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THE PRAGUE RULES AS CHOICE ARCHITECTURE

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ABSTRACT

The Prague Rules, although they are drafted in non-mandatory and facilitative terms, draw attention to a number of ways in which the efficiency of an arbitration could be improved by encouraging the arbitral tribunal to be more proactive. These capabilities are not new - in general tribunals are already free to adopt them under their inherent case management powers and are not prevented from doing so by the IBA Rules. However, the Prague Rules are an attempt to combat a tendency towards a “one size-fits-all” arbitration that has developed as a result of the popularity of the IBA Rules. The insights provided by behavioural economics shed an interesting light on the way in which the Prague Rules may be able to dispel a certain inertia in arbitral procedure, by shaking up preconceptions about how an arbitration should be conducted.

Keywords: Prague Rules, IBA Rules, time and costs, case management, proactive, soft law

Introduction

The Rules on the Efficient Conduct of Proceedings in International Arbitration (popularly known as the “**Prague Rules**”)² have been much talked about since they were first released in draft in early 2018 and adopted in final form at an inaugural conference in Prague on 14 December 2018.

Although they were originally conceived of as an alternative to the IBA Rules on the Taking of Evidence in International Arbitration (the “**IBA Rules**”) that might be more comfortable to parties from civil law traditions, the Working Group notes to the final version of the Prague Rules describe their function in broader terms: “*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*”.

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² Available at https://praguerules.com/prague_rules/, last accessed 20 June 2019.

This underlines an important point about the Prague Rules - while they do not claim to be a universal solution, they may find a niche in circumstances where, for one reason or another, the parties or the arbitral tribunal see the need for an expedited or more agile arbitration procedure.

Criticisms of the Prague Rules

The Prague Rules have come under fire from a number of quarters since their publication. On the one hand it has been said that the rules are redundant: they do not provide for anything that is not already a possibility for an arbitral tribunal exercising the broad case management powers conferred on it by most arbitration laws and institutional arbitral rules³, and in any event do not add much to the IBA Rules, a much-thumbed resource that has been available to parties and arbitral tribunals since 1999⁴. While the Prague Rules' expressly stated aim is to promote a more efficient arbitral process by encouraging arbitral tribunals to be more hands-on, the IBA Rules already allow tribunals to take a proactive role in managing proceedings. For example, the capabilities described in the Prague Rules, for the arbitral tribunal to take a hand in fact finding by appointing its own expert (Article 6), limiting document production (Article 4) or curtailing irrelevant and repetitive witness evidence (Article 5) are already envisaged by the IBA Rules.

On the other hand, the Prague Rules are also sometimes criticized for going too far, for example by refusing the possibility of a request for production of a category of documents (as opposed to a specifically identified document) (Article 4.5), which could be problematic in practice given the difficulties that a party faces in identifying a specific document that it does not itself possess⁵, or by encouraging a tribunal to make known its preliminary views about a wide range of substantive issues at an early stage in the case (Article 2.4). While this latter practice is common in jurisdictions such as Germany, Switzerland and Austria, elsewhere (and even in many civil law countries such as France), an arbitrator would hesitate to be too forthright about his or her views so as not to be accused of seeming to prejudice the case⁶.

³ See for example, Sessler, Anke and Max Stein, "*The Prague Rules: Problem Detected, but Imperfectly Solved*", *Alternatives*, Vol. 37, no. 5, May 2019. The authors nevertheless highlight that "*The Prague Rules are certainly a good reminder of the many powers arbitrators already have but are sometimes reluctant to exercise*".

⁴ See for example, Amaral, Guilherme Rizzo, "*Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills – Part I*", *Kluwer Arbitration Blog*, 5 July 2018.

⁵ See for example, Koncur, Michal, "*Why Lawyers from Civil Law Jurisdictions Do Not Need the Prague Rules*", *Kluwer Arbitration Blog*, 19 August 2018.

⁶ See for example, McIlwrath, Michael, "*The Prague Rules: The Real Cultural War Isn't Over Civil vs Common Law*", *Kluwer Arbitration Blog*, 12 December 2018.

The Prague Rules also expressly encourage the arbitral tribunal to play a role in promoting settlement of the dispute, going so far as to envisage one of the arbitrators (with the express written consent of the parties) taking on the role of mediator (Article 9.2). But what, the critics ask, will happen if the mediation is unsuccessful, and the mediator-arbitrator has in the interim become privy to damaging confidential information (for example, during a caucusing session)?⁷ The Rules put in place an exit strategy, requiring that the mediator-arbitrator stand down if one of the parties is not content for him or her to continue as an arbitrator. But clearly this is not an ideal solution as replacement of the arbitrator will, itself, doubtless generate costs and inefficiencies. One can even imagine the provisions being misused by a party acting in bad faith, proposing mediation simply in order to remove an arbitrator it does not like.

