

“Compatibility, Novelty, Practical Corollary? A Collective Analysis of the Prague Rules”

Introduction

The following article is the result of a collective project, carried out by one of the groups of the Young ICCA Mentoring Programme, comprised of Juan Pablo Valdivia Pizarro,¹ Andreea I. Nica² and Maria Teder,³ as Mentees, Vladimir Khvalei,⁴ as Mentor, and Laurence Ponty, as Buddy.⁵

With the benefit of Vladimir Khvalei being one of the drafters of the Prague Rules (or the “Rules”), the group chose to address this hot topic to contribute to the lively (and sometimes passionate) debates, which the Rules have triggered even way before their launch in December 2018. Further, given the concentration of the discussion on the legal background underlying the Rules (the civil law and more inquisitorial approach) and the potential tensions with the common law culture approach, the analysis of the Prague Rules by a group representing a large variety of nationalities and jurisdictions,⁶ sounded particularly relevant.

As the Prague Rules are a new tool available to users, aiming at enhancing efficiency in the conduct of international arbitration proceedings, the group endeavoured to approach the topic essentially from a pragmatism angle. For this purpose, it identified three main issues, which were respectively dealt with by each of the Mentees under the supervision of the Mentor and the Buddy, namely:

1. Whether the Prague Rules are compatible with the major international arbitration rules (this section was dealt with by Juan Pablo Valdivia Pizarro);
2. To which extent the Rules innovate or duplicate existing rules and guidelines, such as the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules”) (this section was dealt with by Andreea I. Nica and Maria Teder, the latter specifically analysing, with a focus on Estonian law, the *Iura Novit Curia* principle introduced by the Rules); and
3. What the potential consequences of the Rules on the conduct of the proceedings from the arbitrator’s perspective are (this section was dealt with by Maria Teder).

1. Are the Prague Rules compatible with the major international arbitration rules?

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Article 1 of the Prague Rules, which deals with the ambit of the Rules, sets forth one of their most significant characteristics, namely their plasticity and the flexibility with which parties and arbitral tribunals can approach them. This is a valuable (albeit not novel)⁷ trait in *soft law* instruments which seek to achieve widespread application.

Such flexibility is first reflected by the fact that both parties and arbitral tribunals enjoy significant latitude when deciding upon the Rules' applicability. Thus, the Rules can be applied as a binding document or as guidelines, and to all or just a specific stage of the proceedings.⁸ Parties can also exclude sections of the Rules which they do not find suitable or apply only a specific portion of them.⁹ Second, but equally important, is the fact that the Rules provide at the same time that “[i]n all cases, due regard must be given to the mandatory legal provisions of the *lex arbitri*, as well as to the applicable arbitration rules and the procedural arrangements of the parties.” The purpose of this section is to assess, on this basis, whether the Prague Rules are compatible with the rules of the major arbitration institutions.

Only a limited amount of arbitral institutions' rules has been investigated, as it is not the intention of this section to be exhaustive. Rather, this section concentrates on the compatibility of the Prague Rules with institutional rules in relation to the overall objective of the Prague Rules (*i.e.* to enhance the efficient conduct of the proceedings) (section 1.1). It then deals with specific powers conferred to arbitrators by the Prague Rules, which - at first glance - may seem likely to give rise to possible incompatibilities, namely the arbitral tribunal's power to express preliminary views and to proceed with early determination of issues (Articles 2.4 and 2.5 of the Prague Rules) (section 1.2); and the tribunal's power to assist in a possible amicable settlement process (Article 9 of the Prague Rules) (section 1.3).

1.1. The overall objective of the Prague Rules: enhancing the efficient conduct of the proceedings

Due to the nature and spirit of the Rules, it appears difficult to assume upfront that there might be any significant incompatibilities between them and the rules of the major international arbitral institutions. After all, the Preamble of the Rules states that they “are not intended to replace the arbitration rules provided by various institutions” and that they have been “designed to supplement the procedure to be agreed by parties or otherwise applied by arbitral tribunals in a particular dispute.” This seems to ring especially true with regard to the most global arbitral institutions, whose rules have been tailored to be applied by practitioners around the world and in a wide variety of jurisdictions. The safe initial bet would, therefore, seem to be in favour of compatibility.

⁷ See, *e.g.*, the IBA Rules (Foreword, Preamble and Art. 1); the Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration (2007) (Preamble, paras. 1 and 2); the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) (Introduction, para. 6).

⁸ Preamble of the Prague Rules, Preamble (3rd para.).

⁹ Art. 1.2. of the Prague Rules.

By the same token, it is important to remember from the outset that the Prague Rules primarily contemplate the efficient conduct of proceedings.¹⁰ As a consequence, their drafters did not intend to create something unheard of or fully innovative and did not expect the Prague Rules to stand as a totally new way of conducting arbitration proceedings or to replace the IBA Rules. Essentially, the Prague Rules aim at putting forward an alternative that incorporates some of the most efficient techniques available for managing arbitration proceedings.

Actually, the repeated calls in the Prague Rules for an expedient procedure and a proactive conduct by the arbitral tribunal both echo and find legitimacy in the duties that all major institutional rules place on arbitral tribunals to manage the proceedings in such way as to avoid unnecessary delays and expense and to provide an expeditious resolution of the dispute.¹¹

Indeed, most modern institutional rules have a ‘built-in’ mechanism for promoting efficiency, whereby both the tribunal and the parties are usually encouraged (if not obliged) to make an effort towards the fast, efficient and cost-effective conduct of the arbitral proceedings. And, in the process, the arbitral tribunal is afforded wide discretion to discharge its duties.¹² The combination of such ‘built-in’ mechanism with the explicit recommendations of the Prague Rules for the tribunal to act proactively is, therefore, likely to create a promising synergy to the advantage of the parties choosing to apply the Prague Rules, rather than potential sources of incompatibility.

By way of illustration, the encouragement in the Prague Rules to limit the use of evidentiary hearings, subject to some safeguards,¹³ is not only compatible with the major institutional rules, but is also aligned with their provisions. For example, similarly to the Prague Rules, the ICC Arbitration Rules provide for and encourage ‘documents only’ arbitration proceedings, especially in smaller cases,¹⁴ unless any of the parties requests a hearing.¹⁵

Further, and although the major institutional rules do contain ‘essential’ provisions which cannot be derogated from by agreement of the parties,¹⁶ institutional rules give predominance to the parties’

¹⁰ And not only the taking of evidence.

¹¹ See, e.g., Art. 14(4) of the LCIA Rules and Art. 22(1) of the ICC Rules.

¹² See, e.g., Art. 14(5) of the LCIA Rules and Art. 19 of the ICC Rules.

¹³ Art. 8.2 of the Prague Rules provides that “(i)f one of the parties requests a hearing or the arbitral tribunal itself finds it appropriate, the parties and the arbitral tribunal shall seek to organise the hearing in the most cost-efficient manner possible (...)”.

¹⁴ It is worth noting that Art. 3(5) of the ICC Rules on Expedited Procedures also authorizes the arbitral tribunal to decide a dispute solely on the basis of documents (see ICC Arbitration Rules Appendix VI - Expedited Procedure Rules). This provision grants even wider powers to the tribunal since it allows the arbitrator to make such a decision as long as the parties have been previously consulted, whereas article 25(6) of the ICC Arbitration Rules (which applies to the ‘standard’ ICC arbitration proceeding) only authorizes the tribunal to decide on a “documents only” basis provided that none of the parties requests a hearing.

¹⁵ See Art. 25(6) of the ICC Rules. See also the Appendix IV to the ICC Rules in relation to case management techniques; and the ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration, items 27 and 35. The LCIA Rules, by contrast, allow for ‘documents only’ arbitration only if the parties have agreed to it in writing (Art. 19(1)).

¹⁶ By way of illustration, two of such “essential” provisions are Arts. 11(1), 23 and 34 of the ICC Rules, in relation to the independence and impartiality requirement, the Terms of Reference and the Scrutiny of the Award, respectively.

choice and permit the parties to adapt the proceedings to their expectations. As explained in further detail in the following sections,¹⁷ the provisions of the Prague Rules do not by any means irreconcilably conflict with the ‘essential’ prescriptions of institutional rules. By contrast, they actually fit well into the space left by such institutional rules to the parties to tailor the proceedings to their own needs.

As a result, the Prague Rules and the arbitration rules of the main arbitral institutions overall seem not only compatible but also complementary as far as their common objective of promoting efficiency is concerned. Specific powers granted to the arbitral tribunal by the Prague Rules may, however, raise some concerns as to a potential collision with institutional rules.

