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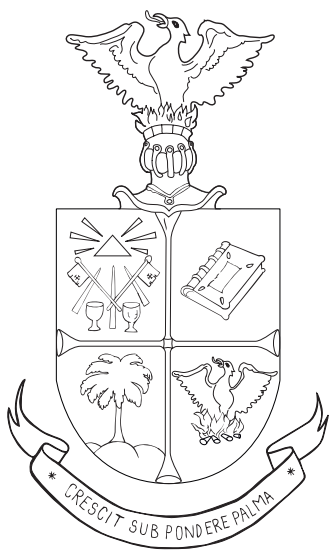

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A Sailor's Knot or a Life Belt? Comments on the Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration)

I.

The Prague Rules (Rules on the Efficient Conduct of Proceedings in International Arbitration) (hereinafter: *Prague Rules* or Regulation) was officially signed on the 14th December 2018 in Prague, after four years of preparation. It is a question whether the Regulation is going to serve as a reliable sailor knot fixing the ropes, or a lifebelt giving chance to survive for those who got into trouble in the sea of arbitration. This study seeks answers to this question.

In this work, we will summarise the most relevant special features of the Regulation, taking into account that there is no practical experience yet, and the literature is basically only about the text of the Prague Rules themselves, so it focuses on the possible future effects.[2]

The aim of the Regulation, which can be considered as a recommendation with regard to international arbitration, is to regulate taking evidence and provide an efficient procedure for arbitration. [3] As it is, the Regulation helps the arbitration procedure to be even more efficient and well-conducted. [4] It is the work of a 46-member international work team, in which jurist professor and lawyer Alexander Belohlavek took on a key role. The lawyer József Antal was the Hungarian member of the work team. The Prague Rules have so far been officially translated into English, Portuguese, Russian, Spanish, Chinese, Estonian, Lithuanian and Latvian.

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2 It is worth mentioning that the 2nd edition 2019 of Revista Română de Arbitraj deals with Prague Rules in detail. See: Revista Română de Arbitraj. season 13, 2 (2019).

3 See the detailed description of Prague Rules including background studies and analysis: www.praguerules.com (date of access: 2019. 07. 18.)

4 See summary on the taking of evidence in arbitration procedure: Gary B. Born: *International Arbitration. Cases and Materials.* Alphen aan den Rijn, 2011. 768 – 791.

II.

The aim of the Regulation is in fact to make arbitration procedure more efficient. Of course, the Regulation is not binding; it's more like a guideline. In the arbitration procedure, the parties and the arbitration presidium can decide whether to apply the Prague Rules, but they can also refuse to apply them. Obviously, the Prague Rules are not suitable for replacing the procedural code of an arbitration institution (for example ICC or LCIA). The Preamble of the Regulation itself emphasises that, by the application of the Prague Rules, the presidium of the arbitration takes on a much more important role in conducting the procedure.

According to the first comments on the Prague Rules, they reflect much more the continental point of view than the system of taking of evidence in Common Law.[5] According to some authors, for example Michal Kocur, the Prague Rules follow principally the continental system of taking evidence.[6] In this sense, the Prague Rules can be an alternative to IBA Rules (*IBA Rules on the Taking of Evidence in International Arbitration*).[7] We can also find opinions of Anglo-Saxon authors according to which it is an open question if the Prague Rules embedded in Anglo-Saxon legal culture, are an appropriate alternative to the IBA Rules in international arbitration procedures.[8]

The Prague Rules are set out in the following twelve Articles on the efficient arbitration procedure:

- Article 1: *Application of the Prague Rules*;
- Article 2: *Proactive Role of the Arbitral Tribunal*;
- Article 3: *Fact finding*;
- Article 4: *Documentary evidence*;
- Article 5: *Fact Witnesses*;
- Article 6: *Experts*;
- Article 7: *Iura Novit Curia*;

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5 See summary: Klaus Peter Berger: *'Common Law v. Civil Law in International Arbitration: The Beginning or the End?'* Journal of International Arbitration, 3 (2019), 295 – 313.