There is an element of truth in these comments. Nevertheless, what should be remembered when considering these criticisms is the overtly non-prescriptive way in which the Prague Rules are drafted. Their preamble and Article 1 both state that the parties or the arbitral tribunal “*may*” apply them in either whole or in part, and the remainder of the rules are full of hortatory language such as “*generally, the arbitral tribunal and the parties are encouraged...*” or “*should seek to...*” or “*shall use [their] best efforts to...*”.

The provisions regarding exclusion of fact witness evidence are a case in point. Article 5.3 allows the arbitral tribunal to decide not to call a witness, even before he or she has submitted a witness statement, for example where the evidence would be irrelevant, immaterial or unreasonably burdensome. Article 5.4 then clarifies that such a decision does not, in itself, prevent a party from submitting a witness statement for that witness. However, according to Article 5.6, once the witness statement is submitted, the tribunal can still decide that the witness should not be called - but nevertheless, “*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*” (Article 5.7).

While critics have expressed reservations about an arbitral tribunal barring witness evidence (potentially even before seeing a witness statement), it seems that in somewhere in all of this back and forth, there is ample room for the parties and tribunal to reach a just and efficient resolution of the issue in the circumstances of each particular case⁸.

⁷ See for example, Doudko, Artem and Olena Golovtchouk, “*Introducing the Young Contender - The Prague Rules*”, *Ukrainian Journal of Business Law*, October 2018.

⁸ Relying, in some circumstances, on the “strong discouragement” that a tribunal’s decision not to call a witness would constitute: see Giarretta, Ben, “*Prague Rules OK?*”, *The Resolver*, Spring 2019.

Choice Architecture

The facilitative language of the Prague Rules brings to mind another recent “hot topic”, following the award of the Nobel Prize to behavioural economist Richard H. Thaler in 2017 - that of the power of the “nudge”. In *“Nudge: Improving Decisions about Health, Wealth and Happiness”*⁹, Thaler and his colleague Cass R. Sunstein argue that the way in which a decision is framed, including for example which option is framed as being the “default”, can have a powerful impact on the choices that people make.

Behavioural economists have highlighted that the way in which people make choices is not always rational: humans display a tendency to inertia and procrastination, they are sensitive to how choices are presented, they react to social influences and they do not handle probabilities very well¹⁰. The field of choice architecture has developed as a study of the ways in which these propensities can, for good or ill, be used to influence decisions of many different types.

As Thaler and Sunstein note, people can be nudged into opting for something that is in fact in their interests (although they may not otherwise have chosen it), or conversely, they may be nudged into a bad choice - in both cases without restricting their freedom of choice by compelling or prohibiting them from doing anything. As the authors say, *“If people want to smoke cigarettes, to eat a lot of candy, to choose an unsuitable health care plan, or to fail to save for retirement, libertarian paternalists will not force them to do otherwise.... A nudge, as we will use the term, is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options”*¹¹.

Importantly, as the authors also point out, the un-nudged choice is not necessarily the best one, as is demonstrated by the body of empirical research showing that people will make irrational and sub-optimal decisions under the influence of various kinds of cognitive biases. And in any event, given that a decision is always, deliberately or inadvertently, framed in one way or another, there is often no such thing as a “neutral” option. Thaler and Sunstein therefore advocate a conscious and transparent reflection, in many different contexts, on what the framing of an issue is encouraging people to decide.

Nudging Arbitration Practitioners

It is instructive to consider the Prague Rules in the light of behavioural economics research (which is admittedly far more complex than the brief

⁹ Thaler, Richard H. and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, Penguin Books, 2009.

¹⁰ Sunstein, Cass R., *“Empirically Informed Regulation”*, *University of Chicago Law Review*, 78, 2011.

¹¹ Thaler and Sunstein, *Nudge*, p. 9.

summary above). Given the essentially libertarian nature of arbitral procedure, what parties and arbitral tribunals do can be heavily influenced by what they regard as “normal practice”, or otherwise by the context in which the decision is made. There are various types of frame that surround any procedural decision, including a growing number of soft law instruments which confer familiarity, influence and respectability on certain procedural choices¹².

In particular, the IBA Rules have, in some jurisdictions, become a default option in their own right, and despite their flexible nature, the way in which they are applied by arbitral tribunals and parties has become increasingly standardised. According to a survey conducted by the IBA giving rise to its report of September 2016¹³, the IBA Rules were referred to in more than 70 per cent of the arbitrations surveyed in Belgium and England and in more than 50 per cent of arbitrations in France, Germany and Switzerland. Their “normalization” means that parties and Tribunals can be tempted to turn to them reflexively and to apply their criteria in pre-set ways, without giving them too much further thought.

The types of arbitration that result from such a lack of reflection are not necessarily in either party’s interest. It is a common complaint that opposing counsel who each, acting as diligent and responsible representatives of their clients, feel the need to use all the procedural tools at their disposal in any way possible to increase their chances of winning their case, has led to increasingly long and expensive arbitrations¹⁴. It is equally clear that this is contrary to what was once regarded as an important advantage of arbitration over court proceedings - the possibility of resolving a dispute quickly and cheaply. In addition, the decisions resulting from a paper-heavy, witness-heavy and procedurally complex arbitration are not necessarily more sound, as there is a real risk that an arbitral tribunal may end up reaching a less than optimal decision because, overloaded with submissions and evidence, it has not been able to see the wood for the trees.