1.2. The tribunal’s power to express preliminary views and to determine preliminary matters (Articles 2.4 and 2.5 of the Prague Rules)

There may first appear to be a potential incompatibility between the standards and rules for challenge of arbitrators under the major arbitration rules, and the tribunal’s power to express preliminary views and to determine preliminary issues under Articles 2.4 and 2.5 of the Prague Rules. One might indeed fear that the exercise of those powers may be a valid reason for a party to believe that the tribunal is no longer able to remain impartial. For example, once a tribunal has expressed preliminary views on certain issues upon which it will later have to finally decide, a party could feel that the arbitrator may have formed a bias that (in the eyes of a reasonable third person) would give rise to justifiable doubts as to the arbitrator’s impartiality, even if further information is later presented during the proceedings.¹⁸

In such a scenario, it would be important to determine which rules would prevail. Would it be the rules and standards shrouded in the applicable arbitration rules? Or would it be the relevant articles of the Prague Rules, which provide that the expression of preliminary views by the tribunal “shall not by itself be considered as evidence of the tribunal’s lack of independence or impartiality, and cannot constitute grounds for disqualification”?¹⁹ Due to their fundamental nature, the provisions of the arbitration rules prescribing the duty of independence and impartiality of arbitrators are certainly not subject to deviation by virtue of an agreement between the parties. Such provisions are undoubtedly of critical importance for the administering bodies and other decision-making organs within the relevant institution. However, in analysing the issue at hand, the arbitrators will have to necessarily assess such provisions in the applicable arbitration rules (*i.e.* the standards regarding independence and impartiality of arbitrators) in conjunction with the text of Article 2.4 of the Prague Rules, which will embody the decision of the parties and/or of the tribunal not to rely on the expression of preliminary views as an (independent) ground for disqualification of an arbitrator.

¹⁷ See sections 1.2. and 1.3 below.

¹⁸ By way of illustration, such situation could resemble the scenario presented in paragraph 3.5.2 of the IBA Guidelines on Conflicts of Interest, where a case in which an arbitrator “has publicly advocated a position on the case” is included in the Orange List (This list describes scenarios that, depending on the specific circumstances, may give rise to doubts as to the arbitrator’s impartiality or independence and, therefore, require the arbitrator’s disclosure of such situations).

¹⁹ Art. 2.4 of the Prague Rules.

In addition to that, the Prague Rules themselves, as already mentioned, concede that due regard shall be given not only to the mandatory rules of the seat but also to the applicable arbitration rules.²⁰ In light of this guideline, one may argue that the potential conflict described above may be resolved against the application of the relevant articles in the Prague Rules.

On the other hand, where the parties have agreed to apply the Prague Rules and, therefore, to exclude the expression of preliminary views as a ground for a challenge and to authorize the tribunal to determine certain issues as preliminary matters, it seems only wise that the relevant institution takes that agreement into account when deciding on a possible challenge.²¹ Such agreement shall be considered a valid waiver as the expression of preliminary views by the tribunal does certainly not fall within the IBA non-waivable red-list. At the same time, such waiver is a "price" the parties are prepared to pay to contribute to the efficiency of proceedings.

As further explained below, it is reasonable to say that in the context of Article 9 of the Rules regarding the assistance in amicable settlements, the situation should be similar.

1.3. The tribunal's power to assist in amicable settlement (Article 9 of the Prague Rules)

In relation to settlement facilitation, the drafters of the Prague Rules certainly had in mind the potential conflicts that a tribunal may face when expressing its views during an amicable settlement process.²²

Arbitration is a product of the parties' consent, an essential feature which is the source, via an agreement to apply the Prague Rules, of the tribunal's powers and authority under those Rules. And this applies equally to any other arrangements between the parties. The consensual nature of arbitration and the parties' freedom that flows therefrom, appear therefore as the basis for a robust and active conduct of the proceedings under the Prague Rules. Further, such authority is not limited to procedural steps. If the parties consent that the tribunal also actively engages in the substance by providing guidance during amicable settlement discussions, that agreement must certainly be abided by as well.

²⁰ Art. 1.3 of the Prague Rules.

²¹ With this in mind, it is important to note that the last paragraph of Art. 2.4 of the Prague Rules does not constitute a general impediment for parties to bring a challenge against an arbitrator when such challenge may be related to the expression of preliminary views under Art. 2.4(e). What Art. 2.4 of the Prague Rules states is that expressing such preliminary views cannot by itself be considered as evidence of the tribunal's lack of independence or impartiality. This is a clear expression of the limited scope of this article. Therefore, should other factors giving rise to justified doubts as to the tribunal's independence or impartiality exist, Art. 2.4 will not prevent a party from successfully challenging a partial or dependent arbitrator.

²² This is expressed in the draft version (of 1 September 2018) of the Prague Rules. Art. 9.2 of such draft (which is not included in the current version of the Rules) then provided that "[t]o the extent permissible under the *lex arbitri*, the Arbitral Tribunal may, upon obtaining consent from all of the Parties, express its preliminary views with regard to the Parties' respective positions in order to assist in an amicable settlement of the dispute. The expression of such preliminary views shall not be considered as a pre-judgment or by itself constitute a ground for disqualification of any member of the Arbitral Tribunal." By contrast, the IBA Rules, as well as the IBA Guidelines on Conflicts of Interest, remain silent on the issue.

In principle, the essential duties of independence and impartiality are in no way tainted by the arbitral tribunal performing functions legitimized by the parties' agreement. Naturally, should the arbitrators carry out such functions in a manner that would give rise to justifiable doubts regarding their independence and impartiality, the parties will still be able to use the relevant tools provided in the applicable arbitration rules. But again, the decision-making body in such a case will certainly have to assess the conduct of the arbitrators in light of the agreement of the parties.²³

In any event, given the wording of the Prague Rules and the importance placed on Article 9 on the consent of all parties, it is unlikely that such article would be incompatible with the major institutional arbitration rules regarding the standards for challenging arbitrators on the basis of an alleged violation of their duty to remain impartial and independent.

That being said, the challenge to address may rather be how the institution's decision-making body would assess the specific conduct of the arbitrators. This could constitute an intriguing hurdle, since the standard of independence and impartiality may need to be assessed differently when the tribunal has been performing a role of assistance in the parties' amicable settlement negotiations (or even of mediator), distinct from that of an arbitrator.

The possibility for the tribunal to encourage the amicable settlement of a dispute is nothing new. Article 9 of the Prague Rules is actually very similar to Article 26 of the Arbitration Rules of the German Arbitration Institute (DIS).²⁴ However, institutional rules usually do not expressly encourage arbitrators to serve as settlement facilitators. Therefore, due to the arguable lack of experience of most major arbitral institutions in this respect, the assessment of the tribunal's lack of independence and impartiality in the context of facilitating settlement discussions may constitute uncharted territory for the decision-making bodies of institutions.²⁵

However, if this may indeed be a challenge for institutions, this does not automatically make Article 9 of the Prague Rules incompatible with institutional rules.

²³ At this stage, one could imagine that it would require remarkable ingenuity for a party that has given its express consent for the tribunal to assist in the facilitation of a settlement, to challenge the very performance of the authorized action or to attempt to explain how that party 'became aware' of such ground for challenge.

²⁴ Art. 9.1 of the Prague Rules is, in fact, almost a verbatim copy of Art. 26 of the DIS Rules. Interestingly enough, Art. 27(4)(iii) of the DIS Rules further contains an obligation for the tribunal to discuss with the parties the possibility of using mediation or other settlement facilitation to seek the resolution of the dispute. See also the ICC Rules, which allow, through their Appendix IV on case management techniques, for a similar option provided that there is an agreement to that effect between the parties and the tribunal (see para. (h)(ii) thereof). The Swiss Rules of 2012 also contain a similar provision in Art. 15(8), which sets forth that "[w]ith the agreement of each of the parties, the arbitral tribunal may take steps to facilitate the settlement of the dispute before it. (...)".

²⁵ Beyond the compatibility with institutional rules, the issue may arise before state courts, when called upon to decide an application for the annulment of an arbitral award, or simply a challenge to the tribunal for lack of independence and impartiality. Likewise, it can be reasonably expected that the agreement of the parties that the tribunal act as settlement facilitator or mediator may guide the court and serve as a basis for its reasoning. Arguably, a state court may also, however, assess the situation through the lens of its own domestic law and tradition.

