the parties' conduct during arbitral proceedings in accordance with the general emphasis of cost-efficient and expeditious arbitral proceedings, pursuant to Articles 10 and 11. Lastly, Article 12 ensures that arbitral tribunals shall use their best efforts to issue their arbitral awards as soon as possible.

Ⅲ. The IBA Rules of Evidence

1. Introduction and background of the IBA Rules of Evidence

The IBA Rules of Evidence are flexible in applicability, much like the Prague Rules, upon party agreement or based on arbitral tribunal's determination to apply the Rules. Applicability of the Rules is subject to the mandatory provisions of law agreed to by the parties.[23] If there is a conflict between any provisions of the IBA Rules of Evidence and any institutional, ad hoc, or other rules that apply to the conduct of the particular arbitration, then the arbitral tribunal must apply the IBA Rules of Evidence in the manner that the tribunal determines best in order to accommodate the purposes of

21) Art. 8.2 of the Prague Rules.
22) Art. 9.3 of the Prague Rules.
23) Art. 1.1 of the IBA Rules of Evidence.

all relevant applicable rules.[24)]

In this section, the specific provisions of the IBA Rules of Evidence are examined in detail in order to provide a comprehensive overview, especially in comparison to those provisions of the Prague Rules. It is also evident from the Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration (hereinafter the "Commentary to the IBA Rules of Evidence") as demonstrated below that the IBA Rules were also mindful of procedural economy and efficiency as well.

2. Specific provisions of the IBA Rules of Evidence

Article 2.1 of the IBA Rules of Evidence provides that an arbitral tribunal shall consult the parties at the "earliest appropriate time" in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical, and fair process for the taking of evidence. Therefore, it is clear that the IBA Rules of Evidence are intended to provide guidance to parties and arbitral tribunals in an efficient manner as well. According to the Commentary to the IBA Rules of Evidence, generally, such consultation would coincide with a procedural conference or exchange of views early in the proceedings. This sort of early timing was intended to allow all parties involved to organize the taking of evidence in an efficient, economical, and fair manner.[25)]

Also, during such consultation on evidentiary issues, the scope, timing, and manner of the taking of evidence, such as preparing witness statements and expert reports, requirements, and procedure of document production, the level of confidentiality that would be afforded to evidence, and promotion of efficiency, economy, and conservation of resources in connection with the taking of evidence, may be addressed.[26)] The Commentary to the IBA Rules of Evidence clarifies that the issues subject to discussion at this consultation are neither limited to those enumerated in Article 2.2, nor is Article 2.2 intended to illustrate how evidence should be taken in any particular proceeding. An arbitral tribunal is encouraged to identify to the parties, as early as possible as it considers to be appropriate, any issues that the tribunal may regard as relevant to the case and material to its outcome, and/or for which a

24) Art. 1.3 of the IBA Rules of Evidence.
25) Commentary to the IBA Rules of Evidence, p. 5.
26) Art. 2.2(a)-(e) of the IBA Rules of Evidence.

preliminary determination may be appropriate.[27)]

Article 3 of the IBA Rules of Evidence addresses production of documents in arbitral proceedings. Notably, the text "within the time ordered by the arbitral tribunal" is repeated in this Article and throughout the IBA Rules of Evidence, in order to maintain a maximum flexibility in schedule for the parties and arbitral tribunals, but also suggesting that after having heard the parties, the tribunals retain control over timetables.[28)]

A party may submit to the arbitral tribunal a request to produce documents, and such request must contain (a)(i) a description of each requested document sufficient to identify it, or (ii) a description in sufficient detail of a narrow and specific requested category of documents that are reasonably believed to exist; (b) a statement as to how the requested documents are relevant to the case and material to its outcome; along with (c)(i) a statement that the requested documents are not in the possession, custody, or control of the requesting party, or a statement of reasons why it would be unreasonably burdensome for the requesting party to produce such documents, and (ii) reasons why the requesting party assumes the requested documents are in the possession, custody, or control of another party.[29)]

