INTERNATIONAL ARBITRATION NEWS

Quadrant CHAMBERS

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EDITORIAL by Chris Smith QC

The recent advent of the Prague Rules has been a boon to the international arbitration community, in no small measure because it constitutes a topic of conversation which does not involve Brexit. There is ample scope for debate and discussion as to whether or not the introduction of the Prague Rules will herald a sea change as regards the conducting and resolution of international arbitration disputes, with some seeking to portray the rules as an opportunity for parties to conduct their disputes on the lines of an inquisitorial, civil law model. James M Turner QC's article below considers the impact and scope of the Prague Rules and suggests that, notwithstanding how they have been characterised, their introduction is unlikely to mark the start of a brave new era.

One guiding principle that will never change, no matter how international arbitrations are conducted, is that preparation is the key to a successful outcome. Even the strongest of cases can be wrecked by insufficient preparation. Most articles on this subject consider the position from the practitioners' point of view. However, the need for proper preparation is perhaps even more important when considering matters from the client's perspective. In the article overleaf, Deborah Ruff identifies some useful tips to enable companies to best ready themselves for an arbitral dispute.

By the time the next issue of this newsletter is published, the inaugural London International Disputes Week 2019 will have taken place. One of the key aims of this event is to enable the London legal community to look ahead and demonstrate that, notwithstanding the current political uncertainty, London's role as a dispute resolution hub will continue undiminished. Quadrant Chambers is delighted to be supporting the week of events and technical sessions and we look forward to seeing you there.

Introduction to the Prague Rules

Author: James M Turner QC

On 18 December 2018, the "*Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules)*" were published. The Prague Rules are most readily viewed (and have been trailed) as a civilian, inquisitorial alternative to the more common law, adversarial *IBA Rules on the Taking of Evidence in International Arbitration 2010* ("IBA Rules"). The reality, however, is that there is little of substance between the two.

The single biggest difference between the Prague and IBA Rules is the permission in Article 9 of the former for the Tribunal to assist the parties in reaching an amicable settlement. Indeed, if the parties consent, one of the Tribunal may act as mediator and – again with the parties' consent – continue to act as arbitrator even if the mediation fails. The IBA Rules contain no equivalent. There may be much to be said for Article 9: whether or not the attempt to settle or mediation succeed, the additional cost of the mediation phase may well be lower than a separate process, even if the arbitrator-mediator has to resign and be replaced.

Article 9 aside, the principal differentiation between the Prague and the IBA Rules is one of emphasis. For example, Article 4 of the Prague Rules deals with documentary evidence in far fewer words and with fewer teeth than Article 3 of the IBA Rules, "*encourag[ing]*" the tribunal and the parties "*to avoid any form of document production, including e-discovery*". In similar vein, Article 8 of the Prague Rules encourages the resolution of the disputes on documents alone, although – in effect – either party can insist on a hearing (Art. 8.2). The IBA Rules, by contrast, assume that there will be an "*Evidentiary Hearing*". There is virtually no difference in substance in the treatment of expert evidence, although Articles 5 and 6 of the IBA Rules regulate expert evidence in finer detail than Article 6 of the Prague Rules.

The Prague Rules also encourage the tribunal (in Article 2.4), from the case management hearing onwards, to offer provisional views on various matters such as undisputed facts; burden of proof; and "*its understanding of the legal grounds on which the parties base their positions*". That, too, is not so very different from the experience of any robust tribunal, or one driven by institutional rules to identify the real nature of the dispute at a similarly early stage.

James M Turner QC is a highly regarded and well-known Commercial Advocate. His practice encompasses commercial contractual disputes across sectors including International & Commercial Arbitration, Energy, Shipbuilding, Off Shore Construction, Shipping and Banking.

In the UK he appears frequently in the Commercial Court and the Appellate Courts (Court of Appeal and Supreme Court) and has extensive experience of Arbitration, appearing before all the main domestic and international arbitral bodies (HKIAC, UNCITRAL, LCIA, ICC, LMAA) as well as in ad hoc matters.

INTERNATIONAL ARBITRATION SET OF THE YEAR

NEWS

- Simon Rainey QC and Luke Parsons QC are to feature in The Legal 500 Arbitration Powerlist 2019.
- Simon Rainey QC has been elected to the Advisory Board of the ICCA-ASIL Task Force on Damages in International Arbitration.

