

# The Prague Rules – Much Ado About Nothing?

13 September 2019

Kyiv Arbitration Days

**James Castello**

King & Spalding, Paris





# Agenda



1. What does it take for soft law instruments to gain broad acceptance?
2. What features in the Prague Rules may encourage or discourage their adoption?
3. Will the Prague Rules flourish?

# 1. What does it take for soft law instruments to gain broad acceptance?

- Broad acceptance of IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules on Evidence”)
- *Cf.* lesser acceptance of IBA Guidelines on Party Representation in International Arbitration (“IBA Guidelines on Party Representation”)
- Background of increasing skepticism, if not hostility, toward proliferation of ad-hoc “soft law” rules and guidelines

# Evolution of the IBA Rules on Evidence

---

1983 -

- First edition published in 1983 – “Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration”
- Second edition published in 1999 – “Rules on the Taking of Evidence in International Commercial Arbitration”
- Third edition published in 2010 – “Rules on the Taking of Evidence in International Arbitration”

# Growing Acceptance of the IBA Rules on Evidence



## IBA Rules on Evidence in Arbitral Practice

- 2012 Queen Mary Survey (710 respondents)
  - By 2012, the IBA Rules on Evidence were used in approximately 60% of arbitrations
  - A substantial majority of practitioners considered the adoption of the IBA Rules “useful” (85%)

# Growing Acceptance of the IBA Rules on Evidence

---

## IBA Rules on Evidence in Arbitral Practice (cont'd)

- 2015 Queen Mary Survey (763 respondents)
  - By 2015, 77% of respondents had used the IBA Rules on Evidence in practice
  - Interestingly – and this may reflect some of the concerns that led to the Prague Rules – **fewer respondents (69%) viewed these IBA Rules as “effective”**
- 2016 IBA Report on the Reception of the IBA Arbitration Soft Law Products (845 respondents)
  - The survey showed **no significant difference between common law and civil law jurisdictions**, in terms of the number of times the IBA Rules of Evidence were referenced

# *Cf.* 2013 IBA Guidelines on Party Representation



## 2015 Queen Mary Survey (763 respondents)

- 61% of respondents were aware of the IBA Guidelines on Party Representation but had not seen them used in practice
- 72% of respondents perceived the IBA Guidelines on Party Representation as being either “not effective” or “neutral” in their effectiveness

## 2016 IBA Report on the Reception of the IBA Arbitration Soft Law Products (845 respondents)

- Referenced in fewer than 20% of arbitrations involving issues of counsel conduct
- IBA Guidelines on Party Representation appeared to be **more frequently used in common law jurisdictions** than civil law jurisdictions

# Cf. 2013 IBA Guidelines on Party Representation



- Guidelines contain some controversial provisions (e.g., Guideline 12)
  - Guideline 12 obliges counsel to instruct client before arbitration of its "need to preserve" documents, including electronically stored documents
  - This so-called "litigation hold" requirement is familiar in common law countries like the U.S. but viewed as excessively intrusive in other jurisdictions



# Cf. 2013 IBA Guidelines on Party Representation



*“[I]s it fair to place obligations in this area on the non-US party whose entire ... document management practice may be based on the expectation and premise that a very broad category of internal documents are and will remain confidential and cannot be discoverable in legal proceedings? Does this reflect an existing business level playing field? A fortiori is it appropriate to place an obligation on counsel for the non-US party, for fear of sanction from arbitrators and a risk of compromising his or her career in the field?”*

— DOMITILLE BAIZEAU (admitted to practice in Geneva and in England and Wales), IBA Guidelines on Party Representation in International Arbitration: Do We Need Them? A Swiss Perspective (June 2014).

# Background Trend of Increasing Resistance to Soft Law



See, e.g., Michael E. Schneider, *The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into 'Best Practices,'*

in Lévy, L. and Derains, Y. (eds), *Liber Amicorum en l'honneur de Serge Lazareff* 563 (Pedone 2011)



## 2. Salient characteristics of the Prague Rules

- Most proactive steps that the Prague Rules authorize arbitrators to take are permitted under other existing arbitral Rules
- **What is new is thus the emphasis:** the Prague Rules encourage practices diverging from the current norm.
- Drafters intend the Rules for cases “where the nature of the dispute ... justifies a more streamlined procedure,” rather than for all cases
- To assess the possible extent of the Rules’ future use, we should examine those features that may be viewed as **particularly positive, possibly neutral, or potentially negative**

# Potentially Attractive Features of the Prague Rules



## Features that may encourage adoption

- The parties and tribunal “should seek to resolve the dispute on a documents-only basis” (Prague Rules, Art. 8.1)
- Parties “encouraged” to avoid **all** document production; any requests should be limited to “specific documents” (Prague Rules, Art. 4.2-4.4)
- The tribunal, “having heard the parties, shall decide which witnesses are to be called for examination during the hearing.” (Prague Rules, Art. 5.2)



# Possibly Neutral Features of the Prague Rules



## Features whose effect on the Rules' use may be indeterminate

- Favors tribunal-appointed experts; expert/s may be asked to establish joint list of questions and joint reports (Prague Rules, Arts. 6.6-6.7)
- Proactive role for tribunal “in establishing the facts” (Prague Rules, Art. 3.1)
- Adverse inferences against recalcitrant parties (Prague Rules, Art. 10)

