

Global Arbitration Review

The Guide to Evidence in International Arbitration

Editors

Amy C Kläsener, Martin Magál and Joseph E Neuhaus

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Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Evidence in International Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service, but we also provide more in-depth content: books such as this one; reviews; conferences with a bit of flair; and time-saving workflow tools. Do visit www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we often become aware of gaps in the literature. Recently, evidence emerged as one, not because there are no other books about it, just none that bridge the law and practice in a modern way. Indeed, few topics command as much attention as evidence and its related topics during our GAR Live sessions.

The Guide to Evidence in International Arbitration aims to fill this gap. It offers a holistic view of the issues surrounding evidence in international arbitration, from the strategic, cultural and ethical questions it can throw up to the specifics of certain situations. Along the way it offers various proposals for improvements to the status quo.

We trust you will find it useful. If you do, you may be interested in the other books in the GAR Guides series. They cover energy, construction, M&A, IP disputes, and challenge and enforcement of awards in the same practical way. We also have guides to advocacy in international arbitration and the assessment of damages, and a citation manual (*Universal Citation in International Arbitration (UCIA)*). These will soon be joined by a volume on investment treaty arbitration.

We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you all.

And great personal thanks to our three editors – Amy, Martin and Joseph – for the energy with which they have pursued the vision, and to my Law Business Research colleagues in production on such a polished work.

David Samuels

GAR publisher

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The Prague Rules: Fresh Prospects for Designing a Bespoke Process

Janet Walker¹

The challenges and opportunities of procedural diversity

As arbitration flourishes around the world, so too does the variety of the legal traditions of the parties and participants. This diversity brings with it the challenge of ensuring that the procedures adopted accord with their expectations and their basic standards of fairness. It also brings the opportunity to adopt procedures, previously untried by some, to improve the efficiency and effectiveness of the process for all.

In 1999, the International Bar Association (IBA) developed the Rules for the Taking of Evidence to produce a common approach that would bridge the divide between civil law and common law.² The IBA Rules have become one of the most widely adopted soft law instruments in arbitration.³ Despite this, they have not eliminated entirely the diversity of the procedures adopted. A margin of appreciation continues to exist in the approaches taken by counsel and arbitrators in different legal systems.⁴ For example, variations continue in what constitutes a ‘narrow and specific’ category of documents in a request for disclosure,⁵ and the permissible extent to which counsel and potential witnesses may ‘discuss their prospective testimony’.⁶

1 Janet Walker is a chartered arbitrator. The author wishes to thank Brendan Ofner, of Sydney Arbitration Chambers, for his research in support of this chapter.

2 International Bar Association [IBA], ‘IBA Rules on the Taking of Evidence in International Commercial Arbitration’ (adopted by a resolution of the IBA Council, June 1999) [IBA Rules], available via <https://www.ibanet.org/resources> (to select preferred language for download).

3 The IBA Rules have been revised in 2010 and 2020 – both are available via <https://www.ibanet.org/resources> (to select preferred language for download).

4 Janet Walker, Jorge Rojas, Paula Costa e Silva, ‘Interpreting the IBA Rules on the Taking of Evidence’, *Joint IIDP-IAPL Conference on Evidence and Procedure* (October 2018, Salamanca).

5 IBA Rules, Art. 3(a).

6 *id.*, Art. 4(3).

Still greater diversity has been produced by the growth of international arbitration, which has increased the desire for variety in the basic framework of rules that are available. For example, it has been observed that arbitrations between parties from different legal systems might not include any participants from a common law country, making it unnecessary to accommodate the expectations of participants with a common law background.⁷ Whether the perceived tendency to incline towards party prosecution in the IBA Rules is a result of the influence of the common law, or merely a reflection of the preferences of the self-selected group of parties who have proactively planned for dispute resolution by including arbitration agreements in their commercial contracts, may be debated. However, as the use of arbitration expands to include smaller matters, the importance of efficiency and cost containment in the process increases. Finally, in arbitrations of all sizes, there is a growing recognition that the quality of the process and the satisfaction of the parties improves with the proactive engagement of the tribunal.