6 See: Michal Kocur: *Why Civil Law Lawyers Do Not Need the Prague Rules*. https://www.praguerules.com/upload/iblock/a41/a41366c67308ea1286a4d3a3a3fde2a7.pdf (date of access: 17th of August 2019.)

7 Az *IBA Rules on the Taking of Evidence in International Arbitration* szövegét angolul lásd: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines (date of access: 18th of July 2019.) See in Hungarian: Kecskés László – Lukács Józsefné (edited): *Book of arbiters*. Budapest. 2012. 369 – 380. See also: Varga István: *Questions of proving in international arbitration procedures.* In: *Magister Artis Boni et Aequi. Studia in Honorem Németh János.* (edited by: Varga István – Kiss Daisy) Budapest, 2003. 877 – 913.

8 Lásd: Rob Javin-Fisher –Erika Saluzzo: *Prague Rules on evidence in international arbitration: a viable alternative to the IBA Rules?* https://www.praguerules.com/upload/iblock/587/5872685539bddee7618083c020f6ff93.pdf (date of access: 18th of July 2019.)

- Article 8: *Hearing*;
- Article 9: *Assistance in Amicable Settlement*;
- Article 10: *Adverse Inference*;
- Article 11: *Allocation of Costs*;
- Article 12: *Deliberations.*

As it can be seen from the titles of these Articles, the Prague Rules themselves are not enough to be considered a comprehensive set of arbitration regulations, but they can function as a supplement in order to achieve an efficient procedure of arbitration, so it can result in an even more decent arbitration process. We make to following comments on the above-mentioned Articles, in order to present the Regulation including but not limited to.

Application of the Prague Rules: The Regulation, due to its nature and as a soft law instrument, can only be applied based on the agreement of the parties or the decision of the arbitral tribunal. It is important to mention that it is also possible to apply only specific parts of the Regulation. The practical implementation of this will be especially interesting, considering the complexity of the Prague Rules. The Regulation also mentions that, during its application, *lex arbitri* in particular has to be considered in every case, along with the other applicable regulations and the agreements of the parties. [9]

Proactive Rule of the Arbitral Tribunal: The essence of the Prague Rules can be summarised as the title of this Article. The actual purpose of the Regulation is to give an opportunity for arbitrators to control and guide the procedure in a proactive way. In this Article, the case management conference is explained. The essence of the case management conference, a concept known and applied by many international arbitration procedures, is that, after the formation of the arbitral tribunal and the description of the basic documents of the case, the tribunal holds a conference in the presence of the parties. During this, a schedule is established and applied to the rest of the procedure, including the deadlines; the parties clarify the claim they wish to enforce, the facts on which parties agree and disagree and what the basic legal grounds are on which the parties seek to enforce their claims. During the case management conference, or later in the procedure, there is a chance for the tribunal to inform them of its preliminary opinion on the case (preliminary view). Here, it is possible, among other things, for the arbitral tribunal to take a position on what facts the parties agree on and what facts dispute, what types of evidence the arbitral tribunal will consider to have full probative value, and what its preliminary position is on the parties' legal arguments.

9 On the important correlations of *lex arbitri* and arbitration see from the latest literature: Jacomijn Van Haersolte-Van Hof – Erik V. Koppe: *International Arbitration and the Lex Arbitri.* Grotius Centre Working Paper 2014/033. https://ssrn.com/abstract=2518978 (date of access: 18th July 2019.)

Basically, the arbitral tribunal here gives an opinion in advance (presumably also in order to conduct the proceedings more efficiently) on certain issues concerning important issues of the case, which may even affect the content of the judgment. Therefore, an important rule for guarantee is that such a preliminary opinion by the arbitral tribunal shall not in itself constitute evidence of a lack of independence or impartiality of the arbitrator and shall not be the reason of exclusion. Taking international practice regarding arbitration independence and impartiality into account, it cannot be certain that, in a particular arbitration case, an unfavourable preliminary opinion will result in a party initiating exclusion proceedings against the arbitrator. [10] As such, it is possible that the application of this part of the Prague Rules will affect the international practice of excluding arbitrators, and it is also possible that it will change the *IBA Guidelines on Conflicts of Interest in International Arbitration* practice developed by IBA (International Bar Association) and widely used ever since. [11]