2. To which extent do the Prague Rules innovate or duplicate existing rules and guidelines?

Initially portrayed as an alternative to the IBA Rules,²⁶ which are often perceived in the civil law countries as being closer to common law traditions, the final version of the Prague Rules adopts a more neutral tone and proposes their usage “in any arbitration proceedings where the nature of the dispute or its amount justifies a more streamlined procedure actively driven by the tribunal”.²⁷ However, it quite clearly transpires from their content that the goal of the Prague Rules is to address problems allegedly triggered by the counsel-driven (or adversarial) way of handling arbitration proceedings. The Rules, therefore, aim at proposing a more inquisitorial approach on the conduct thereof, with a view to reinforcing flexibility and cost-efficiency of arbitration.

To date and before they had even been used in practice, the arbitration community had very varied reactions towards the adoption of the Prague Rules, ranging from their complete dismissal²⁸ to suggesting that they represent a step in the right direction,²⁹ or simply questioning their utility.³⁰

Overall, it seems that many provisions of the Rules do not reinvent the wheel and have a similar wording or, at least, purpose as existing rules and recommendations. For instance, common features can be found between the Prague Rules and the IBA Rules regarding their scope of application,³¹ or the administration of the case management conference.³² In fact, the Prague Rules were never intended to present a novel or perfect view of how to conduct arbitrations, but rather “to make parties and arbitrators think about which of the procedural techniques are better for any given case”.³³ Thus, the Prague Rules are said to represent an alternative or an addition to the IBA Rules, and not a competitor.³⁴

²⁶ See the Note from the Working Group in the draft version of the Prague Rules, p. 2 (paras. 3-4).

²⁷ See the Note from the Working Group in the final version of the Prague Rules, p. 2 (para. 3).

²⁸ M. KOCUR, “Why Lawyers from civil law jurisdictions do not need the Prague Rules” (2018), *Kluwer Arbitration blog*, available at: <http://arbitrationblog.kluwerarbitration.com/2018/08/19/why-lawyers-from-civil-law-jurisdictions-do-not-need-the-prague-rules/>, section [Let’s Stick to the IBA Rules] accessed on 13 January 2019.

²⁹ M. MCILWRATH, “The Prague Rules: The Real Cultural War Isn’t Over Civil vs Common Law” (2018), *Kluwer Arbitration blog*, available at: <http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law>, section [The Prague Rules should occupy a bigger tent] accessed on 13 January 2019.

³⁰ G. R. AMARAL, “Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills – Part II” (2018), *Kluwer Arbitration blog*, available at: <http://arbitrationblog.kluwerarbitration.com/2018/07/06/prague-rules-v-iba-rules-taking-evidence-international-arbitration-tilting-windmills-part-ii/>, section [Prague Rules and IBA Rules: not that different after all] accessed on 13 January 2019.

³¹ See the respective Preambles and Art. 1 of the Prague Rules and of the IBA Rules.

³² See Art. 2 of the Prague Rules and IBA Rules.

³³ A. PANOVA, “Why the Prague Rules may be needed?” (2018), *Thomas Reuters Arbitration blog*, available at: <http://arbitrationblog.practicallaw.com/why-the-prague-rules-may-be-needed/>, section [Conclusion] accessed on 13 January 2019.

³⁴ A. PANOVA, *Ibid.*; D. G. HENRIQUES, “The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?” (June 2018) *ASA Bulletin*, Volume 36, Issue 2, p. 355.

Nevertheless, the Rules are meant to address two issues which are thought to be the main roots of dissatisfaction in international arbitration nowadays,³⁵ *i.e.* (i) the lack of flexibility in tailoring the arbitration proceedings in light of the particularities of the case, notably when it comes to the handling of evidence and (ii) the tribunal's due process paranoia when facing conducts, which would be deemed unacceptable from the parties in other dispute resolution fora, involving stronger case management and fact-finding prerogatives. With this in mind, a closer look at the Rules shows that they actually diverge from the IBA Rules and other rules in some distinguishable respects, as discussed in detail below.

2.1. Proactive Role of the Arbitral Tribunal (Article 2 of the Rules)

Initially conceived as rules on the taking of evidence based on the inquisitorial model,³⁶ the Prague Rules ultimately evolved to include provisions bestowing a proactive role upon the arbitral tribunal on larger aspects, such as case management.

Similarly to the IBA Rules (Article 2) and to major institutional rules,³⁷ the Prague Rules provide first for an early case management conference. However, while the early consultation prescribed by Article 2 of the IBA Rules remains primarily focused on evidentiary issues, Article 2 of the Prague Rules also envisages discussions with the parties regarding (i) the procedural timetable (Articles 2.2(a) and 2.5)³⁸ and (ii) the positions of the parties,³⁹ including the relief which they seek, the disputed and undisputed facts between them and the legal grounds they rely on (Articles 2.2(b) and 2.4).

Further on, where Article 23 of the ICC Rules provides that the Terms of Reference shall include “a list of issues to be determined”⁴⁰ and Article 2(3) of the IBA Rules encourages the tribunal to identify issues relevant to the case and material to its outcome, or amenable to preliminary determination,⁴¹ Article 2.4 of the Prague Rules actually goes way further (as already discussed at section 1.2 above). In particular, it expressly⁴² gives the tribunal the power, if it deems appropriate, to indicate from the outset to the parties:

³⁵ D. G. HENRIQUES, *Ibid.*, p. 351.

³⁶ See the Note from the Working Group in the draft version of the Prague Rules, p. 2 (para. 5).

³⁷ See, for instance, Art. 24 of the ICC Rules (and the corresponding recommendations in paras. 25 seq. of the ICC Arbitration Commission Report on Controlling Time and Cost in Arbitration), Art. 14.1 of the LCIA Rules and Art. 19.3 of the SIAC Rules.

³⁸ This issue is already extensively envisaged by the major arbitration rules, such as Art. 24 of the ICC Rule and Art. 22 of the CEPANI Rules.

³⁹ In particular, Arts 2.2(b), 2.3 and 2.4(a) and (c), arguably serve, to some extent, the same purpose as terms of reference, which establishment is prescribed by various arbitration rules and, notably, Art. 23 of the ICC Rules.

⁴⁰ “Unless the arbitral tribunal considers it inappropriate”.

⁴¹ See also point b) of Appendix IV of the ICC Rules on Case Management Techniques referring to the identification of “issues that can be resolved by agreement between parties or their experts”.

⁴² It should be noted that Appendix IV of the ICC Rules on Case Management Techniques is a non-exhaustive list of examples of case management techniques, which are recommended for controlling time and costs. As a consequence, it does not prevent, in theory, from agreeing on and using those envisaged by the Prague Rules. See also in this sense, paras. 26 and 27 of the ICC Arbitration Commission Report on Controlling Time and Cost in Arbitration.

- i. the type(s) of evidence it considers “to be appropriate to prove the parties’ respective positions” (Article 2.4 (b));
- ii. “the actions which could be taken by the parties and the arbitral tribunal to ascertain the factual and legal basis of the claim and the defence” (Article 2.4 (d)); but also
- iii. its preliminary views on important issues such as (i) the allocation of the burden of proof between the parties; (ii) the relief sought; (iii) the disputed issues; and (iv) the weight and relevance of evidence submitted by the parties (Article 2.4 (e)).⁴³

2.2. Fact Finding (Article 3 of the Rules)

The Rules further envisage a proactive role from the tribunal when it comes to fact finding. Under Article 3.1, the tribunal is thus “entitled and encouraged to take a proactive role in establishing the facts of the case which it considers relevant for the resolution of the dispute”.

Article 3.2 provides a non-exhaustive list of powers that the tribunal may exercise in this respect, including requesting documentary or witness evidence (point a)), appointing experts (point b)), ordering site inspections (point c)) and taking “any other actions which it deems appropriate” (point d)). This list is, however, comparable with existing rules, such as Article 22.1 of the LCIA Rules (on “Additional Powers”).⁴⁴ Further, regarding inspections in particular, whereas the wording of Article 3.2(d) of the Prague Rules is probably broad enough to cover other types of inspections, such as the inspection of any “property, machinery or any other goods, samples, systems, processes or [d]ocuments” expressly envisaged, for example, by Article 7 of the IBA Rules, it is doubtful whether it would also cover the prescriptions of that Article regarding logistical arrangements and the parties’ right to attend the inspection.

