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THERE IS A NEW KID ON THE BLOCK. IS THERE ANYTHING MISSING IN THE IBA RULES THAT IS PROVIDED IN THE PRAGUE RULES?

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Abstract: *The assessment of the efficiency of any arbitration procedure is made, more and more, in terms of time and costs. Therefore, the taking of evidence is one of the procedures whose effectiveness is under focus. This paper examines the recent revision of IBA Rules on the taking of evidence in international arbitration (the IBA Rules) as well as the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules), a collection of rules issued in 2018, both aiming to assign a more pro-active role to the arbitral tribunal.*

Key words: *Arbitration, Efficiency, Evidence, IBA Rules, Prague Rules.*

1. Introduction

These days, the assessment of the efficiency of any arbitration procedure is made, more and more, in terms of time and costs. While the international arbitration community is ready to praise the advantages of arbitration over the state court procedures, the concern regarding the increase of time and costs implied by arbitration is growing.

Therefore, the taking of evidence as an important part of an international arbitration, is one of the procedures whose effectiveness is under focus. The recent revision of IBA Rules on the taking of evidence in international arbitration (the IBA Rules) is not the only obvious effort to answer the efficiency demands in this field; most of the principal institutional arbitration procedures are currently updated to provide adequate and effective rules for the taking of evidence (for instance, the revised arbitration rules of the London Court of International Arbitration issued on October 1st, 2020, the (ICC) Rules of the International Chamber of Commerce in force since January 1st, 2021 or the updated rules of the International Centre for Dispute Resolution -March st1, 2021); furthermore, in 2018, the release of the Prague Rules, consequently aiming to assign a more pro-active role to the arbitral tribunal, marked the arrival of a new player on the market of evidentiary procedures.

Notwithstanding that IBA Rules regulate only the taking of evidence in international

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arbitration while the Prague Rules aim to cover a broader subject, addressing the efficient conduct of the proceedings in international arbitration, there is a common ground where they meet - i.e., the taking of evidence - and therefore claims of competition, war and conflict between these Rules have already been expressed by the scholars.

The taking of evidence is the cornerstone of each arbitration procedure and therefore, for almost four decades, IBA Rules assisted and provided guidance in this field to the parties and to the arbitral tribunals, being an important inspiration and an instrument in the harmonization of the various arbitration procedural rules.

On the other hand, the Prague Rules aim further, intending not only to offer assistance in the taking of evidence but also to chiefly provide a framework and guidance for arbitral tribunals and parties on how to increase efficiency of arbitration, the main theme of these rules being the construction of a more active role for arbitral tribunals in managing proceedings.

But providing for an effective taking of evidence, as it is the aim of the IBA Rules, is definitely an instrument to efficiently conduct the whole arbitration proceedings, which is also the declared goal of the Prague Rules. Therefore, both Rules address a common issue and, although they are not conflicting, they are overlapping in some areas. Although the review of IBA Rules was consecutive to the promulgation of the Prague Rules, it does not appear that the revision had been triggered or that the introduced changes had been influenced by the Prague Rules.

In international arbitration, for parties and their counsels, the choice of the arbitration procedure is an important one, since all of them are looking for a procedural environment that is best suited to their particular case. Rules that supplement or add to the general arbitration rules are therefore very important for the swift and efficient conduct of the proceedings. As a matter of fact, both IBA Rules and the Prague Rules may be adopted in whole or in part by the parties, or the tribunal may itself conclude that the respective rules should be applied. On the other hand, it is true that both IBA Rules and Prague Rules address the taking of evidence and, therefore, in order to make a choice and to indicate which of these two Rules will be used in addition to the general applicable rules, the parties and their counsels should be familiar with the similarities and differences that grant a proper identity to any of these rules.

That is what I intend to point out in the following presentation, focusing on the main themes of the evidence usually provided by parties to an arbitration.

2. Documents

The submission or production of documents continues to represent the most important share of the evidence on which the parties rely in support of their cases. In this regard, the revision of IBA rules did not produce significant changes, with the exception of the mention that Article 2 makes in relation with cybersecurity and data protection, issues which should be addressed at the preliminary consultation of the parties. By that, parties are encouraged to agree on any adequate measures to protect the integrity of important, sensitive and confidential information that may be released

to the arbitral tribunal or to the parties during the arbitration proceedings. This change was probably triggered by the developments of legal technology that allows the arbitral tribunal and the parties to transfer information online or to organize virtual or remote hearings.