Article 3 also provides provisions allowing any party to make objections to some or all of the requested documents, pursuant to procedures outlined in Article 3.5, after which the arbitral tribunal needs to rule on such objection(s) in accordance with Articles 3.6, 3.7, and 3.8. With respect to obtaining documents from a non-party to arbitration, the party may ask the arbitral tribunal to "take whatever steps are legally available" to obtain the requested documents, or seek permission from the arbitral tribunal to take such steps itself.[30)] Upon a party's request, the arbitral tribunal shall decide on whether to authorize such request, based on its discretion.[31)] Other provisions of Article 3 deal with forms of submission or production of documents (Art. 3.12), confidentiality of requested documents (Art. 3.13), and other organizational issues, such as taking of evidence in phases, among others (Art. 3.14).

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27) Art. 2.3(a)-(b) of the IBA Rules of Evidence.
28) Commentary to the IBA Rules of Evidence, Art. 3, p. 6.
29) Art. 3.3(a)-(c) of the IBA Rules of Evidence.
30) Art. 3.9 of the IBA Rules of Evidence.
31) Art. 3.9 of the IBA Rules of Evidence.

As the issue of document production is one of the key areas in which arbitration practitioners from common law countries differ greatly from those of civil law countries, the IBA Rules of Evidence have been widely accepted by the international arbitration community for having established what is perceived a balanced approach. As such, any extensive common law jurisdiction style of discovery is generally inappropriate in international arbitration. Instead, requests for documents should be carefully tailored to issues that are relevant and material to the determination of the case, according to the Commentary.[32] However, neither the text of the Rules nor the Commentary to the Rules provides definitions or detailed descriptions of the key terms "relevant" and "material," despite the repeated use of such terms throughout.[33] Additionally, although the Rules provide that arbitral tribunals may take "whatever steps are legally available to obtain the requested documents," or give permission to a requesting party to take such steps, there is no description or instruction as to what these steps may entail. Thus, arbitral tribunals are to exercise their discretion and authority in conducting such matters. In any event, the specificity requirements set forth in Article 3.3 are intended to prevent a broad "fishing expedition;" therefore, a party must describe an individual document in accordance with Article 3.3(a)(i), or "in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist" pursuant to Article 3.3(a)(ii).

This "category" of documents is susceptible to criticism that while "fishing expeditions" are generally inappropriate in arbitration, allowing requests of "category" of documents is overly broad. However, such is qualified by the pretext of "narrow and specific requested," so the tribunal would duly exercise its discretion and decision-making authority in granting or denying such request. It is also worthy to note that the IBA Rules of Evidence require that the party's description of such requested document be simply "sufficient to identify" the document.

Also, decisions regarding the scope of document production lie solely with the arbitral tribunals.[34] Generally, an arbitral tribunal is to order the document production request if the tribunal is convinced of the following: first, that the issues that the requesting party wishes to prove are relevant to the case and material to its outcome,

32) Commentary to the IBA Rules of Evidence, p. 7.
33) The repeated standard text is "relevant to the case and material to its outcome."
34) Commentary to the IBA Rules of Evidence, p. 8.

secondly, none of the reasons for objection set forth in Article 9.2 applies, and thirdly, the requirements provided for in Article 3.3 are satisfied.

Additionally, for efficiency of time, the default by the 2010 revised IBA Rules of Evidence has been changed so that documents are to be produced to the other parties and only to the arbitral tribunal, if it so requests, in light of the observation that it had often been inefficient for arbitrators to review all of the documents at the stage of their production under the previous version of the Rules.[35] Therefore, it is apparent that efficiency of procedures has also been an issue for consideration for the IBA Rules of Evidence, as well.