In response to these observations, the Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules or the Rules)⁸ were developed in 2018 as an alternative to the IBA Rules. They are based on procedures that are more familiar to those trained in the civil law tradition than to their common law counterparts. In the early months following their release, there were many lively debates about whether the two sets of rules were rivals or whether they would serve to complement one another in the practice of international arbitration, and several publications provided comprehensive reviews of the provisions.⁹ This chapter seeks to identify the main procedural innovations found in the Prague Rules and to assess critically their value in promoting efficiency and effectiveness in the arbitral process.

7 Gonzalo Stampa, 'The Prague Rules', *Arbitration International* (June 2019, Volume 35, Issue 2, 1–24) (noting that the genesis of the Rules was in a panel discussion entitled 'Creeping Americanization of International Arbitration: Is It the Right Time to Develop Inquisitorial Rules of Evidence?' at IV Annual Conference of the Russian Arbitration Association, 20 April 2017 in Moscow, and documenting the development of thought that led from the initially confrontational approach to one that sought to provide a meaningful alternative).

8 'Rules on the Efficient Conduct of Proceedings in International Arbitration' [Prague Rules], available at https://praguerules.com/prague_rules/.

9 Annett Rombach and Hanna Shalbanava, 'The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?' in Jörg Risse, Guenter Pickrahn, et al. (eds), *SchiedsVZ | German Arbitration Journal* (Kluwer Law International; Verlag CH Beck oHG 2019, Volume 17, Issue 2), pp. 53–60; Klaus Peter Berger, 'Common Law vs. Civil Law in International Arbitration: The Beginning or the End?' in Maxi Scherer (ed), *Journal of International Arbitration* (Kluwer Law International 2019, Volume 36, Issue 3), pp. 295–314; Peter J Pettibone, 'The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration: Are They an Alternative to the IBA Rules on the Taking of Evidence in International Arbitration?' in Romesh Weeramantry and John Choong (eds), *Asian Dispute Review* (Hong Kong International Arbitration Centre [HKIAC] 2019, Volume 21, Issue 1), pp. 13–17; Lukas Hoder, 'The Arbitrator and the Arbitration Procedure, Prague Rules vs. IBA Rules: Taking Evidence in International Arbitration' (Chapter II) in Christian Klausegger, Peter Klein, et al. (eds), *Austrian Yearbook on International Arbitration* 2019 (Manz'sche Verlags- und Universitätsbuchhandlung 2019), pp. 157–77; Duarte Gorjão Henriques, 'The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?' in Matthias Scherer (ed), *ASA Bulletin* (Association Suisse de l'Arbitrage; Kluwer Law International 2018, Volume 36, Issue 2), pp. 351–63.

Beginning with the cornerstone of proactive case management, the chapter moves through the principles of supervised disclosure, witness summaries, joint commissions of experts, amicable settlement, and on to the hearing and tribunal discussions and decision-making, examining the proposed techniques against alternatives found in common law, civil law and the IBA Rules. The chapter concludes with the view that the Prague Rules make an important contribution to the toolkit of procedures available to parties and tribunals in their efforts to maximise the efficiency of the process.

Proactive case management

The cornerstone of the Prague Rules is the principle of proactive case management. This begins with the first case management conference (CMC). In a provision described as the ‘proactive role of the tribunal’, the Rules recommend that this CMC should occur ‘without any unjustified delay after receiving the case file’.¹⁰ However, in view of the agenda contemplated for this CMC, as discussed below, the tribunal will need a better appreciation of the nature of the dispute than is often the case at the first CMC. For this reason, the Rules acknowledge that some of the more substantive aspects of the CMC may need to be deferred to a later stage of the arbitration, leaving the first CMC to focus on settling basic housekeeping matters and establishing a procedural timetable.¹¹

In the first substantive CMC, then, the tribunal is directed to take a proactive role by seeking to clarify the relief sought by the parties, which facts are undisputed and which are disputed, and the legal grounds of each side’s case.¹² The tribunal is further encouraged to indicate to the parties the facts that it regards as in dispute, the types of evidence needed to resolve the factual disputes, the apparent legal grounds for each side’s case, and the options for ascertaining the factual and legal bases of the claim and the defence.¹³

Discussions such as this stand in stark contrast to the traditional common law approach in which judges and arbitrators are expected to remain largely passive while the parties prepare and present the evidence, deferring to the parties’ judgement on how they will make their respective cases and refraining from any involvement that might hint at an emerging view of the case.¹⁴ Clearly, then, for the tribunal to engage with the parties in the way envisaged by the Prague Rules, it is necessary for the parties to be persuaded that any questions asked by the tribunal members, or provisional views expressed by them, do not represent conclusions reached, and that everything that is said is subject to contrary indications arising from the evidence subsequently adduced, and the submissions that the parties might subsequently make in the arbitration.