It also important to mention that the Rules of Proceedings of the Permanent Arbitration Court attached to the Hungarian Chamber of Commerce and Industry, entered into force on the 1st February 2018, contain the possibility of a case management conference as follows:

36. [Case Management Conference]

(1) Within thirty days following the constitution of the arbitral tribunal, a case management conference shall be held with the participation of the parties, in person or by means of telecommunication, in order to draw up the procedural timetable.

(2) During the case management conference, the arbitral tribunal shall come to terms with the parties as to the procedural rules to be determined pursuant to Section 31(1) and (2) of the Rules, the means of evidence expected to be applied, including especially the necessity of expert evidence, and shall also invite the parties to declare if they request that a hearing be held. In light of these, the arbitral tribunal shall establish the procedural timetable and set time limits for each procedural act.

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10 On the independency and impartiality of arbiters from the Hungarian literature see especially: Boóc Ádám: International commerce arbitration. Nomination and exclusion of arbiters. Budapest, 2009.

11 See the English text of *IBA Guidelines on Conflicts of Interest in International Arbitration*: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#Practice%20Rules%20and%20Guidelines (date of access: 18th July 2019.) See in Hungarian: Kecskés László – Lukács Józsefné (edited): *Book of arbiters*. Bp. 2012. 358 – 369. See also: Boóc Ádám: *The new arbitration clauses in the mirror of the new IBA directives. In: European legal culture. Novation and tradition in the Hungarian civil law.* (The edited version of the lectures organized by the Association of Civil Law Professors and the Faculty of Law ELTE University on the 17-18th June 2011.) (edited by: Fuglinszky Ádám – Klára Annamária) Budapest, 2012. 457 – 472. See the original summary of *IBA Guidelines* of 2004: Mathias Scherer: *The IBA Guidelines on Conflicts of Interest in International Arbitration. The First Five Years. 2004 – 2009*. Dispute Resolution International 4 (2010) 5 – 53.

(3) During the case management conference or within 3 days thereafter at the latest, the arbitral tribunal shall render a procedural order on the agreed terms and course of the proceedings.

(4) In light of the circumstances and complexity of the case the arbitral tribunal may decide to

a) proceed without a case management conference and directly set a hearing, or

b) by mutual consent of the parties, continue the case management conference as a hearing, or

c) decide on the case with neither a case management conference nor a hearing. The arbitral tribunal shall notify the parties of this in advance and shall provide the parties with an opportunity to file a request that a hearing be held. [12]

It is important to mention as a relevant difference that the regulations on the case management conference of Rules of Proceedings of the Arbitration Court of Commerce do not state that the arbitrators may or shall give an opinion on the questions, considered relevant, of the case. Of course, this may lead to the concepts and fundamental rules of fair procedure to prevail during the procedure. [13]

III.

Fact finding: In order to establish the facts of the case, the Prague Rules give the arbitral tribunal a very proactive role, which of course does not relieve the parties of the burden of proof. This proactive role also means that the Tribunal may call upon any party to attach specific documents, request evidence, or have the right to order an on-site inspection, take other steps that it deems necessary, or appoint experts even in legal issues. This is basically the strengthened version of the weakened inquisition concept (*eingeschränkter Untersuchungsgrundsatz)* known and used in German law. [14]

Documentary evidence: In arbitration, documentary evidence is known to play a primary role in relation to proof, so it is no coincidence that the Prague Rules devote a great deal of space to these relevant rules. According to the fundamental rules established, the parties have to present the evidence on which they wish to rely in

12 See: https://mkik.hu/mkik-vb-eljarasi-szabalyzat-2018 (date of access: 25th July 2019.) See the general presentation of the activity and organization of the Hungarian Commerce Court of Arbitration: Burai – Kovács János: *The organization and the regulations of the Hungarian Permanent Commerce Court of Arbitration, first steps in order to improve competitiveness of the Court of Arbitration.* In: *Annual book of Commerce Court of Arbitration 2018*. (szerk.: Burai – Kovács János) Budapest, 2019. 105 – 110. o.