Article 4 of the IBA Rules of Evidence addresses fact witnesses. In particular, Article 4.9 provides that if a party wishes to present evidence from a person who will not appear voluntarily at its request, the party may ask the arbitral tribunal to take whatever steps are legally available to obtain the testimony of that person, or seek permission from the tribunal to take such steps the party itself. Then, the arbitral tribunal is to decide on the request and shall take, authorize the requesting party to take, or order any other party to take such steps as the tribunal considers appropriate in its discretion that it determines that the testimony of that witness would be relevant to the case and material to its outcome.[36]

Generally, arbitration rules by institutions and national arbitration statutes are usually silent on witness testimony, so the IBA Rules of Evidence serve as a gap-filler in this aspect.[37] Also, the IBA Rules leave it solely to the arbitral tribunal to impose time frames, further emphasizing that with consultation with parties, the arbitral tribunals retain control over procedures.

Additionally, the Commentary indicates that the use of witness statements pursuant to Article 4.4 would enhance the efficiency of the proceedings as submission of witness statements would contribute to reducing the length of oral hearings.[38] The Commentary provides that depending on the circumstances, such as, the requesting party's physical location and proximity to the requested documents, the arbitral tribunal may authorize the party to take the necessary steps to obtain the documents itself.[39]

35) Commentary to the IBA Rules of Evidence, p. 10.
36) Art. 4.9 of the IBA Rules of Evidence.
37) Commentary to the IBA Rules of Evidence, p. 14.
38) Commentary to the IBA Rules of Evidence, p. 16.

Articles 5 and 6 provide fairly lengthy procedures relating to experts, appointed either by a party or parties (Article 5), or by the arbitral tribunal (Article 6). In these articles, what should be included in expert reports, ways to submit revised or additional expert reports, the tribunal's determination to disregard the expert report of which expert who fails to appear for testimony without a valid reason, any objection(s) by the parties as to the tribunal-appointed expert based on qualifications and independence, and a provision as to opportunities for parties to respond to the expert report by the tribunal-appointed expert, among others, are provided. While experts who are appointed by tribunals are to provide expert reports on specific, designated issues only, these provisions, nonetheless, are fairly detailed in order to provide proper guidance to the parties and tribunals, if necessary.

After a brief provision of inspection in Article 7, Article 8 addresses evidentiary hearings procedures. In particular, Article 8.2 explicitly provides that arbitral tribunals shall have complete control over the evidentiary hearing at all times. Therefore, the tribunal may limit or exclude any question, or answer by, or appearance of a witness, if the tribunal considers such to be irrelevant, immaterial, unreasonably burdensome, duplicative, or otherwise covered by a reason for objection set forth in Article 9.2. Also, the Commentary makes clear that these provisions are intended to provide arbitral tribunals the ability to focus on issues that are material to the outcome of the case, again, a way of making hearings more efficient.[40]

Lastly, Article 9 addresses the duty of arbitral tribunals to determine the admissibility, relevance, materiality, and weight of the evidence. In particular, Article 9.2 sets forth grounds based on which the arbitral tribunals may, either upon a party request, or on its own initiative, exclude from evidence or production of any document, statements, oral testimony, or inspection. Article 9.5 clearly provides that in case a party fails to produce any requested document, which it has not objected in due time or fails to produce documents ordered by the arbitral tribunal, the arbitral tribunal may make inferences adverse to the interests of that party. In addition, if a party fails to make available any other relevant evidence without satisfactory explanation, then the tribunals may infer that such evidence would have been adverse to the interests of that

39) Commentary to the IBA Rules of Evidence, p. 18.
40) Commentary to the IBA Rules of Evidence, p. 23.

party, according to the explicit wording of Article 9.6. Finally, if an arbitral tribunal determines that a party failed to conduct itself in good faith in the taking of evidence, then it may, in addition to other measures available under the IBA Rules of Evidence, take such failure into account when assigning the costs of arbitration.[41] The Commentary provides an explanation that Article 9.2(g) is a catch-all provision, which is intended to assure procedural economy, proportionality, fairness, as well as, equality in the case, with hopes that such provision will ensure that the arbitral tribunal provides parties with an effective and efficient hearing.[42]