10 Prague Rules, Art. 2.1; Gonzalo Stampa, ‘The Prague Rules’, op.cit., pp. 8–9.

11 id., Art. 2.3.

12 id., Art. 2.2.

13 id., Art. 2.4, paras. (a) to (d); Duarte Gorjão Henriques, ‘The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?’ in Matthias Scherer (ed), *ASA Bulletin* (Association Suisse de l’Arbitrage; Kluwer Law International 2018, Volume 36, Issue 2), p. 354.

14 Rolf Trittman and Boris Kasolowsky, ‘Taking evidence in arbitration proceedings between common law and civil law traditions: The development of a European hybrid standard for arbitration proceedings’ (2008), 31(1) *UNSW Law Journal*, p. 330; Klaus Peter Berger, ‘Common Law vs. Civil Law in International Arbitration: The Beginning or the End?’ in Maxi Scherer (ed), *Journal of International Arbitration* (Kluwer Law International 2019, Volume 36, Issue 3), pp. 295–314.

For some counsel and parties, the concern about the possibility of prejudgment may be so strong that it cannot easily be allayed. For them, this degree of proactivity will cause unease. However, for others – those who have confidence that the tribunal members are willing and able to be persuaded to the contrary – an open discussion of the state of the issues and the evidence can be a useful exercise in streamlining the matters in dispute and focusing the parties' attention on the real challenges that they must meet in making out their claims and defences.

A willingness to suspend judgement on whether the tribunal has formed firm views of the case is critical for the third recommendation that the Prague Rules make for this CMC: that the tribunal share its preliminary views on questions such as who bears the burden of proof; the nature of the relief sought; the disputed issues; and the weight and relevance of the evidence submitted by the parties at that stage.¹⁵ Again, for some, this level of engagement with the emerging issues of the case, and this candour from the tribunal about their current impressions of the evidence, will cross a line. Aware of the risk that this poses for maintaining the tribunal's impartiality, the Prague Rules provide explicitly that '[e]xpressing such preliminary views shall not by itself be considered as evidence of the arbitral tribunal's lack of independence or impartiality, and cannot constitute grounds for disqualification'.¹⁶

Returning to the question of the placement of this CMC in the arbitral process, it is clear that a tribunal will need to have a fairly detailed grasp of the case to engage in this kind of proactive case management. This may depend on the nature of the first substantive written submissions received at the outset of the matter. This kind of CMC may be possible where, for example, a matter is commenced with a detailed memorial-style pleading that attaches the relevant documentary evidence on which the claimant relies, and which is responded to with a similarly detailed pleading by the respondent, with documents attached. However, it is unlikely to be possible if the arbitration has been commenced with a notice of arbitration and answer containing only a few paragraphs of the substance of the dispute – or when the tribunal has received only traditional common law pleadings containing broad allegations relating to the events giving rise to the claim and no documents or witness statements to support them. In these situations, the tribunal may wish to devote the first CMC to administrative matters and, at that time, schedule a second CMC of a more substantive nature to follow a further round of written pleadings.

Finally, the Prague Rules encourage the parties and the tribunal during this CMC to identify any preliminary matters of fact or law that might usefully be decided at an early stage in the proceedings to streamline the process.¹⁷ It is worth distinguishing the process of determining preliminary issues from the traditional notion of bifurcation. The determination of preliminary issues generally occurs within the context of an overall timetable, leading to a main evidentiary hearing and the completion of an award. The scheduling of preliminary issues may require the creation of two streams of case preparation operating in tandem and allowing the subsequent steps in the arbitration to be adjusted in accordance

15 Prague Rules, Art. 2.4(e).

16 *id.*, Art. 2.4; Peter J Pettibone, 'The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration: Are They an Alternative to the IBA Rules on the Taking of Evidence in International Arbitration?', *op.cit.*, p. 15.