13 See also: Nochta Tibor: *Thesis about Guarantees of a Fair Trial in Arbitration Proceedings.* In: *Annual book of Commerce Court of Arbitration 2018*. (edited by: Burai – Kovács János) Budapest, 2019. 381 – 385. See also: William W. Park: *Two Faces of Progress: Fairness and Flexibility in Arbitral Procedure.* Arbitration International 23 (2007). 499 – 503.

14 See also: Varga István: *The new Rules of Proceeding of the Permanent Commerce Court of Arbitration.* In: *Study on the commerce court of arbitration.* (edited by: Bodzási Balázs). Budapest, 2018. 58.

the procedure at the beginning. The *document production* and the *discovery* known in the Anglo-Saxon legal system according to which the other party can be forced to present the evidence are applicable exceptionally. If any of the parties want to apply this rule, it primarily needs to be initiated during the above-mentioned case management conference and, besides the formal request, it why *document production* or *discovery* needs to be applied in the case must be justified. If the Arbitral Tribunal also agrees with this request, a suitable and open deadline for *document production* and *discovery* will be included in the procedural schedule, including procedural deadlines, during the case management conference. In exceptional circumstances, if a party submits a request for document production or discovery after a case management conference, it may be approved by the arbitral tribunal under the Prague Rules, just like under many other rules of international commercial arbitration, only if the arbitral tribunal is satisfied that it has not previously been possible for the party concerned to make such a request at the case management conference.

It should be noted that the above rule is analogous, at least in terms of temporality, to the following rule of Article 12 (2) of the UNCITRAL Model Law on the exclusion of an arbitrator: *(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made*.[15]

According to the above rule, a party may submit a request of exclusion against an arbitrator nominated by it only on the basis of a reason that came to its notice after the nomination. The situation is similar here, as according to the Prague Rules, in order for a party to initiate *document production* or *discovery* after a case management conference, it has to prove that it was not in a position to conduct the exploration procedure at the time of the preparatory consultation, so for example it has to present new, unknown facts and circumstances that make this probable.

In general, if one of the parties requests document production or discovery, it must prove regarding the documents concerned, that they are material and relevant for the decision, not in the public domain, inaccessible, or in the possession or control of the other party. Of course, a document that has consequently been placed in the arbitration proceedings is also subject to the strict obligation of confidentiality that characterises the arbitration proceedings as a whole.

Fact Witnesses: Although witness hearings are not as common in arbitration procedures as in state court procedures, they are of course not unknown in arbitration either. [16]

15 See: UNCITRAL Model Law on International Commercial Arbitration, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/07-86998_ebook.pdf Date of download 27th of September 2019 12:46

16 On witness evidence in arbitration procedures see: Lawrence W. Newman – Ben H. Sheppard (ed.): *Take the Witness: Cross-examination in International Arbitration.* New York, 2019[2].

When a witness hearing proposal is submitted during any part of the procedure, the party must indicate the identity of the witness, the factual circumstances in which the witness wishes to be heard and the relevance of the testimony to the outcome of the case.

The Arbitral Tribunal, having heard the parties, has the right to decide which witnesses they wish to hear. The Regulation states that, in making its decision, the Arbitral Tribunal shall consider whether the testimony is relevant regarding the case, whether hearing it is unreasonably burdensome and whether it results in duplication, meaning whether it relates to an assertion that has already been proved or otherwise.

If the Arbitral Tribunal does not allow the witness to be heard, this shall not prevent the party from obtaining written testimony from the witness and attaching it to the files. The arbitral tribunal may itself recommend that the party obtain written evidence from that witness.

Once in possession of a written testimony, the arbitral tribunal may decide not to hear the witness. However, if the other party expressly insists on hearing the witness personally on the basis of the written testimony given by the opponent, the arbitral tribunal shall hear that witness, unless there are *good reasons* for the contrary. In my opinion, this also proves that the parties are expressly the masters of the case in the arbitration proceedings.