Ⅳ. Analysis of the Prague Rules and Comments for Potential Betterment

As aforementioned, the Prague Rules were promulgated in order to better address the issues of the currently inefficient arbitral proceedings. In order to make arbitral proceedings more efficient, as most time and monetary resources are involved with document exchange and hearings, especially if they end up being lengthy, efforts to reduce costs involved with such would be an effective way to facilitate efficiency proceedings. But doing away with discovery altogether would make rendering a fair and full resolution impracticable.[43] So, an attempt to strike a balance between legal and cultural disparities of civil and common law jurisdictions has been what the IBA Rules of Evidence have been widely praised for. However, provisions of the IBA Rules of Evidence, provides for fairly extensive and detailed procedures regarding (a) the taking of evidence, in particular, arbitral tribunals' authority to take whatever steps legally available in order to obtain evidence even from a non-party to arbitration,[44] (b) many procedures of objections to document requests, (c) procedures regarding witnesses who will not appear voluntarily pursuant to Article 4.9, in addition to (d) "category" of documents being overly broad. These provisions, among others, primarily reflect the common law practices.[45] On the other hand, one good news is that the

41) Art. 9.7 of the IBA Rules of Evidence.
42) Commentary to the IBA Rules of Evidence, p. 26.
43) L. Tyrone Holt, "Whither Arbitration? What Can be Done to Improve Arbitration and Keep Out Litigation's Ill Effects," 7 DePaul Bus. & Com. L.J. 455, 464-65 (2009).
44) Art. 3.9 of the IBA Rules of Evidence.

Prague Rules do not have such detailed procedures relating to parties' involvement in the taking of evidence.

In this section, the particularities of the Prague Rules that are put in place arguably to make arbitral proceedings more efficient are discussed in order to examine their prospective success in reaching the goal of efficiency.

1. The provisions that may potentially increase the efficiency of proceedings

(1) Expert communication and joint expert reports

Article 6.7 of the Prague Rules encourages arbitral tribunals to instruct experts to correspond with one another in order to streamline the issues and come up with a joint report, which would more likely than not, aid in efficiency of proceedings.

(2) Documents-only basis default

According to Article 8.1 of the Prague Rules, in order to promote cost-efficiency, the disputes should be resolved on a documents-only basis. Upon a party request, or on its own initiative, if the arbitral tribunal finds it appropriate to have a hearing, then such would be organized in the most cost-efficient manner possible.[46] Needless to mention that hearings are both time-consuming and costly, such a default rule of resolving disputes based on documents only, unless upon a request either by a party or the tribunal, may be an effective way of improving efficiency to arbitral proceedings. Moreover, if parties to the dispute opted to adopt such provision of the Prague Rules, then presumably, they agreed to such default provision. Therefore, time and monetary resources that would otherwise have been spent on having an actual hearing(s) would be saved, without compromising the parties' rights to be heard and opportunity to represent their cases.

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45) In common law jurisdictions like the United States, procedures are generally focused on allowing parties to prove or defend themselves. This stage is usually long and expensive, and such sort of party-driven discovery has become the expected practice in American domestic arbitration. Clemence Prevot, "The Taking of Evidence in International Commercial Arbitration: A Compromise Between Common Law and Civil Law," 71 Disp. Resol. J. 73, 80 (2016).

46) Art. 8.2 of the Prague Rules.

2. Other provisions with room for further improvement

(1) What does it mean to be a "proactive" arbitral tribunal?

As seen above, the crux of the Prague Rules in its effort to enhance the efficiency of arbitral proceedings is to encourage arbitral tribunals to take more of a proactive role, but without the specifics as to how to take such "proactive" role. For instance, Article 2 of the Prague Rules sets forth that the management conference should be had without any unjustified delay. During such conference, the procedural timetable, relief sought by the parties, undisputed as well as disputed facts, legal grounds, and preliminary views of the arbitral tribunal on any of these issues may be discussed. Such provision, however, is similar to Article 1.3 of the IBA Rules of Evidence. Moreover, arbitral tribunals may, and not shall, have these management conferences, during which any of the aforementioned issues may get discussed. If preliminary views of the arbitral tribunals are made known to the parties early on in the proceedings, that may reduce time taken with the hearings and overall proceedings because of the streamlined issues. But if an arbitral tribunal chooses not to disclose its preliminary views because the Prague Rules essentially do not require it to, then, no efficiency benefit would be realized. Therefore, the Prague Rules are not that different from those already in existence.