As a component to the taking of evidence mechanism, the Production of Documents, i.e., the request of a party that the other party or a third party submit documents that are in their possession, custody or control, constitutes a significant method to confer value to the case of one party, by putting on display documents that are not in their possession but which are paramount to prove the facts invoked by that party. To encourage production of documents, Article 9 of IBA Rules states that if a Party fails without satisfactory explanation to produce any Document requested or ordered to be produced by the Arbitral Tribunal, to which it had not objected in due time, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.

From this perspective, one should note that, while IBA Rules provide detailed instructions for the Production of Documents, - and I will not go into further detail as the Prague Rules adopt a restrictive approach on document production, instructing the arbitral tribunal to encourage the parties to avoid any form of document production (Article 4.2).

Moreover, according to the Prague Rules, if a party intends to request documents from the other party, it should indicate this to the arbitral tribunal at the case management conference and may do so at a later stage of the arbitration only in exceptional circumstances and if the requesting party could not have made such a request at the case management conference (Article 4.4.). In opposition to this approach, under IBA Rules, the arbitral tribunal, taking a more relaxed stand, may, at any time before the arbitration is concluded, request any Party to produce Documents or request any Party to use their best efforts to obtain the relevant Documents from any person or organisation (Article 3.9 and Article 3.10.).

One should not fail to remark, nonetheless, that the Prague Rules explicitly allow the parties to submit or to produce documents in photocopies and/or electronically. The submitted or produced documents are presumed to be identical to the originals unless disputed by the other party (Article 4.7). Indeed, furthermore, under current pandemic conditions, the submission or production of evidentiary documents in electronic form seems to be the most adequate format, as long as the identity or the validity of these documents is not challenged by the parties.

According to IBA Rules, only Documents that a Party maintains in electronic form shall be submitted or produced in that electronic form or in the most convenient or economical form that is reasonably usable by the recipients (Article 12 letter d). Although IBA Rules do not contain explicit provisions regarding the submission in electronic format of documents that are recorded on a material support, they allow for the consultation of the arbitral tribunals with parties regarding the requirements and format applicable to the production of documents, aiming for the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence. Of course, such an approach opens the gate for the submission of electronic documents, if the arbitral tribunal so decides after the consultation of the parties

(Article 2.2.). Anyhow, as a matter of practice, arbitral tribunals that apply the IBA Rules allow for the submission of documents in electronic format, even if such submission is often followed by the delivery of hard-copy documents. Nevertheless, there are sufficient indications that IBA Rules, in comparison with the Prague Rules, use a more elaborate and appropriate approach to the taking of evidentiary documents and offer the parties more comfort in following precise and unambiguous guidance. As such, it seems that, in this respect, IBA Rules are the right choice for the management of the submission or production of documents.

3. Fact Witnesses

Addressing the witnesses of fact issue, the rules that are being compared through this presentation differ in their stance on witness statements. Usually, according to many arbitration rules, the written witness statements precede the oral testimony rendered at the evidentiary hearings and this is a good practice even if only because it avoids procedural surprises and complications and offers the arbitral tribunal and the parties a timely opportunity to decide if such a testimony is relevant and material to the outcome of the case.

According to IBA Rules, the written witness statement is the primordial and the preponderant format of witness testimony that the parties submit to the arbitral tribunal and to the other parties, according to their intention to rely on some facts and based upon their procedural strategy. The submission of witness statements is not necessarily followed by the oral testimony during the evidentiary hearings (Article 4.4.). If a party submits a witness statement and, thereafter, the witness, although requested to appear at a hearing, fails to attend the hearing, without a valid reason, then the arbitral tribunal shall disregard the statement of that witness.

As a matter of practice, under IBA Rules, for every witness appearing at an evidentiary hearing, the party that nominated him/her had previously submitted a written witness statement. And, one should note that the arbitral Tribunal has no say regarding the number of witnesses that a party may rely on, which is sometimes an issue that may affect the costs and the length of the taking of evidence.

Adopting a somehow contrary approach, the Prague Rules allow the arbitral tribunal to decide which and how many witnesses are to be called for examination during the hearing, assessing the relevance, the materiality and the utility of such testimonies or the outcome of the case and the reasonability of the costs involved and of the formalities required for hearing such witnesses. If the arbitral tribunal decides not to call a witness for examination during the hearing, the parties may nonetheless submit a written witness statement for that witness (Articles 5.3, 5.4). And, as a general rule, if a party insists on calling a witness whose witness statement had been submitted by the other party, the arbitral tribunal should call the witness to testify at the hearing. Therefore, it appears that in the Prague Rules the emphasis is on the testimonies delivered during the hearings, whether or not preceded by witness statements.