⁴³ Despite the disclaimer contained to this effect in Art. 2.4 of the Prague Rules, the expression of preliminary views by the arbitral tribunal at the outset of the proceedings may arguably raise potential risks of the tribunal prejudging the case (as discussed in section 1.2 above and 3.4 below).

⁴⁴ Art. 22.1 of the LCIA Rules provides, in its relevant parts, that: “The Arbitral Tribunal shall have the power, upon the application of any party or (...) upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide: (...) (iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties’ dispute; (iv) to order any party to make any documents, goods, samples, property, site or thing under its control available for inspection by the Arbitral Tribunal, any other party, any expert to such party and any expert to the Tribunal; (v) to order any party to produce to the Arbitral Tribunal and to other parties documents or copies of documents in their possession, custody or power which the Arbitral Tribunal decides to be relevant; (vi) to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any issue of fact or expert opinion; and to decide the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal (...)”. See also section 2.6.2 below.

Likewise, as a common practice deriving from the IBA Rules or the recommendations of paragraph 73 of the ICC Arbitration Commission Report on Controlling Time and Costs in Arbitration (the “ICC Report on Controlling Time and Costs”), Article 3.3 of the Prague Rules advocates for the tribunal to consider imposing a cut-off date for the submission of evidence, save for under exceptional circumstances. This provision will not add much from a practical standpoint as, more than often, the tribunals in agreement with the parties include a deadline for the submission of evidence in their procedural order no. 1.

As a result, Article 3 does not seem to innovate that much in terms of powers available to the tribunal for a proactive conduct of the proceedings and has been criticized as a false premise for increasing efficiency in arbitration given the complexity of the disputes.⁴⁵ However, it might arguably prove to be a useful tool in arbitrations with unexperienced counsels.

2.3. Documentary Evidence and Document Production (Article 4 of the Rules)

Based on the reality that documentary evidence production has become a costly and time-consuming exercise and is not an efficient tool in international arbitration,⁴⁶ the Prague Rules intend to avoid it as much as possible. Thus, while the IBA Rules simply intend to limit document production to what is considered appropriate in international arbitration (namely, intend to exclude expansive American- or English-style discovery, but allow some level of document production),⁴⁷ Article 4 of the Prague Rules encourages the tribunal and the parties “to avoid any form of document production, including e-discovery”. Article 4.3 however envisages that a party may request certain documents from the other party. In this respect, the Prague Rules certainly tend to achieve the same purpose as Appendix IV of the ICC Rules on Case Management Techniques (the “ICC Case Management Techniques”), which recommends “avoiding requests for document production when appropriate”.

Unlike Article 3 of the IBA Rules, which follows an adversarial approach and contains very comprehensive and detailed provisions on the sequence, format and contents of document production requests and procedure, Article 4.3 of the Prague Rules adopts a more lenient and less formal attitude, leaving it to the tribunal “to decide on a procedure for document production”.⁴⁸ Furthermore, whereas the IBA Rules envisage requests for both (i) single documents and (ii) a narrow and specific categories of documents (Article 3(3)), the Prague Rules only contemplate requests for a “specific document”⁴⁹ (Article 4.5). As a result, one may doubt whether requests for categories of documents may fall under the scope of the Rules.

⁴⁵ M. KOCUR (n 27).

⁴⁶ As the most sensitive documents normally go to shredder before the document production process starts and tribunals usually draw adverse inference from the fact of non-producing documents.

⁴⁷ See “Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration”, p. 7.

⁴⁸ Likewise, the recommendations made in the ICC Case Management Techniques remains limited where it comes to document production and only deal with the recommended grounds for the requests, the establishment of time limits and the use of document production schedule.

⁴⁹ By which it is also understood “documents”, but not categories of documents.

Further, Article 4.5 of the Rules, specifies the grounds for making a document production request, namely (i) the relevancy and materiality of the documents to the outcome of the case, (ii) its lack of availability in the public domain and (iii) its possession, power or control by the other party (Article 4.5). It is noteworthy that such grounds are very similar to those referred to in the IBA Rules (Article 3(3) (b) and (c)) and in the ICC Case Management Techniques (Point d) iii)).

It is also noteworthy that Article 4 of the Prague Rules further deals with the issue of confidentiality of documents. The Rules' standards in this respect (Article 4.8) are rather similar to Article 3(13) of the IBA Rules. Nevertheless, the situations in which disclosure thereof is permitted vary: (i) the Prague Rules permit it only when required by the applicable law, whereas (ii) the IBA Rules, as well as similar arbitration rules,⁵⁰ allow it in various specific situations, such as in case of a need to fulfil a legal duty, protect a legal right or enforce or challenge an award in *bona fide* legal proceedings before a state court.

2.4. Fact Witnesses (Article 5 of the Rules)

The Prague Rules and the IBA Rules diverge concerning both (i) the determination of the number of witnesses appearing at the hearing and (ii) the conduct of their examination. The Prague Rules grant much more power to the tribunal in both respects.

First, while under Article 8(1) of the IBA Rules the parties are practically free to decide who will testify at a hearing,⁵¹ Articles 5.2 and 5.3 of the Prague Rules leave that decision completely in the tribunal's hands, upon hearing the parties. By leaving such discretion to the tribunal, the Rules also go beyond (i) the ICC Case Management Techniques, which recommend to limit "the length and scope of [...] written and oral witness evidence [...]",⁵² or (ii) the ICC Report on Controlling Time and Cost, which envisages a series of limitation measures,⁵³ but primarily leaves it to the parties to consider how many witnesses should appear at the hearing.⁵⁴

Moreover, Article 5.6 of the Prague Rules grants the tribunal discretion, after having heard the parties, to assess the evidential value of a witness statement, by ultimately deciding not to call the witness to testify at the hearing. This, of course, implies the risk of relying on written testimony only, without giving the other party the opportunity to interrogate the witness. That risk may, however, be tempered where the opposing party has been given the opportunity to rebut or comment on the witness statement. Also, under Article 5.7 of the Rules, a party can still insist on calling a witness, whose statement was

⁵⁰ See, for instance, Art. 30.1 of the LCIA Rules, Art. 44(1) of the Swiss Rules and Rule 39.2 of the SIAC Rules.

⁵¹ Subject to the tribunal's power to request the appearance of a witness (Art. 8(1)) or to limit or exclude such appearance (Art. 8(2)).

⁵² See point e).

⁵³ Such as the tribunal's assistance in narrowing the issues on which witness evidence is required (para. 60), considering for the tribunal to limit the length of cross-examination (para. 80) and possibly calling for witness conferencing (para. 79).

⁵⁴ See para. 77.

submitted by the other party, and under Article 5.8 it is further specified that the tribunal’s decision in this respect does not limit its authority “to give as much evidential value to the written witness statement as it deems appropriate”.

Therefore, in theory at least, the application of the Prague Rules is likely to limit the number of witnesses appearing at hearings. Now, one may certainly argue that for the tribunal to exercise judgement fairly in this respect, it must be proactively involved in the proceedings. It is, though, what is consistently intended by the Rules, in general, and by Article 2, in particular.

Second, whereas Article 8(3) of the IBA Rules has generally led in practice to the cross-examination of witnesses by the parties, Article 5.9 of the Prague Rules, coupled with other provisions on the taking of evidence (*e.g.*, Article 3.1), provides for the conduct of examination of witnesses “under the direction and control” of the tribunal. It is, however, clear from the wording of Article 5.9 that this does not exclude interrogation by the parties.

Further, while the IBA Rules are very comprehensive regarding the format and contents of witness statements⁵⁵ and the sequences of oral testimony,⁵⁶ the Prague Rules proceed on the assumption that written witness statements should not be produced, unless the tribunal invites a party to present a witness statement (or, when the tribunal decides not to call a witness at all, but the party still believes that the tribunal should be aware of the scope and content of the testimony of such witness).

Last but not least, it is also worth noting that although the Rules contain a general provision dealing with adverse inferences,⁵⁷ they do not contemplate any specific measures, should a witness (who was called) fail to appear at the hearing or where he/she will not appear voluntarily at a party’s request. By contrast, the IBA Rules deal with both scenarios, with Article 4(7) providing that the tribunal should disregard the statement submitted by the witness who failed to appear,⁵⁸ and with Article 4(9) contemplating requests for measures to obtain testimony from recalcitrant witnesses. One may, however, argue that Article 10 of the Prague Rules is sufficiently broad to cover both situations and in fact provides more flexibility to the tribunal.