17 Prague Rules, Art. 2.5.

with the outcome of the preliminary issues determination. However, the scheduling of preliminary issues will not generally include two sequentially created timetables, the first ending with the determination of the preliminary issue, and the second beginning afresh to deal with the remaining issues, should the matter continue.

Supervised disclosure

Most readers will be familiar with the civil law–common law compromise on the disclosure of documents that is proposed in the IBA Rules: each party discloses the documents on which it intends to rely and then each is entitled to request a ‘narrow and specific’ category of documents from the other side. Objections to the requests to produce documents and the resolution of those issues are then addressed through a table known as a Redfern Schedule, which logs summaries of the requests, objections, responses and rejoinders.

This is followed by an effort to decide whether or not the documents should be disclosed, which is undertaken by a tribunal that may have insufficient knowledge about the case at that stage to make confident determinations of the relevance and probative value of the evidence sought or the merits for the objections. Since the introduction of the IBA Rules, there have been countless debates in arbitral proceedings, and in discussions at conferences and meetings, about what constitutes a ‘narrow and specific’ category and, more generally, about whether the time and cost of the disclosure process is warranted – quite apart from the time and cost that may be involved in the disputes that can arise in the disclosure process.

The Prague Rules begin from the standpoint that the value of disclosure is not to be presumed and that the parties should be required to persuade the tribunal that it is needed in the instant case.¹⁸ Further – and these are perhaps the most striking features of document production under the Prague Rules – the party seeking production must ask the tribunal to request the document and the request must be for one or more specific documents, rather than for a category of documents.¹⁹

Of course, in weighing the benefits of such a restrained approach to the exchange of documents, much will turn on whether the issues of fact will be decided on a balance of probabilities or on a clearly allocated burden of proof. The balance of probabilities standard in the common law may require the parties to seek more documentary evidence than the civil law burden of proof standard. The nature and size of the case will also be relevant: a claim for non-payment on a sale of goods will require fewer documents than a major multi-party infrastructure dispute.

However, in principle, greater restraint in disclosure is likely to be welcome to all, as may be the encouragement of the tribunal to become more involved in this part of the process. Many have experienced the benefits of tribunal engagement in the resolution of contentious disputes about the production of documents under the IBA Rules. When convening a CMC serves to get to the bottom of the issues and to find a way forward, one wonders

18 *id.*, Art. 4.2; Annett Rombach and Hanna Shalbanava, ‘The Prague Rules: A New Era of Procedure in Arbitration or Much Ado about Nothing?’ *op.cit.*, p. 56.

19 Prague Rules, Art. 4.3; Peter J Pettibone, ‘The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration: Are They an Alternative to the IBA Rules on the Taking of Evidence in International Arbitration?’, *op.cit.*, p. 15.

how much more time and money would have been expended without the tribunal's intervention. One also wonders, as the tribunal becomes involved, and the advocacy becomes less strident and the parties more conciliatory, whether this involvement has increased the parties' confidence that their cases will be heard thoughtfully in the knowledge of the documents that were available to them.

Whether those with a common law background are likely to embrace the very restrictive approach to disclosure proposed in the Prague Rules is less certain. Even if they do not, it may be helpful for them to appreciate the context in which it is intended to operate. This becomes clear when the Rules are read as a whole. Elsewhere in the Rules, the tribunal is encouraged to take a more proactive role in fact finding in various ways, including, of its own initiative, requesting documentary evidence and the attendance of fact witnesses.²⁰ Accordingly, even for those who struggle with the presumption against disclosure, the approach in the Prague Rules should be understood in the context of a process for developing the evidentiary record that has a more prominent role for the tribunal in identifying and obtaining the relevant evidence.

Witness summaries

Even without allocating the primary responsibility for identifying and obtaining relevant evidence to the tribunal, there are several ways in which the Prague Rules seek to streamline the preparation and presentation of fact evidence. The perennial challenge of enabling the parties and the tribunal to anticipate the evidence that will be presented at the main hearing has led to a range of cumbersome and costly practices. One of the most cumbersome is the process of taking depositions. This practice is largely unknown outside litigation in North America, but its counterpart, witness statements, is common practice in international arbitration.