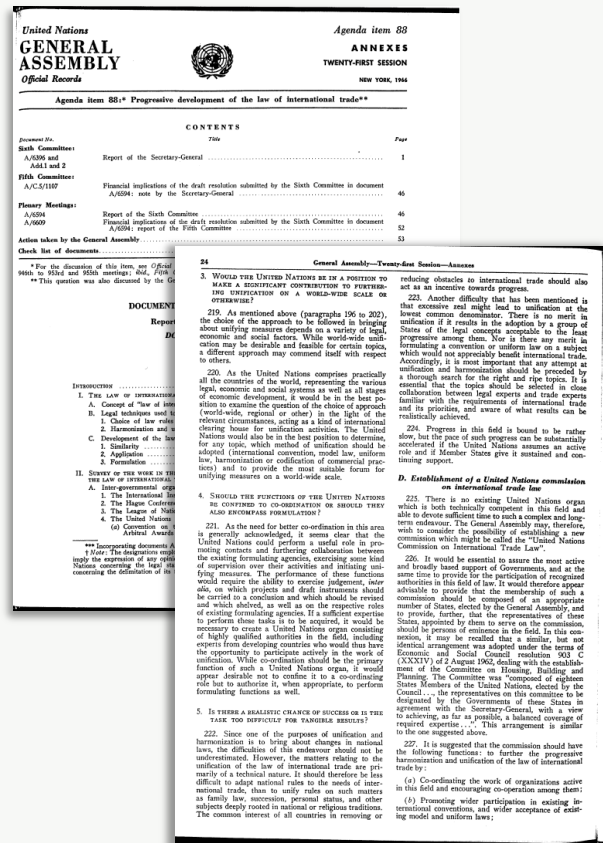
# Potentially Negative Features of the Prague Rules



## Features that may discourage adoption

- Tribunal can assist in amicable settlement “unless one of the parties objects” (Prague Rules, Art. 9)
- Tribunal can “reject” any question posed to the witness (Prague Rules, Art. 5.9)
- Tribunal may express preliminary views on parties’ positions as early as the Case Management Conference (Prague Rules, Art. 2.4)

### 3. Will the Prague Rules flourish?



“[T]he United Nations comprises practically all the countries of the world, representing the various legal, economic and social systems as well as all stages of economic development, it would be in the best position to ... provide the most suitable forum for unifying measures on a world-wide scale.”

— REPORT OF THE SECRETARY GENERAL (23 September 1966)

# Harmonization in International Arbitration

---



*“Codification of arbitration law is a healthy phenomenon. It is an evolution towards more predictability and more consistency of a global system of justice that cannot be left to local idiosyncrasies, and which needs to reach a common framework that is acceptable to all players.”*

— ALEXIS MOURRE (president of the ICC International Court of Arbitration), *About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration*, in *THE POWER AND DUTIES OF AN ARBITRATOR: LIBER AMICORUM PIERRE A. KARRER*, at 241 (Kluwer 2017).



# General Acceptance of the IBA Rules on Evidence

---



*“The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures.”*

— FOREWORD, IBA RULES OF EVIDENCE

# Members of the IBA Rules Working Party

## IBA Rules Drafters' Nationality

- Belgium (1)
- Canada (1)
- France (3)
- Germany (2)
- Italy (1)
- Netherlands (1)
- Spain (1)
- Sweden (1)
- Switzerland (1)
- United Kingdom (2)
- Hong Kong (1)
- USA (1)

## Cf. Lesser acceptance of the IBA Guidelines on Party Representation (perceived as less “harmonizing”)



*“[M]any respondents pointed out an alleged bias for common law within the Party Representation Guidelines. ... [Some] respondents stated that, although a lawyer cannot lie to an arbitral tribunal, there should be no ethical duty to tell the client to preserve documents that may go against his case.”*

— IBA Report on the Reception of the IBA Arbitration Soft Law Products ¶ 220 (2016)

# Similar Absence of Harmonized Approach in the Prague Rules



*“[A] Working Group was formed with representatives from around 30, mainly civil law, countries...[t]he members of the group conducted a survey on procedural traditions in international arbitration in their respective countries...On the basis of this research the Working Group prepared the first draft of the Rules...”*

— NOTE FROM THE WORKING GROUP, Prague Rules



# Concluding Considerations

---

- Given the growing antipathy toward proliferation of soft law instruments, do Prague Rules fill a genuinely unmet need – or are they just another set of guidelines of marginal utility?
- Styling the Prague Rules as deliberately championing one approach to adjudication – the “inquisitorial” model – conflicts with the long tradition of transnational harmonization in international arbitration, .
- Even if the Prague Rules are not widely adopted, however, they may prompt a re-evaluation of how to apply the IBA Rules on Evidence

# Questions?

## The Prague Rules – Much Ado About Nothing?

13 September, 2019



**James Castello**

Partner,  
*Trial and Global Disputes*

[jcastello@kslaw.com](mailto:jcastello@kslaw.com)

[kslaw.com](http://kslaw.com)