2.5. Experts (Article 6 of the Rules)

Article 6 of the Rules tends to outrightly favour the appointment of one or several independent expert(s) by the tribunal,⁵⁹ rather than by the parties. This contrasts with Articles 5 and 6 of the IBA Rules, which treat on an equal footing both party- and tribunal-appointed experts, even if in practice the former tend to be more common than the latter.

⁵⁵ Art. 4(5).

⁵⁶ Art. 8(3).

⁵⁷ Art. 10.

⁵⁸ Unless exceptional circumstances justify otherwise. See also Art. 9(6).

⁵⁹ Including at the request of a party and upon consultation of the parties (See Arts 6.1 and 6.2).

Further, the Prague Rules do not specify the contents of the expert report, whereas the IBA Rules are very detailed regarding reports both from party- and tribunal-appointed experts.⁶⁰

2.6. *Jura Novit Curia (Article 7 of the Rules)*

Surely, one of the most controversial provision of the Prague Rules, especially from a common law lawyer's perspective,⁶¹ is Article 7, entitled "*Iura Novit Curia*".⁶² The maxim translates to "the court (or the judge) knows the law", suggesting rightfully that the principle has its origins in court proceedings. In overly simplistic terms, it is associated with civil law tradition, though its application varies greatly, and it is perceived as alien to civil procedure in common law countries.⁶³

That said, the concept of *Iura Novit Curia* has also been introduced in commercial arbitration, either by virtue of the parties' agreement or, most likely, also as a result of the arbitrators' legal background and the way they handle a case. This may also be supported by the national arbitration laws (section 2.6.1) or the applicable rules and guidelines (section 2.6.2).

2.6.1 *The application of the Iura Novit Curia principle through the applicable arbitration law*

Many national arbitration laws, such as the Estonian arbitration law,⁶⁴ are silent on the applicability of the *Iura Novit Curia* principle. At the same time, this principle is recognized in the civil court procedure. For example, in Estonia, the court is not bound by the legal arguments made by the parties, which essentially means that the court must independently qualify the legal relationship between the

⁶⁰ The possibility for the tribunal to appoint its own experts is further discussed in section 3.4 below.

⁶¹ M. SAUNDERS and T. KARALIS. International Arbitration Update by Ashurst, "Prague Rules officially launched: The beginning of a new era in international arbitration?" (2018), available at: <https://www.ashurst.com/en/news-and-insights/legal-updates/prague-rules-officially-launched---the-beginning-of-a-new-era-in-international-arbitration/>.

⁶² See section 2.6 above.

⁶³ For a brief overview, see: INTERNATIONAL LAW ASSOCIATION (ILA), "Final report on Ascertainning the Contents of the Applicable Law in International Commercial Arbitration" (2008), pp. 8-12; T. ISELE, "The principle iura novit curia in international commercial arbitration" (2010), *International Arbitration Law Review*, Volume 13 Issue 1, pp. 14 – 17; J. WAINCYMER, "International Arbitration and the Duty to Know the Law" (2011), *Journal of International Arbitration*, Volume 28, Issue 3, pp. 204 – 206; C. VON WOBESER, "The Effective Use of Legal Sources: How Much Is Too Much and What Is the Role for Iura Novit Curia?", in A. J. van den Berg (ed), *Arbitration Advocacy in Changing Times (2011) ICCA Congress Series*, Volume 15, pp. 207 – 208 ; V. ÖHLBERGER AND J. PINKSTON, "Chapter II: The Arbitrator and the Arbitration Procedure, Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blinders and Misplaced Concerns About Impartiality", in C. Klausegger, P. Klein, et al. (eds), *Austrian Yearbook on International Arbitration* (2016), pp. 104 – 106; M. S. ABDEL WAHAB, "Iura Novit Arbiter in International Commercial Arbitration: The Known Unknown", in N. G. Ziadé (ed), *Festschrift Ahmed Sadek El-Kosheri* (2015), Kluwer Law International, pp. 5 – 6.

⁶⁴ RT I 2005, 26, 197; RT I, 07.12.2018, 27 – Tsiviilkohtumenetluse seadustik (Code of Civil Procedure) entered into force on 1 January 2006. It is available on *Riigi Teataja*, the official online publication of the Republic of Estonia, which also contains unofficial translations of legal acts: <https://www.riigiteataja.ee/en/eli/516012019001/consolide> Estonian law does not differentiate between domestic and international arbitration which are both regulated by Part 14 of the Estonian Code of Civil Procedure.

parties and the legal grounds for their claims.⁶⁵ In exercising this prerogative, the court has a duty to clarify the legal and factual circumstances of the case, and to draw the parties' attention to the possible legal qualifications based upon the facts that have been presented. However, when qualifying a situation, the court is limited by the factual circumstances put forward by the parties. If the parties have failed to present factual circumstances that would allow to make a claim on a different legal basis, the court may not consider that alternative legal basis.⁶⁶

The situation is slightly different when the court is dealing with foreign law. One might even say that foreign law enjoys a quasi-factual treatment in Estonian court proceedings. In establishing the relevant rules of foreign law, the court may seek the assistance of the parties, who may in turn wish to present evidence on the contents of the law, such as legal authorities, expert opinions, etc. However, should the parties' submissions be lacking, it is for the court to determine the contents of the applicable foreign law, failing which the courts may apply Estonian law by default.⁶⁷

The court further has the duty to advise the parties on the allocation of the burden of proof as early as possible. The rationale being that such actions lead to more efficient proceedings.⁶⁸ All in all, the courts are expected to take a proactive role in steering the proceedings rather than to be guided by the actions of the parties.

The above provisions of the Estonian Code of Civil Procedure are not directly applicable to arbitral proceedings.⁶⁹ There is also no known case-law from Estonia dealing with the *Iura Novit Curia* principle in arbitration. Therefore, it remains to be seen whether the *Iura Novit Curia* principle could be applicable to arbitral proceedings with a seat in Estonia. Assumedly though, it would fall within the arbitrators' discretion to apply the principle, even where the parties have not explicitly agreed on its application. This has been the practice in a nearby jurisdiction such as Finland.⁷⁰ All in all, there is nothing in the Estonian arbitration law that would prevent the tribunal from applying the *Iura Novit*

⁶⁵ CCP § 436(7): "In making a judgment, the court is not bound by the legal allegations made by the parties." [Unofficial translation of the *Riigi Teataja*].

⁶⁶ See V. KÕVE, et al. (eds), *Civil Code of Procedure II. Commentary* (2017), §436, para. 3.2.1., pp. 1000 – 1005.

⁶⁷ CCP § 234: "Proof of law in force outside of the Republic of Estonia, international law or customary law must be given only in so far as the court is not acquainted with such law. The court may also use other sources of information and perform other acts to ascertain the law. Upon ascertaining foreign law, the court is also guided by § 4 of the Private International Law Act." [Unofficial translation of the *Riigi Teataja*]. See V. KÕVE, et al. (eds), *Civil Code of Procedure II. Commentary* (2017), § 436, para. 3.2.5., pp. 1011 – 1013.

⁶⁸ See V. KÕVE, et al. (eds), *Civil Code of Procedure II. Commentary* (2017), §436, para. 3.2.1., pp. 1002 – 1003.

⁶⁹ The courts have, however, on one known occasion accepted the application of provisions not contained in Part 14 of the Code of Civil Procedure to arbitration. In a decision from 29 June 2012 in a civil case no 2-12-16851, the court denied that there had been a procedural irregularity where the tribunal directly relied on the evidentiary rules and deadlines set for court proceedings without the parties having agreed to apply the CCP. Reported in P.-M. PÕLDVERE, "Kaheksa aastat mudelseadust: kas Eesti vahekohtumenetlus vastab mudelile?" (2014), *Juridica*, Issue 1, p. 20.

⁷⁰ See G. KNUTS, "Jura Novit Curia and the Right to Be Heard - An Analysis of Recent Case Law" (2012) *Arbitration International*, Volume 28, Issue 4, pp. 677, 679 – 680.