Additionally, Article 2.5 of the Prague Rules allows arbitral tribunals to determine preliminary matters like number of submissions, scope, extent, and form of document production. But such provision, again, is not different from the already widely accepted understanding and current practice in international arbitration that arbitral tribunals remain in control of procedural matters.[47)]

Moreover, despite the text in Article 3.1 that the arbitral tribunal is entitled to and encouraged to take a proactive role in establishing the facts without releasing the parties from their burden of proof, the non-exhaustive list of actions that the tribunal may do, as set forth in Article 3.2,[48)] do not vary greatly from what an arbitral tribunal

47) See, International Arbitration Rules of the International Centre for Dispute Resolution (ICDR), Art. 20; IBA Rules of Evidence, Art. 2; among others.

48) "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

may do pursuant to other commonly invoked arbitral rules.[49]

On the other hand, Article 3.3 of the Prague Rules requires an arbitral tribunal to consider imposing a cut-off date for submission of evidence and not accepting any new evidence after that date, except for exceptional circumstances. While this provision actually provides a specific and particular way for an arbitral tribunal to be more proactive in promoting procedural economy, arbitral tribunals are, again, to merely consider imposing such deadline(s).

Therefore, the overall lack of specific details as to what a more proactive arbitral tribunal should or should not be engaged in, despite the emphasis on the idea of a "proactive tribunal" throughout the Prague Rules, there is no practical differentiating features or characteristics that the Prague Rules offer with respect to the role of arbitral tribunals in terms of increasing efficiency. For instance, Article 3.2(d) only provides inclusive, catch-all type of provision that arbitral tribunals may take any other actions that the tribunal deems appropriate, in addition to those enumerated, rather than specifying what an arbitral tribunal is to do under particular circumstances. This approach, leaving open-ended what an arbitral tribunal should do under the circumstances, is consistent with and much like the widely accepted IBA Rules of Evidence.[50]

Generally, courts in civil law jurisdictions follow inquisitorial traditions, largely taking control of the evidentiary process and not allowing party-initiated disclosure, whereas rather broad, party-initiated disclosure is of tantamount importance in dispute resolution in common law jurisdictions.[51] Therefore, if the drafters of the Prague Rules had intended a "proactive" arbitral tribunal in the sense of taking more of charge as an adjudicator, similar to national court judges, then such proposal to empower arbitral tribunals with more inquisitorial powers should have been more explicit, instead of relying on what may or may not be successfully implied.

Also, the Prague Rules could have explicitly granted more authority to arbitral tribunals, enabling them to make decisions more quickly, putting them essentially in

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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." Article 3.2a-d of the Prague Rules.

49) See, ICC Rules, Art. 25 on Establishing the Facts of the Case; LCIA Arbitration Rules, Art. 22.1(iii) on Additional Powers(of arbitral tribunals, in particular, as to ascertaining relevant facts, etc.).

50) See, Articles 3.9 and 4.9 of the IBA Rules of Evidence.

51) Claudia T. Salomon, Sandra Friedrich, "Obtaining and Submitting Evidence in International Arbitration in the United States," 24 Am. Rev. Int'l Arb. 549, 550 (2013).

charge of proceedings. For a simple example, rather than having arbitral tribunals consider imposing stricter deadlines, the Rules could have actually charged them to do so, shying away from the role of overseer and conducting proceedings as parties have agreed. However, the due process rights of parties should not be compromised, not only because of the risk of the final arbitral award being subject to challenge, but also especially because parties have opted to arbitrate their dispute(s), having foregone their rights to litigate in national courts. Thus, in making any rules more clear and explicit, the importance of parties' due process rights should not get overlooked.