The Regulation also emphasises that if the arbitral tribunal, in possession of the written testimony, has decided not to hear a witness, it does not restrict the Arbitral Tribunal from giving probative value to the testimony.

Regarding the technical rules for the examination of witnesses, the Regulation states that it shall be conducted and led by an Arbitral Tribunal, and may decide accordingly, for example, not to allow the parties to ask certain questions. It is worth mentioning that the Regulation does not regulate the legal institution of *affidavit,* known in Common Law, at all.

Experts: Expert evidence can play a very important role in arbitration proceedings, as in many cases, due to the nature of the dispute, as many questions can arise where special expertise is needed to answer them.[17] The Regulations also seek to assist in the procedure of taking expert evidence. Either the Arbitral Tribunal may decide that the involvement of an expert is necessary, or the parties may request this. If the Arbitral Tribunal decides to involve an expert, it may request a proposal from the parties on the person of the expert, and in this context the arbitral tribunal may specify certain requirements regarding the qualification requirements and possible budgets of the

17 On the role of experts in the arbitration procedures see Nigel Blackaby – Constantine Partasides: *Redfern and Hunter on International Arbitration*. Oxford, 2009[5] 406 – 413.; Giovanni De Berti: *The Arbitrator and the Arbitration Procedure – Experts and Expert Witnesses in International Arbitration: Advise, Advocate or Adjudicator?* In: Austrian Yearbook on International Arbitration (edited by: Christian Klausegger – Peter Klein) Wien, 2011. 53 – 63.

expert. [18] It is important that the Arbitral Tribunal is not tied to the person of the expert nominated by the parties; it may nominate a person other than the person nominated by the parties as an expert, or even set up a committee of experts from the persons nominated by the parties. (In addition, the Arbitral Tribunal has other options for appointing an expert, for example requesting a proposal on the person of the expert from an impartial organization or even from a chamber of commerce.) Besides, the Regulation mostly contains the known rules of civil law, so we will not describe them in detail. With regard to expert costs, it should be emphasised that, as a general rule, the parties must jointly advance the expert's fee. However, if one of the parties is reluctant to advance it, the Arbitral Tribunal shall call upon the other party to advance the expert fee.

Another important feature is that the parties are obliged to provide all the information and documents related to the case to the expert in order to perform his/her expert duties. The expert may appear and be heard in person at the hearing, either by the request of one of the parties or on the Arbitral Tribunal's own initiative.

Iura novit Curia: In my view, this rule is one of the most significant innovations of the Prague Rules. In arbitration proceedings, the burden of proof on the legal position is primarily on the litigant party, but under this rule the arbitral tribunal may apply different legal provisions, which have not been referred to in the parties' submissions, including but not limited to public policy. The Arbitral Tribunal may also rely on other legal literature, not referred to by the parties, that may be relevant to the legal provisions in the questions of the case, if the tribunal provides the opportunity to the parties to express their point of view on these legal authorities.

In these cases, the Arbitral Tribunal shall obtain the opinion of the parties on the rules to be applied. Even now, without knowing the practical application of the Prague Rules, it can be said that this provision is completely novel compared to the current practice of international commercial arbitration and it may induce significant changes in certain procedures that actually apply the Prague Rules. It should be emphasised that the opportunity for the Arbitral Tribunal to be free to use legal authorities not invoked by the parties may open up new perspectives for arbitrators in terms of legal reasoning and justification.

Hearing: With regard to the hearing, the Regulation states that primarily on the basis of the principle of cost-effectiveness, the arbitral tribunal and the parties shall endeavour to settle the dispute essentially on the basis of documents. If either of the parties requests or the arbitral tribunal deems it necessary, it is of course possible to hold hearings, but in this case it has to be organised in the most cost-effective manner possible, either by limiting the duration of the trial or by using video, electronic or telephone communication to avoid unnecessary travel costs.