Curia principle, especially if the parties themselves have conferred upon the tribunal the discretion to do so, *i.e.*, by way of agreeing to be guided by the Prague Rules.⁷¹

As for the tribunal's duty to determine the applicable law, the Estonian arbitration law contains an unorthodox provision, according to which the tribunal will apply Estonian law, if the applicable law does not follow from the parties' agreement or an act (CCP § 742(2)).⁷² The provision applies both to domestic and international arbitrations, suggesting that the arbitrators have an independent duty to familiarize themselves with Estonian law in case of such default situation.⁷³

By contrast, only a few national laws explicitly refer to and regulate the *Iura Novit Curia* principle. Surprisingly enough, they notably include the English Arbitration Act 1996,⁷⁴ as highlighted by numerous authors.⁷⁵ Nevertheless, the case-law from other jurisdictions, such as Switzerland, France, Sweden and Finland, confirms that the *Iura Novit Curia* principle is considered compatible with arbitral proceedings even without express provisions to this effect in the arbitration acts, provided that the fundamental principles of international arbitration, such as impartiality, equal treatment, the right to be heard, and the *ne ultra* or *extra petita* principle, etc., are respected.

2.6.2 The application of the *Iura Novit Curia* principle through the applicable arbitration rules and guidelines

Except for the LCIA Rules which afford the tribunal the power to “take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the [...]”

⁷¹ CCP § 732(3): “If the parties have not agreed on the procedure for the proceeding and such procedure is not provided by this Part either, the procedure for the proceeding is determined by the arbitral tribunal. An arbitral tribunal has the right to decide on the admissibility of evidence, to examine evidence and to be free in its evaluation of the outcome of giving evidence.” [Unofficial translation of the *Riigi Teataja*].

⁷² CCP § 742 (2): “An arbitral tribunal applies Estonian law if the parties have not agreed on applicable law and applicable law does not arise from an Act.” [Unofficial translation of the *Riigi Teataja*].

⁷³ Under the English Arbitration Act 1996, where the foreign (applicable) law is not satisfactorily proved, the tribunal may apply the presumption that foreign law is the same as English law and will apply (on its own initiative) English law. For a more detailed commentary, see, in particular, G. CORDERO-MOSS, “Is the arbitral tribunal bound by the parties' factual and legal pleadings?” (2006) *Stockholm International Arbitration Review*, Volume 2006, Issue 3, pp. 16.

⁷⁴ See Art. 34 of the English Arbitration Act (1996) (“Procedural and evidential matters”), which provides in its relevant part that:

“(1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include /.../

(g) whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law.”

For a more detailed commentary, see, in particular, G. CORDERO-MOSS, *Ibid.*, pp. 16-17.

⁷⁵ J. WAINCYMER (n 62), pp. 208–209; M.S. ABDEL WAHAB (n 62), pp. 8–18; C. P. ALBERTI, “Part I: International Commercial Arbitration, Chapter 1: *Iura Novit Curia* in International Commercial Arbitration: How Much Justice Do You Want?”, in S. M. Kroll, L. A. Mistelis, et al. (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (2011), pp. 16 – 17; D. BAIZEAU AND T. HAYES, “The Arbitral Tribunal's Duty and Power to Address Corruption *Sua Sponte*”, in A. Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series (2017), Volume 19, pp. 237 – 238.

merits of the parties' dispute"⁷⁶ there is no wide-scope rules other than the Prague Rules, which explicitly call for the application of the *Iura Novit Curia* principle.⁷⁷

This is not to say that no guidelines exist as to the application of this principle in the context of international arbitration. Notably, in 2008 the ILA published its final report on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration", which essentially recommends that: "the tribunal should inquire about the applicable law within the general parameters of the arbitration defined by the parties and, considering costs, time and relevance of issues, may conduct their own research, provided the parties are given the opportunity to be heard on material that goes meaningfully beyond the parties' submissions".⁷⁸

At first glance, the Prague Rules, though considerably more concise, seem to advocate a solution similar to the ILA Report. While recognizing that "[a] party bears the burden of proof with respect to the legal position on which it relies" (Article 7.1), the Prague Rules further prescribe that "the arbitral tribunal *may* apply legal provisions *not pleaded* by the parties" provided it has sought the parties' view beforehand. The rules also stipulate that the tribunal "may also rely on legal authorities even if not submitted by the parties if they relate to legal provisions pleaded by the parties and provided that the parties have been given an opportunity to express their views in relation to such legal authorities" (Article 7.2).

At a closer look, the Prague Rules may in fact allow for a wider application of the *Iura Novit Curia* principle than the recommendations in the ILA Report. This results from the wording of Article 7.2: "the arbitral tribunal may apply legal provisions not pleaded by the parties", which is broad enough to allow the introduction of totally new legal issues by the tribunal (by re-characterising, for example, the legal ground on which the parties rely). However, in light of the tribunal's obligation to seek the parties' views on the legal provisions it intends to apply in such cases, the parties must have been given the opportunity to discuss and plead such new legal arguments before their application (Article 7.2,

⁷⁶ See Art. 22 of the LCIA Rules (2014) ("Additional Powers"), which provides in its relevant part that:

"22.1 The Arbitral Tribunal shall have the power, upon the application of any party or /.../ upon its own initiative, but in either case only after giving the parties a reasonable opportunity to state their views and upon such terms (as to costs and otherwise) as the Arbitral Tribunal may decide:

[...]

(iii) to conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying relevant issues and ascertaining relevant facts and the law(s) or rules of law applicable to the Arbitration Agreement, the arbitration and the merits of the parties' dispute; (...)".

⁷⁷ However, unless the parties agree otherwise, the main arbitration rules afford the tribunal a wide discretion in adopting the appropriate rules of procedure (See, for instance, Art. 19 of the ICC Rules, Art. 23 of the SCC Rules and Art. 17 of the UNCITRAL Arbitration Rules). This procedural discretion may well extend to the application of the *Iura Novit Curia* principle in the context of the arbitrators' duty to apply the (rules of) law, even if the rules are otherwise silent on the issue (See, for instance, Art. 21 of the ICC Rules, Art. 27 of the SCC Rules and Art. 35 of the UNCITRAL Arbitration Rules).

⁷⁸ International Commercial Arbitration Committee of the International Law Association, Final Report, in Rio de Janeiro Conference, Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (2008) (ILA Report), p. 22.

second sentence).⁷⁹ The ILA Report, conversely, advises against introducing any legal issues (that bear on the outcome of the case) that the parties have not raised and only recommends raising new legal (and factual) issues in special circumstances, *e.g.*, in disputes implicating rules of public policy.⁸⁰

The IBA Rules, to which the Prague Rules are sometimes presented as an antidote, do not take a stance on the matter. However, while the IBA Rules do not expressly encourage the application of laws not pleaded by the parties,⁸¹ neither do they discourage the tribunal from applying the *Iura Novit Curia* principle in such a manner. In fact, some supporting principles therein are very similar to the Prague Rules in this respect, such as the possibility for early determination of issues⁸² and the means at the tribunal's disposal for ascertaining the contents of the law.⁸³ As explained above though, the scope of the *Iura Novit Curia* principle is considerably wider under the Prague Rules.⁸⁴

2.7. Hearing (Article 8 of the Rules)

Whereas Article 8 of the IBA Rules extensively regulates the conduct of the hearing, the corresponding provision of the Prague Rules⁸⁵ solely calls for the organisation of the hearing “in the most cost-efficient manner possible”, with examples of how to limit duration and costs.⁸⁶ This is a consequence of the Rules highly encouraging dispute resolution on documents-only basis.⁸⁷ Hence, although the Prague Rules contain separate provisions on the examination of fact witnesses,⁸⁸ they stress less on the formalities of the evidentiary hearing, leaving it to the parties and the tribunal to determine the appropriate means and rules for the organization of the hearing. While entailing

⁷⁹ A better wording would have been to bestow on the tribunal the authority to suggest that legal provisions *not raised* by the parties may apply, rather than stipulating that the arbitral tribunal may apply legal provisions *not pleaded* by the parties. Under the safeguard provisions in the Prague Rules, the parties must in any case be given the opportunity to *plead* such new provisions raised by the tribunal before their application.

⁸⁰ ILA Report, Recommendations 6 and 13, p. 23.

⁸¹ And establishes as a principle, similarly to the Prague Rules, that the parties bear the burden of proof with respect to their respective legal positions (See Art. 3(1) of the IBA Rules and the Commentary thereon, p. 6).

⁸² *E.g.* under Art. 2(3) of the IBA Rules, “[t]he Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues: (...) (b) for which a preliminary determination may be appropriate”. According to the Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, that provision was not meant “to encourage litigation-style motion practice, [but] the [IBA] Working Party recognised that in some cases certain issues may resolve all or part of a case. In such circumstances, the IBA Rules of Evidence [made] clear that the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work” (see p. 6).

