

International  
Arbitration Focus Team



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## The Prague Rules: wind of change?

Practitioners from more than 30 countries had a role in the production of the “**Rules on the Efficient Conduct of Proceedings in International Arbitration**”, known as the Prague Rules. The official launch was in Prague on 14 December 2018.

Promulgated principally by civil-law trained practitioners from Eastern European jurisdictions, **the Prague Rules represent an alternative to the IBA Rules on the Taking of Evidence in International Arbitration**, perceived by some as too closely modeled on the common law adversarial approach to resolution of disputes. Concerned about extensive document production, parties utilizing numerous fact witnesses, biased party-appointed expert witnesses, and lengthy hearings – allegedly distinctive traits of the adversarial approach embodied by the IBA Rules – **Prague Rules proponents wish to implement new approaches to reduce time and costs of international arbitration.**

These new approaches are founded on the notion of a more active, inquisitorial, role by the arbitral tribunal in the management of the proceedings, more typical of civil law traditions.

The BonelliErede international arbitration group in Milan discusses with leading arbitration practitioners from civil law and common law backgrounds in a seminar on the Prague Rules and their possible impact on future arbitrations on Wednesday, 20 February 2019.

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## The new (improved?) rules on the conduct of arbitration

The seminar approached a discussion with the most innovative and controversial provisions of the Prague Rules: the provisions **limiting document production** (Article 4), **examination of witnesses** (Article 5) and **oral hearings** (Article 8). It was felt that, although these provisions may have efficiency benefits, they are **too distant** from common law traditions to be particularly useful. Practitioners from a common law background, representing a large segment of arbitration users, may consider these rules to be a limitation of the parties’ right to substantiate their case.

The panellists also discussed Article 2, which encourages the tribunal to assume a more active role in the conduct of arbitration and to limit, together with the parties, the scope of the dispute at the case management conference. The panellists believed that such an exercise at this very early stage of the proceedings is premature and can put the dispute on an unproductive path.

A final session topic was the provision in Article 9, which allows a **member of the arbitral tribunal to act as mediator during arbitration**. Panellists expressed a **concern** that if parties fail to settle, the mediator can resume its role within the tribunal only with the prior consent of all parties. It is doubtful that such consent will be granted, given that mediation includes *ex parte* communications with the mediator.

#### **Practical implications: how the Prague Rules may be introduced into cases**

The seminar also examined the types of proceedings and the stages during which the Prague Rules may be implemented.

The panellists agreed that the Prague Rules may be useful in disputes where the factual background is undisputed, or when the dispute is limited to discrete factual aspects. In such cases, the limitation, or even the exclusion, of the evidentiary phase will **help speed up** the proceedings.

The panel emphasized that, similar to the IBA Rules, the Prague Rules leave **liberty** to the parties, and the tribunal, to decide whether and to what extent the provisions should be applied to the proceedings. However, an arbitration agreement will, in all likelihood, seldom feature an express reference to the application of the Prague Rules. Hence, **their application will most likely have to be agreed by the parties or by the tribunal** – after having heard the parties – during the course of the proceedings (Article 1).

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**Conclusions**

The conference closed with all panellists in agreement that the arbitrators' powers spelled out in the Prague Rules, aimed at increasing the efficiency of the proceedings, are already intrinsic in the tribunal's general power to conduct the evidentiary phase as it deems fit, as recognised by the IBA Rules. **In this respect, the Prague Rules do not bring anything particularly new to the table.**

However, regardless of whether the Prague Rules are truly innovative, the panellists agreed that **the rules have the undisputed merit of refreshing the debate on the need for efficiency in international arbitration.**

According to the majority of the panellists, the best way to promote efficiency, rather than new rules on the conduct of arbitration, is for **arbitrators to be more willing to assume a proactive role** in the management of the proceedings.

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**Panellist of the Seminar**

Giovanni Minuto, BonelliErede – Milan (Keynote Speaker)

First session:

- Catherine Anne Kunz, Lalive – Geneva (moderator)
- Alberto Fortún Costea, Cuatrecasas – Madrid
- Flavio Ponzano, Arblit – Milan
- Kirstin Dodge, Homburger – Zurich

Second session:

- Barbara Concolino, BonelliErede – Milan (moderator)
- Mahnaz Malik, 20 Essex Street – London
- Stefan Riegler, Wolf Theiss – Vienna
- Gaëlle Filhol, Betto Seraglini – Paris

Closing remarks

Laurence Shore, BonelliErede – Milan