(2) "Efficient" arbitral proceedings by other procedural means

First and foremost, the Prague Rules also limit document production and consultation relating to producing documents to early stages of proceedings. However, this idea of taking care of issues of document production at the earliest possible stage, is not a novel one. For instance, the IBA Rules of Evidence Article 2 takes a similar approach, as aforementioned.

However, in particular, Article 4.2 of the Prague Rules makes abundantly clear that arbitral tribunals and parties should avoid any form of document production. Also, if a party believes that it would need to request certain documents from the other party, it should indicate this to the arbitral tribunal with reasons why such document production may be needed, at the case management conference. Under the IBA Rules of Evidence, any party may submit to a request to produce "within the time ordered by the arbitral tribunal."[52] Thus, although depending on relevant circumstances of each matter, efficiency in procedure may be gained by this arguably earlier timing of requests for document production at the case management conference.

Also, as aforementioned, with respect to the arbitral tribunal's authority to exclude certain evidence, the Prague Rules take an approach similar to that of the IBA Rules of Evidence, without more. Moreover, Article 5.7 of the Prague Rules allows a party to insist on calling a witness even after the tribunal has made known its determination to the parties that such witness testimony would not be necessary. While this may be a good way to respect party autonomy and opportunity to represent their cases, it undermines the decision-making authority of the arbitral tribunal, especially albeit the

52) IBA Rules of Evidence, Art. 3.2.

fact that tribunals are supposed to retain full control over evidentiary matters. Additionally, and more importantly for the purposes of this paper, such provision in Article 5.7 actually seems to run contrary to the principles of procedural economy, which the Prague Rules purportedly seek to achieve. Thus, limiting party's opportunity to contribute to the procedure after the initial consultation with the parties, to an extent necessary, would better promote efficiency in the proceedings and further confirm the authority and finality to arbitral tribunal's decision(s). This suggestion is not to advocate to decrease party autonomy or flexibility in arbitral proceedings but only to further promote procedural economy.[53)]

Furthermore, imposing stricter deadlines for parties' submissions and/or further restrictions on examination of witnesses, among others, may help in increasing the efficiency in arbitral proceedings. It should be noted that putting more restrictions or suggesting them to the current version may compromise party autonomy and discretionary powers and authority of arbitral tribunals. However, if the Prague Rules were intended mainly to resolve the issues of inefficiency in arbitration, then, it must be apparent from the text of such Rules that, they aim to be different, and perhaps more successful than those already in existence, including the already widely utilized IBA Rules of Evidence. Therefore, it would have been far more effective if more specific provisions of practical assistance in efficiency of proceedings had been provided in the text of the Prague Rules.

(3) The "relevant and material" documents

One of the drawbacks of the IBA Rules of Evidence is the lack of clear definitions of what sorts of documents are "relevant" and/or "material" to the outcome of the case and uncertainties that may result from such lack thereof. Nevertheless, this "relevant to the case and material to outcome of the case" language is repeatedly used throughout the Prague Rules, also without making it clear what documents meet the standard of "relevant" and/or "material" documents.

One effective way of promoting efficiency in arbitral proceedings would have been

53) The author would like to note that while limitations on opportunities for parties to add to or contribute in any way to procedural matters are being suggested as possibilities, she is not proposing that due process rights of the involved parties should get undermined in any way.

providing clear definitions and/or standard, whether descriptive and/or illustrative, so that much of time spent on arguing for and against such materiality and relevancy would be curtailed, thereby making the overall proceedings far more efficient.