To its credit, the practice of submitting witness statements obviates the need for the direct examination of witnesses, and it does so far more effectively than depositions. However, the cost of saving time at the hearing is the need for counsel to expend time in crafting witness statements that are concise and on point, but also in the language and style of the witnesses who will swear them.

This is an expensive front-loaded element of the process. When the fact-witness statements are appended to a memorial-style pleading that includes the relevant documents on which the party will rely, they ensure that the facts pleaded will be more precise and accurate. However, if they are expected to provide a foundation for a complex factual record, the length and number of statements to be prepared can make the early phases of the arbitration very costly. Furthermore, there is an unhelpful tendency for witness statements prepared by counsel to merge with the submissions, making it difficult for the tribunal to discern where the witnesses' evidence leaves off and the pleadings begin.

As an alternative to witness statements, the Prague Rules propose that the parties identify in their initial pleadings the fact witnesses on whom they intend to rely, the factual circumstances of their testimony, and the relevance and materiality of the testimony.²¹

²⁰ Prague Rules, Art. 3.

²¹ *id.*, Art. 5.1.

Having considered these summaries of the proposed witnesses' evidence, the tribunal then decides, in consultation with the parties, which of the witnesses' evidence requires the more extensive treatment involved in preparing a witness statement and, possibly, cross-examining the witness at the hearing. The Rules then provide in some detail for the rights of (1) parties to submit witness statements that have not been sought, but which they regard relevant, (2) the tribunal to request a witness statement, but then not require the witness to appear for cross-examination, (3) parties to insist on calling witnesses for examination in any event, and (4) the tribunal to accord the weight it sees fit to the evidence in a witness statement in the absence of live testimony from the witness.²²

As a natural extension of the early assessment of the tribunal of what is and is not genuinely in dispute, there could be value in this practice of submitting summaries of proposed witnesses' evidence to be expanded into full witness statements only as needed for a limited number of key witnesses. The practice might add an interim step between the typical two rounds of pleadings, but it could eliminate the need to prepare complete statements for all the potentially relevant witnesses that might be required. It could also provide an opportunity for the tribunal to encourage counsel to limit the statement to the witnesses' evidence and refrain from shaping it into submissions. Furthermore, the subsequent possibility that the tribunal could direct the preparation of one or more additional witness statements during the second round of pleadings, where the need emerges, may serve to reassure the parties that the evidence needed to decide the case will be before the tribunal by the time of the hearing.

Finally, in regard to witness evidence at the hearing, the Prague Rules make it clear that the tribunal is to direct and control the examination of witnesses. Specifically, the tribunal may reject unnecessary questions and establish time limits, set the sequence of witnesses and types of questions to be asked, and hold witness conferences.²³ Even though all these steps are generally accepted for the purposes of time management during the hearing, the extent to which the tribunal takes control of fact witness examination will, no doubt, vary considerably from tribunal to tribunal and from case to case.

Joint commissions of experts

The preparation and presentation of expert evidence has proved to be a major challenge for common law and civil law alike. The need for experts to assist a tribunal in understanding the issues in a case, and the facts that are likely to be determined, weigh in favour of allowing the parties to appoint and instruct them, and to take the lead in questioning them at the hearing, particularly if the parties know more about the case in the early stages of the arbitration than the tribunal. Moreover, authorising the parties to select and manage the experts increases the parties' confidence in the arbitral process. However, this level of party control can undermine the experts' independence, potentially making their evidence less useful to the tribunal.

²² *id.*, Art. 5.2 to 5.8; see also Peter J Pettibone, 'The Prague Rules on the Efficient Conduct of Proceedings in International Arbitration: Are They an Alternative to the IBA Rules on the Taking of Evidence in International Arbitration?', *op.cit.*, p. 16.

²³ *id.*, Art. 5.9.