In our opinion, the IBA Rules made the right choice by considering the written witness statement as a preliminary stage of the testimony process, an approach which is regarded as appropriate, more and more, even by the civil jurisdictions. On the other

hand, limiting the number of witnesses may be a wise decision in terms of time and costs, and the arbitral tribunals that apply IBA Rules may encourage the parties to take action in that regard, agreeing on a limited number of witnesses and limiting the time allocated to their examination – which, as a matter of fact, happens in numerous arbitrations.

Anyhow, according to the IBA Rules, the arbitral tribunal has complete control over the evidentiary hearings, being entitled to limit or exclude the appearance of a witness if it considers such appearance to be irrelevant or immaterial to the case (Article 8.3.). In this matter, the IBA Rules are more flexible, since, at any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to ensure the appearance for testimony during the Evidentiary Hearing of any person, including one whose testimony had not yet been offered (Article 4.10).

4. Evidentiary Hearing

One of the innovations brought by the recent revisions of IBA Rules is that, in order to promote an effective procedure, after consultation with the parties, the arbitral tribunal may, in accordance with Article 8.2 of the IBA Rules, order a Remote Evidentiary Hearing, establishing the technology to be used and, in particular, how documents may be placed at the disposal of the parties, a witness, an expert or before the Arbitral Tribunal. Under current pandemic conditions, such an approach is probably gaining momentum, step by step, although, as a matter of fact, most parties and arbitral tribunals during the 2020 – 2021 pandemic postponed the hearings as much as possible in order to enjoy the benefits of an in-situ hearing.

IBA Rules provide detailed instructions regarding the carrying out of the evidentiary hearing as well as regarding the admissibility and the assessment of evidence, establishing, as a new feature, that the Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally (Article 9.3). IBA Rules express the principle of complete control exerted by the arbitral tribunal in relation to any issues linked to the evidentiary hearing, not only conferring a proactive role to the arbitral tribunal, but also providing a flexible protocol for such hearings.

On the other hand, the Prague Rules definitely favour the resolution of the dispute on a document-only basis, in order to promote a cost-efficient procedure. A hearing will be organised only if one of the parties or the parties so request, but 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.

5. Conclusions

Here are some of the differences that make a distinction between these two sets of rules. Of course, there are a lot more, but I addressed only those issues related to the taking of evidence.

There is an agreement between the practicians, either counsels or arbitrators, that the

Prague Rules are rooted in the civil law, as a reaction to the predominance of the common law rules that seem to govern the IBA Rules. Therefrom, an inquisitorial approach characterises the Prague Rule, while IBA Rules favour the adversarial approach. While Prague Rules claim to prompt a more proactive role of AT, I will not deny such role under IBA Rules.

Contrary to the adversarial approach where the fact-finding procedure is handled by the parties (for instance through party-nominated experts), the inquisitorial procedure relies on a proactive role of the arbitral tribunal. In other words, the inquisitorial procedure, which is specific to the civil law system, distributes the procedural duties and powers between parties and the arbitral tribunal. But, for any arbitral tribunal, embracing a pro-active role does not mean necessarily to become inquisitorial!

A general examination of the IBA Rules and of the Prague Rules may show that these two sets of rules express the traditional competition between civil law that is particular to continental Europe and common law, emerging from Old England, which still looks more attractive to the arbitration practitioners and which inspired various rules of international arbitration procedures.

There is no winner in this contest; both sets of rules are bringing valuable contributions to the procedural environment of international arbitration. In some ways, the IBA Rules, which gained a solid reputation over the years, may have pre-eminence in the choice of litigators; on the other hand, the Prague Rules providing for the submission of all documents in electronic format, a procedure that is accepted as long as the identity of the document is not contested by the other party and which openly declare their aim to avoid any waste of time and useless costs, should look more attractive to arbitration practitioners.

At the end, one question remains: if it is true that the Prague Rules promote a more pro-active role of the arbitral tribunal which apparently offers greater leeway for this tribunal in handling the procedural issues of the case, how will this liberty cope with the rigors of the civil law system? One should take into consideration that in the civil law system, an arbitral award may be reversed if it infringes upon the public policy requirements, good morals and the mandatory provisions of the law.

This means that the pro-active role of the arbitral tribunal, as envisaged by the Prague Rules, is circumscribed by the public policy requirements, good morals and the mandatory provisions of the law.

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