18 On the experts nominated by the parties see: Doug Jones: *Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last.* Arbitration International 24 (2008). 137 – 156.

Amicable Settlement: Unless any party objects, the arbitral tribunal may take a very active part in the amicable settlement of the dispute by mutual agreement; moreover, with the prior written approval of the parties, any member of the arbitration panel may act as a mediator between the parties. [19] This corresponds to the well-known peculiarity of arbitration, according to which the proportion of amicable settlements in arbitration proceedings is significantly higher than in court proceedings. [20]

Adverse inference: This provision of the Prague Rules contains a rule that is basically an existing rule in common law but also known in other legal systems with different wording. [21] According to this, if a party fails to follow the instructions and orders of the arbitral tribunal without a legitimate reason, for example does not provide any evidence, it may be considered as detriment by the Arbitral Tribunal, even leading to it accepting the opposing party's contrary position in the absence of the evidence requested.

Allocation of costs: According to the Regulation, when the arbitral tribunal decides on the allocation of costs in its decision, it shall take into account, *inter alia*, the behaviour of the parties and their cooperation or lack of cooperation in the proceedings. Of course, this rule has to be completed with the rule of costs being mainly charged to the losing party but, in my view, the sometimes different cost calculating methods of different arbitration institutions should also be taken into account. Some arbitration institutions, such as the VIAC in Vienna or the Hungarian MKIK, determine the fees of arbitrators and the administrative costs of arbitration on the basis of the value of the litigation. With regard to other arbitration systems, such as the rules of the London-based London Court of International Arbitration (LCIA), remuneration is based on the time spent on the case and is settled accordingly. [22] All of this also shows

19 On the question of *amicable settlement* in international arbitration in the latest literature see: Klaus Peter Berger: T*he Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing.* Journal of International Arbitration 35 (2018). 501 – 516.

20 See also in this matter: Gellért György: *New Act on the arbitration*. Magyar Jog 45 (1995). 451 – 452.

21 The www.praguerules.com website contains the following Rule on the *adverse inference*: If a party does not comply with the arbitral tribunal's order(s) or instruction(s) without justifiable grounds, the arbitral tribunal may draw, whether it considers appropriate, an adverse inference with regard to such party's respective case or issue. (date of download: 29th July 2019, 12:32)

22 On the rules of MKIK of bearing the costs see: https://mkik.hu/dijkalkulator-2018-januar-1-tol (date of download: 13th October 2019, 22:22). On the rules of VIAC of bearing the costs see: https://www.viac.eu/en/cost-calculators (date of download: 13th October 2019, 22:22). On the rules of LCIA of bearing the costs see: https://www.lcia.org//Dispute_Resolution_Services/schedule-of-costs-lcia-arbitration.aspx (date of download: 3rd October 2019, 22:27). On specific questions of arbitration in the law of the UK see: Boóc Ádám: *Invalidation of the decision of the arbitration courts law of the UK*. Magyar Jog 66 (2019). 460 – 467.; On the history of the arbitration of the UK see: Kecskés László: *The evolution*

that the Regulation only contains general, indicative rules regarding the bearing of arbitration costs.

Deliberations: The Regulation imposes the obligation on the arbitrators to do everything possible to render the decision as soon as possible regarding the period of reflection and consideration before the decision is made. If a hearing is held, the arbitral tribunal shall conduct internal consultations among its members prior to the hearing, and after the hearing the tribunal shall discuss the decision as soon as possible. If no hearing is held on the case then, after the receipt of the documents, the tribunal shall deliberate on the substance of the case as soon as possible. All of this is intended to help bring the matter to an end without undue delay.

According to this note that summarises briefly the Prague Rules, obviously without knowing the practical application, we can say that the Regulation is capable of having a significant influence on international commerce arbitration. To decide whether the Rules can be considered as a reliable sailor's knot, fixing the ropes, or a lifebelt giving a chance for survival to those who got into trouble at sea will be the task of the future and the future's international arbitration practice, and that of course may indicate further examinations and research.

of civil law in the big legal system of the continental Europe. Pécs, 2004. 163 – 164.