In contrast, in a tribunal-led process, a tribunal-appointed expert will be much more likely to be independent, but the expert's grasp of the issues and the likely findings of fact will be no better than those of the tribunal. This creates a risk that the expert's evidence will be less relevant and probative, prompting each of the parties to challenge it and to seek to retain its own expert to supplement the evidence of the tribunal-appointed expert.

Various solutions to this conundrum have been proposed. For example, the concept of a 'single joint expert' entails the parties agreeing on an expert that they brief and subsequently examine jointly. This approach does not appear to have gained much currency. In another example, the examination of experts of like discipline together at the hearing, sometimes described as 'hot-tubbing', has been adopted more widely, with various approaches taken to the manner of questioning.²⁴ Other combinations of the respective roles of the tribunal and the parties in the process have been developed, with varying degrees of success.

The provisions of the Prague Rules describe in some detail the roles of the tribunal and the parties for the appointment of experts, the establishment of their mandates, the supply of the necessary information and documents, and the examinations at the hearing. The Rules grant the tribunal primary responsibility for the process, as is the case generally in civil law, but considerable care is taken to allow for the involvement of the parties throughout, and for the parties and the tribunal to agree on variations in the process.²⁵

One such variation is worth highlighting. It is described as a 'joint commission' of experts.²⁶ The parties each select an expert on an area in which there is an agreed need. Following the appointment of the experts, the tribunal instructs them to establish a joint list of questions and prepare a joint report, including a list of issues on which they agree, a list of issues on which they disagree, and the reasons why they disagree.²⁷

How does this work in practice? One approach can involve the parties indicating in their first round of pleadings the areas in which they anticipate the need for expert evidence and identifying the experts that they propose to appoint. Subject to the need to refine the areas for expert evidence, or to address objections to the choice of experts, the tribunal then meets with the experts and counsel to explain the process and to instruct the experts to prepare a joint list of questions. This list of questions needs to be sufficiently detailed and precise to ensure that the issues in dispute are joined for the purpose of the joint report. This may require some correspondence between the experts and the tribunal, or even a further meeting to improve the list of questions. However, once settled, the experts can get down to work on the joint report, which might also need to be refined with tribunal management and support.

24 Justice Stephen Rares, 'Using the "Hot Tub" – How Concurrent Expert Evidence Aids Understanding Issues' (Speech, IPSANZ Seminar, 12 October 2013).

25 Prague Rules, Art. 6; Gonzalo Stampa, 'The Prague Rules', *op.cit.*, pp. 8–9.

26 See also Professor Doug Jones AO, 'Ineffective Use of Expert Evidence in Construction Arbitration' (Speech, GAR Dubai Arbitration Week 2020, 16 November 2020).

27 Prague Rules, Art. 6.2.a.ii.

Following this, the experts are instructed to provide their individual reports about areas on which their opinions differ and to highlight any differences in factual, methodological or legal premises on which these differences are based. Finally, the experts may be instructed to provide their opinions on the outcomes, were the tribunal to accept the factual, methodological or legal premises relied on by the expert retained by the other party.

This multi-stage process must be run in tandem with the development of other aspects of the case. A first meeting with the experts might occur soon after the first round of pleadings and the first substantive CMC, in which the main fact witnesses have been identified and their witness statements submitted. Then, the experts' agreed list of questions may be helpful in clarifying the nature and extent of disclosure needed from each side. Following the disclosure process, the joint experts' report can be prepared. The individual reports, and the experts' analysis based on the other experts' factual, methodological or legal premises, may be prepared in conjunction with the second round of pleadings.

An iterative process such as this, involving the tribunal throughout, requires faith on the part of counsel that relinquishing the tight control they might otherwise have on their experts will not result in expert testimony that will undermine their case. Further, from the standpoint of the tribunal, it involves more effort in the early stages of the arbitration. However, this process provides considerable assurance that the technical issues in the case will be joined; that the tribunal will understand the expert evidence at the hearing; that it will know what decisions it needs to make in relation to that evidence; and that it will appreciate the implications of those decisions for its determination of the facts.