⁸³ Pursuant to Art. 6(1) of the IBA Rules, “[t]he Arbitral Tribunal, after consulting with the Parties, may appoint one or more independent Tribunal-Appointed Experts to report to it on specific issues designated by the Arbitral Tribunal” including legal questions. However, according to the Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration, “[a] general principle underlying Article 6 is the substantial involvement of the parties in the process, even though the expert is being appointed by the arbitral tribunal itself” (see p. 21).

⁸⁴ The implications of the *Iura Novit Curia* principle on the conduct of the proceedings are further discussed in Section 3 below.

⁸⁵ Art. 8.2.

⁸⁶ “[I]ncluding 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.”

⁸⁷ Art. 8.1.

⁸⁸ See, in particular, Art. 5.9 (see section 2.4. above).

significantly more flexibility in tailoring the hearing to the specificities of the case, meeting the desiderate of the Rules will ultimately depend on the style of the tribunal.

Furthermore, the Prague Rules are certainly more assertive than the ICC Case Management Techniques in their objective to limit the holding and length of hearings, but one may argue that they contain quite similar provisions and ultimately serve the same purpose.⁸⁹

2.8. Assistance in Amicable Settlement (Article 9 of the Rules)

The IBA Rules do not deal with amicable settlement and deliberations, and quite understandably so, because they are rules on taking of evidence. By contrast, as discussed in section 1.3 above, the Prague Rules, as rules on the efficient conduct of proceedings, provide for the tribunal's ability to assist the parties in reaching an amicable settlement of the dispute at any stage of the arbitration (Article 9.1) and even to act as mediator (Article 9.2). Yet, as also discussed in section 1.3, other existing provisions, such as institutional rules⁹⁰ or the recommendations of the ICC Case Management Techniques⁹¹ and of the ICC Report on Controlling Time and Cost⁹² tend to achieve the same purpose.

2.9. Allocation of Costs (Article 11 of the Rules)

Under the Rules, the decision on costs is taken by the tribunal by reference to factors such as the “parties’ conduct during the arbitral proceedings, including their co-operation and assistance (or the lack thereof) in conducting the proceedings in a cost-efficient and expeditious manner”. This reminds of terms with a similar effect found in Article 9(7) of the IBA Rules or in several arbitration rules.⁹³

2.10. Deliberations (Article 12 of the Rules)

In their ultimate Article, the Rules prescribe that the tribunal “shall use its best efforts to issue the award as soon as possible”. But, here again, many other existing provisions, such as major arbitration rules⁹⁴ and the ICC Report on Controlling Time and Costs,⁹⁵ call for the same.

⁸⁹ Thus, the ICC Case Management Techniques recommend notably to identify “issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing” (see point c)). They further recommend to “[limit] the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues” (see point e)); “[use] telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court” (see point f)); and to “[organize] a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed and the arbitral tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing” (see point g)). See also, to some extent, the recommendations of the ICC Report on Controlling Time and Cost (and, in particular, para. 69).

⁹⁰ See, for instance, Art. 15(8) of the Swiss Rules.

⁹¹ Point h).

⁹² Para. 42.

⁹³ See, for instance, Art. 38(5) of the ICC Rules or Art. 28.4 of the LCIA Rules.

⁹⁴ See, for example, Art- 15.10 of the LCIA Rules.

⁹⁵ Para. 84.

As a conclusion, only few of the provisions of the Prague Rules, such as Article 7, truly innovate or go significantly beyond the existing rules. However, what is somewhat novel about the Rules is perhaps their overall approach and their repeated objective to confer, at each step of the proceedings, a more proactive role to the tribunal and to follow a more inquisitorial procedure. In comparison, even if many existing rules contain specific provisions to the same effect, they do not assert the proactive role of the tribunal as such and do not seem, in practice, to have particularly encouraged arbitrators to fully embrace this approach. One may argue, therefore, that the application of the Prague Rules may help tribunals to adopt a more self-assured and active stance in the proceedings.

3. What are the potential consequences of the Prague Rules on the conduct of the proceedings from the arbitrator's perspective?

As asserted in the Preamble (and the Note from the Working Group),⁹⁶ the Prague Rules are mainly concerned with the proactive role of the arbitrators. This role is primarily supported by Article 2 of the Prague Rules, as explained in section 2.1 above, and further embodied in Article 7 on the *Iura Novit Curia* principle (see section 2.6 above).

Read alone or together, Articles 2 and 7 raise various questions as to the actual implications for arbitrators applying the Prague Rules, namely whether the tribunal needs to have a thorough knowledge of the matter from the outset of the proceedings (section 3.1), whether the tribunal needs to narrow the issues to be decided (section 3.2), and whether the tribunal needs to know or ascertain the contents of the applicable law (section 3.3). A question ultimately arises as to whether the Prague Rules provide sufficient safeguards in light of the powers granted to the tribunal (section 3.4).

3.1. Is the tribunal required to have a thorough knowledge of the matter from the start?

In order to fulfil the expectations set by Article 2, the arbitrators should in principle have an in-depth understanding of the matter from the very beginning of the proceedings. However, despite its best efforts, a tribunal may not always have sufficient grasp of the matter, by the time of the case management conference, to take any meaningful action pursuant to Article 2 of the Prague Rules. As anticipated by the Prague Rules themselves, “[i]f the parties’ positions have not been sufficiently presented at the time of the case management conference “the tribunal could deal with the issues mentioned in Article 2.2(b) at a later stage of the arbitration” (Article 2.3).

This is especially true in arbitrations conducted under major rules, such as the ICC Rules,⁹⁷ the SCC Rules⁹⁸ or the UNCITRAL Arbitration Rules,⁹⁹ under which the parties may initiate proceedings

⁹⁶ See also A. PANOVA, *Ibid.*

⁹⁷ Under Art. 4(3)(c) of the ICC Rules (which wording has not changed since 2012), the Request for Arbitration must contain “a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made”. According to authorities: “The ICC Rules [2012], on the other hand, require the initial submission to contain only a summary of the main facts of the dispute as well as a statement of the relief sought, so as to speed up the proceedings. The claimant may of course choose to submit a more detailed request, describing the

without submitting a full statement of claim. None of these rules require the parties to summarize their legal arguments in the request for arbitration (nor in the answer).

Therefore, having the arbitrators dedicated to the matter from the very start of the proceedings may not necessarily have the desired effect on the efficiency at the outset. The arbitrators may, however, usefully apply the guidelines provided by the Prague Rules at later stages, as envisaged by Article 2.3.

3.2. Is the tribunal required to narrow the issues to be decided in the arbitration?

Under Articles 2.2 and 2.4 of the Prague Rules, the arbitrators are strongly encouraged to narrow the issues to be decided as early as possible, *e.g.* as of the case management conference. Although there is a clear requirement under Article 2.2 that the tribunal must clarify the parties' respective positions at the case management conference,¹⁰⁰ the possibility to provide indications and preliminary views as to factual, legal and evidentiary matters under Article 2.4 remains only recommendatory.

In other words, at the case management conference (or any later stage) the tribunal may (but need not) make indications or express views on the facts, the legal grounds invoked, the relief sought and on evidentiary issues, only if it deems appropriate to do so.

3.3. Is the tribunal required to know or ascertain the contents of the applicable law?

Arguably, an arbitrator is not bound to respect any national law, but only to apply the applicable provisions, which begs the question whether an arbitrator is under an obligation similar to a judge to have extensive knowledge of the contents of the applicable law.¹⁰¹ Unlike courts, the arbitrators are not tasked with watching over the harmonious development and application of the state law.¹⁰² In fact,

position both in fact and at law and including supporting documents as well as evidence from witnesses and expert opinions. However, this is not compulsory and it is indeed unusual outside German-speaking jurisdictions. /.../ the Rules of Arbitration do not require the claimant at this stage to submit a fully detailed statement of claim." See "Chapter 3: Arbitral Proceedings Under the ICC Rules of Arbitration of 2012", in H. VERBIST, E. SCHÄFER, et al., *ICC Arbitration in Practice* (2nd edition, 2015), pp. 27 – 28 and 32 – 33.

⁹⁸ According to Art. 6 of the SCC Rules: "A Request for Arbitration shall include: (ii) a summary of the dispute". The authorities state that in Sweden: "[t]he claimant is not required to state legal grounds for its claims". R. OLDENSTAM, L. LÖF, J. RAGNWALDH, F. ANDERSSON, A. FOERSTER and N. ELIASSON, "Concise Guide to Arbitration in Sweden" (2014) *Mannheimer Swartling Advokatbyrå*, p 23.

