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LHAG update

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Introducing the Prague Rules: Inexpensive Efficiency?

In today's borderless business environment, arbitration is the dispute resolution mechanism of choice particularly for cross-border transactions. Disputing parties may, however, be surprised when arbitration proceedings differ significantly from what they expected when entering the arbitration agreement, due to the different approaches on the taking of evidence between civil law and common law jurisdictions. It is therefore important for transacting parties, when drafting the arbitration clause, to be aware and take advantage of the different procedural options available.

Owing to this mismatch, procedural soft laws were introduced in an attempt to bridge the cultural gap between the differing approaches. The **IBA Rules on the Taking of Evidence in International Arbitration** has, over the course of the past two decades, become accepted and adopted in international arbitration. It is, however, not without its criticism. The extensive disclosure, document production and lengthy cross-examination it provides for often result in spiralling costs and procedural inefficiency.

Latest efforts to address this culminated in the introduction of "**The Rules on the Efficient Conduct of Proceedings in International Arbitration**" (or simply the **Prague Rules**) in December 2018. Notable features include the following recommendations:

- **Proactive Arbitral Tribunal** providing a limited, non-binding early case assessment on undisputed facts, allocation of burden of proof between parties and relevancy of evidence required by parties as early as the very first case management conference.

- **Restrictive Document Production** in contrast to extensive discovery obligations often adopted in common law jurisdictions, distancing itself from e-discovery.

- **No Presumption of Right to Cross-Examine Factual Witnesses** as the Arbitral Tribunal decides which witnesses are to be called for the oral hearing, and only to the extent it deems necessary for resolution of the dispute.

- **Document-only Arbitration** is the de facto preferred basis in resolving disputes. Fewer witnesses and experts required to attend

the hearing, signalling significant cost saving potential.

- **Interventionist Arbitral Tribunal** through the powers to introduce legal arguments not pleaded and legal authorities not referred to by parties.

- **Arbitral Tribunal Assisted Settlement** by allowing a member of the Arbitral Tribunal to act as a mediator and facilitate the amicable settlement of the dispute at any stage of the arbitration.

The question then remains: Will the Prague Rules successfully achieve its objective of providing an economical and efficient alternative for parties?

On the face of it, much of the power, conduct and responsibility of running the arbitration proceedings appear now to have been shifted away from client and counsel. Previous concerns over the Arbitral Tribunal lacking teeth may be alleviated with its seemingly wide-ranging powers enhancing control over arbitration associated costs. Critics would, however, argue that the latest efforts are neither new nor innovative. Instead, the Prague Rules merely seeks to codify best practices, which the Arbitral Tribunal has all along been empowered to do even under pre-existing procedural rules.

Be that as it may, a procedural rule's effectiveness is limited by the Arbitral Tribunal's interpretation and implementation of such rules. The onus of choosing the correct arbitrators remains increasingly vital in any arbitration. Parties would therefore be well advised to involve counsel from an early stage in ensuring the right bargain is negotiated.

The Prague Rules, available in English, Portuguese, Russian, Spanish and Mandarin, can be found here.

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