Amicable settlement

The Prague Rules clarify that, subject to a party's objections, the tribunal may assist in amicable settlement at any stage; with written consent, a tribunal member may mediate; and if unsuccessful, the tribunal member will continue the arbitration with the parties' consent or be replaced.²⁸ Although this process is not new and must always be approached with care so as not to result in a failed mediation and possibly the need to replace an arbitrator, it is a procedural feature worth endorsing through inclusion in the Rules.²⁹ As with a number of the other features available to be adopted in appropriate cases, the inclusion of amicable settlement as an option during the process in a set of rules such as these, can serve to alert the parties to a practice that enjoys broad acceptance even if they have not yet experienced it.

Hearing, tribunal discussions and decision-making

In relation to the hearing, the Prague Rules encourage a number of cost-saving devices, such as documents-only hearings, hearings of limited duration, and remote hearings.³⁰

28 *id.*, Art. 9; Gonzalo Stampa, 'The Prague Rules', *op.cit.*, pp. 10–11.

29 Bernd Ehle, 'The Arbitrator as a Settlement Facilitator' in Olivier Caprasse, et al., *Walking a Thin Line. What an Arbitrator Can Do, Must Do or Must Not Do* (Bruylant 2010), p. 80.

30 Prague Rules, Art. 8; Gonzalo Stampa, 'The Prague Rules', *op.cit.*, p. 10.

Further guidance on the relationship between the evidence and the decision-making is given in various provisions. Despite the proactive role of the tribunal, the parties are not relieved of their obligations regarding their burden of proof.³¹ If a party does not comply with the tribunal's orders or instructions, the tribunal may draw adverse inferences.³² Parties bear the burden of proof on the legal positions on which they rely, but the tribunal is authorised to apply legal provisions and to consider authorities not submitted by the parties, provided the parties are given an opportunity to express their views.³³

In allocating costs, the tribunal is directed to take into account the parties' conduct during the arbitration, including their cooperation and assistance in conducting the proceedings in a cost-efficient and expeditious manner.³⁴

On the question of tribunal discussions and deliberations, the Prague Rules make it clear that the tribunal is not to wait until the hearing is over, but to conduct internal discussions before the hearing and to hold deliberations as soon as possible thereafter with a view to rendering an award as soon as possible.³⁵

Fresh prospects for designing a bespoke process

In the continuing drive to increase the efficiency of international arbitration, the Prague Rules make a welcome contribution to the techniques available to counsel and arbitrators for effective management of their arbitration. As arbitration practitioners become increasingly sophisticated in meeting the diverse expectations of parties and the needs of particular cases, these Rules will assist in looking beyond the existing common principles and standardised procedures to fashion a bespoke process from a broader range of options.

Although some of the Prague Rules' tribunal-led procedures may be more attractive than others to counsel and arbitrators, there are bound to be found among them techniques that will improve the cost-effectiveness of the arbitration. Perhaps most importantly, practitioners who are wary of accepting alternatives to familiar procedures will be encouraged to consider a broader range of possibilities by finding some of these options in a well-crafted set of standard rules produced collaboratively and endorsed by a group of leading arbitrating practitioners.

31 *id.*, Art. 3.1; Gonzalo Stampa, 'The Prague Rules', *op.cit.*, p. 15.

32 *id.*, Art. 10.

33 *id.*, Art. 7.

34 *id.*, Art. 11.

35 *id.*, Art. 12.

Appendix 1

The Contributing Authors

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Chartered arbitrator

Janet Walker is an independent arbitrator with chambers in Sydney, London and Toronto. During the past 20 years, she has served as sole arbitrator, co-arbitrator and chair in ad hoc arbitrations and arbitrations administered by the ICC, ICDR, DIAC, HKIAC, KCAB, PCA and SIAC in a variety of seats. Her matters range from construction, merger and acquisition, shareholder, intellectual property, pharma and environmental. She has a good working knowledge of Spanish and French.

Janet is chair of the ICC Canada Arbitration Committee, a member of the boards of the International Construction Law Association and CIArb Canada, and a founding member of SCL North America.

Janet is distinguished research professor and past associate dean of Osgoode Hall Law School, a member of the Ontario Bar and a licensed legal consultant of the New York State Bar. She authors Canada's main text on private international law, cited in more than 400 judgments, and is co-author of *Common Law, Civil Law and the Future of Categories*, and of the forthcoming edition of *Commercial Arbitration in Australia*.

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