⁹⁹ See Art. 4 of the UNCITRAL Arbitration Rules. According to authorities: "Article 3(3)(e) of the 2010 Rules addresses this issue by requiring a 'brief description of the claim', which calls for a greater degree of detail than what was required under the 1976 Rules." See "UNCITRAL Arbitration Rules, Section I, Arts. 3 and 4 [Notice of arbitration and response to the notice of arbitration]", in Paulsson, J. and Petrochilos, G., "UNCITRAL Arbitration Kluwer Law International (2017)", para. 15, p 26. It is the Statement of Claim that must contain the legal arguments. Under Art. 20(2) of the UNCITRAL Arbitration Rules (2010): "The statement of claim shall include the following particulars: /.../ (e)The legal grounds or arguments supporting the claim."

¹⁰⁰ Provided that the parties' submissions are detailed enough.

¹⁰¹ In court proceedings the judge is most often applying its national law and as, an organ of the state, must ensure that the application of the law is correct. Even if the applicable law is foreign to the judge, the principle of international comity would require it to apply the foreign law correctly. The arbitrators are only concerned with applicable law, so there is no such distinction between domestic and foreign law for them (See ILA Report, Part B, p. 12).

¹⁰² *Ibid.* Also, J. WAINCYMER (n 62), pp. 220 – 221.

contrary to judges in most countries, the arbitrators need not have any legal background at all. That said, it is nevertheless expected that the arbitrators apply the law correctly, even though an award cannot be annulled for incorrect application of the law.¹⁰³

On the one hand, the Prague Rules assign the burden of proof with respect to legal positions to the party invoking it (Article 7.1). On the other hand, the tribunal is not bound to follow the parties' submissions and may even go beyond their positions. As indicated above,¹⁰⁴ Article 7.2 of the Prague Rules allows the tribunal to apply legal provisions not pleaded by the parties. Moreover, under Article 3.2(b), the tribunal is entitled to appoint experts, including on legal issues, on its own initiative. Thus, the need for the arbitrators to have extensive knowledge of the law applicable (including knowledge of the language(s) of the relevant legal sources and of how to conduct research under that law) is not as acute as it is for judges.

In any event, since the obligation to prove the contents of the law primarily lies with the parties under the Prague Rules, it seems unlikely that the proportion of tribunal-appointed experts would increase significantly in arbitrations where the tribunal is guided by those rules. Further, according to Article 6.5 of the Prague Rules, the appointment of an expert by the arbitral tribunal does not preclude a party from submitting an expert report. In other words, the burden of proof with respect to legal positions must first and foremost be borne by the parties who are free to resort to expert or any other evidence.¹⁰⁵ Such evidence may thereafter be supplemented by the tribunal with legal authorities.¹⁰⁶ The role of tribunal-appointed legal experts, under the Prague Rules, would thus be logically confined to circumstances where the tribunal applies the law on its own motion and where the parties, despite being consulted, fail to clarify their legal position in a sufficient manner. Besides, the concept of tribunal-appointed experts is not entirely novel and is, for instance, envisaged in the IBA Rules,¹⁰⁷ the ICC Rules,¹⁰⁸ SCC Rules,¹⁰⁹ and the LCIA Rules.¹¹⁰

3.4. Do the Prague Rules provide for sufficient safeguards?

Finally, one may inquire whether the requirement to “seek the parties’ views on any legal provisions [the tribunal] intends to apply” (Article 7.2) is a sufficient safeguard against infringing upon fundamental principles of arbitration. For the very least, this requirement, if applied properly, should relieve any concerns one may have regarding the right to be heard. By the same token, it also disallows the tribunal to base its decision on a legal position not contemplated by the parties, thereby eliminating

¹⁰³ G. CORDERO-MOSS (n 72), pp. 2–3, 12.

¹⁰⁴ See section 2.6 above.

¹⁰⁵ As per the suggestion of Gabrielle Kaufmann-Kohler, whenever the parties may have different understandings about the need to prove the law, it makes sense to address the issue at the first procedural hearing (case management conference). G. KAUFMANN-KOHLER, “The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions.” (2005) *Arbitration International*, Volume 21, Issue 4, p. 636.

¹⁰⁶ See Art. 7.2 of the Prague Rules.

¹⁰⁷ See Art. 6 of the IBA Rules.

¹⁰⁸ See Art. 25(4) of the ICC Rules.

¹⁰⁹ See Art. 34 of the SCC Rules.

¹¹⁰ See Art. 21 of the LCIA Rules.

the risk of surprising the parties under the pretext of applying the *Iura Novit Curia* principle. Still, in light of the controversial nature of the principle in international arbitration, it would have been useful for Article 7 to provide more detailed guidelines regarding its intended application, which is far from uniform across jurisdictions.

For example, despite the requirement in Article 7.2 to consult the parties, there is arguably a fine line for the tribunal between raising new legal provisions and, (i) first, remaining (or appearing) impartial and ensuring equal treatment of the parties and, (ii) second, observing the limits of its mandate. Some argue that the latter issue should largely be circumvented in practice, if the parties are given sufficient opportunity to present their position regarding any new legal provisions raised by the tribunal.¹¹¹ However, concerns as to the arbitrators' impartiality and the equal treatment the parties remain, as the tribunal's power to express preliminary views on the disputed issues may include the introduction of new legal provisions under the Prague Rules (Articles 2.4(e) and 7.2).¹¹²

Interestingly, the Prague Rules specify that "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" (Article 2.4).¹¹³ On the one hand, this may be an incentive for some arbitrators to be more proactive in expressing their views where appropriate. On the other hand, one may wonder whether such a blank "Get Out of Jail" card may be prone to abuse in situations where the arbitrator does in fact appear to lack independence and impartiality.

All in all, while the Prague Rules do provide for some safeguards, the arbitrators that apply the *Iura Novit Curia* principle in any form or way must still act with caution and take into account the mandatory provisions of *lex arbitri*.

Conclusion

Although doubt may legitimately arise regarding the applicability of certain provisions of the Prague Rules, they appear to be globally compatible with the main arbitration rules and to provide for a certain level of safeguards against violation of fundamental principles of arbitration. They also innovate as far as their primary objective – a more proactive role of arbitrators – is concerned, but also when it comes to more specific provisions.

As a result, the Prague Rules can overall be regarded as constituting a laudable alternative and a source of inspiration for more engaged tribunals and proceedings with limited document production and witness testimony. They may also serve as a useful reminder that for arbitration to remain a valuable tool for the resolution of disputes and to meet the needs of its users, time and costs considerations

¹¹¹ See C. VON WOBESER (n 62), pp. 212–213.

¹¹² Some argue that such concerns stemming from the arbitrators' power to take initiative are mostly misplaced: See P. LANDLOT, "Arbitrators' Initiatives to Obtain Factual and Legal Evidence" (2012) *Arbitration International*, Volume 28, Issue 2, pp. 190 – 193. At the same, the author is weary about the tribunals taking initiatives on factual and legal evidence, except if such is the wish of the parties. *Ibid.*, pp. 222 – 223.

¹¹³ See section 1.2 above.

should guide the conduct of the proceedings. In all instances, it is for the parties and the tribunal to select the procedures that are best suited for their case and the Prague Rules provide an alternative path for the users in the arbitration community, which some parties will possibly recognize as a more familiar one.

Those who have had the chance of visiting the city of Prague have – in all likelihood and whether knowingly or not – walked the Charles Bridge. Its construction began in the middle of the 14th century under the patronage of King Charles IV of Bohemia. At the time, it was the only means to cross the river Vltava in order to connect the Prague Castle with the old city centre. The construction of this remarkable structure was made in solid stone and took about half a century. The bridge itself remains an icon of the city to the present day.

Likewise, the Prague Rules do aim at bridging a perceived ‘geographical divide’ in the conduct of arbitral proceedings. Unlike the Charles Bridge, however, they are fortunately not ‘cast in stone’ and their drafting and publication took much less than half a century. As has been the case with the Charles Bridge, further work and adaptations will be needed and will be welcomed. In the meantime, having a new option to cross (or rather navigate) the sometimes turbulent waters of arbitration proceedings is a healthy development.

How successful and relied upon the Rules will be is, of course, difficult to predict. Having new alternatives, however, was welcomed in the 14th century in Prague and is certainly to be welcomed also today, in Prague and elsewhere.