There is a critical view that such lack of defined or clear standard of "relevant and material" documents in the IBA Rules of Evidence results in lack of uniformity in application of such terms in different cases, especially given that various legal education and background practitioners are at practice in international arbitration.[54] Such lack of uniformity results in less certainty and less predictability; therefore, for uniformity, predictability, and transparency in arbitral proceedings, the standard of "relevant and material" documents should be further defined.[55] For instance, as the definition of "relevance" may reveal disparities due to different legal backgrounds and education, even illustrative and/or descriptive definitions or explanations would be helpful to the users of arbitration in terms of clarity. According to the Federal Rules of Evidence in the United States, as a way of example, evidence is "relevant" if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.[56] If any rules or guidelines used such defined standard as a reference, at the very least, then predictability, certainty, and transparency of admissibility of documents in arbitral proceedings would be enhanced, leading to overall efficiency in proceedings.

(4) Arbitral tribunals' duty to facilitate settlement?

It is generally understood that arbitrators from common law jurisdictions are more likely to perceive their roles as decision-makers, whereas those from civil law jurisdictions are more likely to take a more liberal approach and advocate for and encourage parties to reach a settlement of disputes.[57] Article 9 of the Prague Rules addresses arbitral tribunals' assistance in amicable settlement. The notable, yet rather unfitting provision, especially in the context of arbitration, is that any member of the

54) Pedro J. Martinez-Fraga, "Good Faith, Bad Faith, But Not Losing Faith: A Commentary on the 2010 IBA Rules on the Taking of Evidence in International Arbitration," 43 Geo. J. Int'l L. 387, 403 (2012).
55) Martinez-Fraga, supra note 54, at 404-08.
56) Federal Rules of Evidence, Rule 401.
57) Klaus Peter Berger and J. Ole Jensen, "The Arbitrator's Mandate to Facilitate Settlement," 40 Fordham Int'l L. J. 887, 889 (2017).

arbitral tribunal may also act as a mediator in order to assist in the amicable settlement of the case.[58] While the IBA Rules of Evidence are silent with respect to any arbitrator's capacity to act as a mediator in a matter for which he/she is presiding over, most institutional arbitral rules emphasize the independence and impartiality of arbitrators, to a great extent.[59] When any arbitrator tries to mediate in an effort to assist parties to reach an amicable settlement while arbitral proceedings are in process, the arbitrator would most likely be exposed to the information that he/she originally would not have been if he/she were not acting as a mediator. Therefore, the issues of independence and/or impartiality of that arbitrator may arise. While it is true that Article 9.2 requires a prior written consent by all parties that any arbitral tribunal member act as a mediator, this provision appears to suggest that arbitral tribunals are charged with some additional duty to facilitate settlement, to the extent of acting as a mediator for the same dispute.

Ⅴ. Conclusions

Efficiency in arbitral proceedings, both in terms of time and money, has increasingly been a source of dissatisfaction for the users of arbitration. Since the Prague Rules have launched late last year, only time will tell their efficacy. The outlook on their success, based only on the text of the Rules since there is insufficient empirical data as of now, is not entirely positive because first, there are no specific details of what a "proactive arbitral tribunal" entails, or how such is to be different from the current practice despite the fact that the Prague Rules repeatedly emphasize a more active role to be undertaken by arbitral tribunals. Secondly, the provisions of the Prague Rules do not seem to vary greatly from those already in existence, nor do they supplement, fill the necessary gaps, such as, adding certainty to what may arise to the level of "relevant and material" evidence. Therefore, it is difficult to gauge the potential advantages of the Prague Rules.

Additionally, encouraging arbitral tribunals to assist parties in reaching an amicable

58) Art. 9.2 of the Prague Rules.

59) See, Art. 5.3 of the LCIA Arbitration Rules; Art. 11(1) of the ICC Arbitration Rules; Art. 13 of the ICDR International Dispute Resolution Rules and Procedures.

settlement has its merits. Aside from the aforementioned related issues, however, if such role/obligation of the arbitral tribunal had been explicitly tied to the Rules' predominant idea of a more "proactive" arbitral tribunal, then it may have helped understanding what it means to be a more proactive tribunal, at the very least. While it is not necessary to reinvent the wheel just because such Rules were promulgated later in time than those already in existence, it may have been far more effective if some of the aforementioned issues had been addressed and resolved.

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