None of this is a necessary or even rational outcome of the application of the IBA Rules, which are themselves very clear that their aim is to set out a toolkit to promote an “*efficient, economical and fair process for the taking of evidence in international arbitrations*”. However, the Prague Rules intend, by reframing the procedural decisions concerning witnesses, experts, documents and other types of case management, to change what parties and tribunals regard as the norm in respect of a number of procedural decisions. Once the Rules are adopted, they aim

¹² What has been referred to as “soft normativity”: see Berger, Klaus Peter, “*Common Law vs. Civil Law in International Arbitration: The Beginning or the End?*”, *Journal of International Arbitration*, Volume 36, Issue 3, 2019.

¹³ Available at www.ibanet.org/Document/Default.aspx?DocumentUid=105D29A3-6261-4437-84E2-1C8637844BEB, last accessed 20 June 2019.

¹⁴ See for example Risse, Joerg “*Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*”, *Arbitration International*, Volume 29, 2014 - several of these “drastic proposals” have made their way, in modified form, into the Prague Rules.

to reset the “default option”, and parties and tribunals who do not have a good reason to change the default will simply stick with it.

The idea of shortening the final hearing, for example, or excluding witness evidence, or even holding a documents-only arbitration, may not be revolutionary - but framing these possibilities as part of a structured set of guidelines, which view themselves as the inheritor of a long and rich tradition of court procedure in (certain) civil law countries, may change the way in which these procedural options are perceived. Similarly, holding an arbitration without a document production phase will not be appropriate in all circumstances - but framing it as a respectable default option which the parties are required to make a conscious decision to refuse, may help to promote a more streamlined procedure in cases where it is appropriate to do so.

Other Nudges

In advocating a more hands-on approach by arbitral tribunals, the Prague Rules are not alone. For example, the rules of the recently established Delos arbitration institution were drawn up with the express aim of encouraging a more active engagement of the arbitral Tribunal, in order to deal more effectively with smaller disputes¹⁵.

Similarly, following the ICC Commission Report on Techniques for Controlling Time and Costs in Arbitration (issued in 2007 and updated in 2012)¹⁶ and its guide to *“Effective Management of Arbitration: A Guide for In-House Counsel and other Party Representatives”*¹⁷ published in 2014, the ICC introduced an expedited procedure which is applicable to smaller arbitrations, or where the parties otherwise choose to apply it, as of 1 March 2017¹⁸. Amongst other things, this procedure allows arbitral tribunals to decide proactively on limits to the number, length or scope of written submissions and witness evidence. Other arbitral institutions have undertaken similar initiatives¹⁹.

¹⁵ See Virjee, Hafez R., “*Activating Arbitration: Four Delos Principles to Achieve Fair and Efficient International Arbitration*”, available at: <http://delosdr.org/wp-content/uploads/2018/01/Hafez-R-Virjee-Activating-Arbitration-Delos-2017.pdf>, last accessed 20 June 2019.

¹⁶ Available at: <https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/>, last accessed 20 June 2019.

¹⁷ Available at: <https://iccwbo.org/publication/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives/>, last accessed 20 June 2019.

¹⁸ <https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provision>, last accessed on 20 June 2019.

¹⁹ The Stockholm Chamber of Commerce, the International Centre for Dispute Resolution Procedures, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre and the World Intellectual Property Organization are only a few examples.

The Prague Rules are nevertheless an addition to the existing possibilities, given the nature and specificity of the procedural alternatives that they encourage.

Conclusion

Whether you call it a “nudge”, a paradigm shift or just a change in arbitration culture, these attempts to change the default mindset and “normalize” a set of assumptions about a more streamlined procedure are addressing a real concern. It is frustrating and disheartening for a party who has signed an arbitration clause (and who is perhaps a startup or SME, or an individual, or even a large company with a drawer full of smaller claims) to find itself confronted with the reality that it is not worth bringing a promising claim because it cannot afford a document-, expert- and witness-heavy arbitration, or because the costs are simply disproportionate to the amount at stake.

The reframing proposed by the Prague Rules will clearly not be taken up by parties in every type of case - but in certain disputes it would be in the parties' interests to be able to look to a “new normal” type of procedure that steers them in the direction of a more streamlined, less costly arbitration.

Nevertheless, in order to succeed in their aim, the Prague Rules will need to become a credible challenger to the IBA Rules for the position of “default”, at least for certain types of dispute. In this, those who argue in favour of the Prague Rules can take encouragement from the point made by “*Nudge*” about the scale of the change that can be achieved from a seemingly small reframing of a decision: “*Sometimes massive social changes, in markets and politics alike [and why not arbitration?], start with a small social nudge*”²⁰.

²⁰ Thaler and Sunstein, *Nudge*, p. 67.