UPCOMING EVENTS

- 25 March - **Quadrant Chambers and the DIFC-LCIA Arbitration Centre Special Seminar** in Dubai: Topical Issues in International Arbitration: The role of third parties, interim measures and the new Prague Rules - Sir David Steel is chairing our panel of Chirag Karia QC, Yash Kulkarni QC, Chris Smith QC and Ruth Hosking.
- 3 April - **Quadrant Chambers Annual Energy Disputes Event: Current Challenges and Risks for Oil and Gas** - Simon Rainey QC will be chairing our panel of Sarah Roach, senior counsel at BP, Elisabeth Sullivan, senior legal counsel at Centrica, Sue Millar, partner, Stephenson Harwood, Chris Smith QC and Gemma Morgan of Quadrant.

To find out more or to register visit www.quadrantchambers.com/seminars

- 25-27 April - Nigel Cooper QC is speaking at the **IPBA 2019 Singapore** Conference

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Preparing for a Dispute

Author: Deborah Ruff, Pillsbury Winthrop Shaw Pittman LLP

There are several ways in which companies can prepare themselves for a dispute. We explore these below.

Anticipate the dispute

It should go without saying, but familiarity with the contracts which your company is party to is of paramount importance: it ensures that risks can be identified early and costly disputes avoided, or at least mitigated. Proactively considering your contracts will be far more beneficial than hurriedly flicking through them once a claim has been issued against you.

A pre-emptive review by outside counsel or in-house lawyers not involved in the initial drafting may also be worthwhile, as they may identify risks not previously considered and should, based on previous experience and knowledge of case law, be able to advise as to how potential claims may best be approached.

Consider document management policies, disclosure

Developing a document retention policy after a dispute arises is too late. Think now about what you do and do not want to keep, and what you may have to disclose in the event of a dispute – assume a dispute and act accordingly:

- identify those involved in a deal and ensure relevant communications/ documents are preserved and easily accessible;
- confirm all discussions in writing, by email, etc.;
- try to ensure that relevant employees have an ongoing obligation to assist with evidence after they leave;
- think before firing employees with knowledge of the dispute – they may go to the other side; and
- keep records of oral agreements, meetings and telephone conversations.

Once a dispute is reasonably in prospect, usual document retention/detention policies must be suspended and all relevant documents preserved, including meeting notes, notes of telephone calls, etc. In-house and external counsel have a duty to advise on this.

Whatever you do, don't forget privilege: restrict communications to persons in the company likely to be covered by litigation privilege, and be careful with board minutes, are these are unlikely to be privileged *per se*.

Don't make it harder on yourself

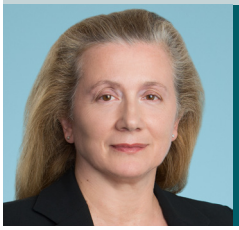
Review your legal and factual position properly before responding substantively to your opponent and always think before hitting "send" how what you have written will be perceived by a judge or arbitrator:

- consider whether the relationship is a valuable, long-term one and act accordingly to try to de-escalate;
- at the outset, consider limiting those who are authorised to respond to your opponent(s) to a small number of people to ensure a consistent response;
- consider which communications should be made on a "without prejudice" basis;
- from the outset, consider mediation; and
- remember that, under English law, an innocent party cannot recover for losses it could have avoided. While the bar for mitigation is not usually set too high, taking steps to limit losses should be considered.

Consider your position

When a dispute is looming, ask yourself the following questions before filing your claim:

- have you satisfied contractual pre-dispute requirements (e.g., structured negotiation, mediation, etc.)?
- are there any assets to satisfy your judgment/award and, if so, where are they located? If they are at risk of having been moved or dissipated by the time the judgment or award appears, what can you do about it?
- do you need other urgent interim relief and, if so, where do you get it and what do you need to show?
- if pursuing an arbitration, consider whether and what early relief is available from the courts of the seat of the arbitration before the tribunal is formed, and what the relevant test is; and
- if you are seeking an injunction, are you prepared to pay the price (undertaking in damages, bank guarantee, payment into court, etc.)?



Deborah Ruff leads Pillsbury's Arbitration - U.S. & International practice. She has extensive experience in multi-jurisdictional disputes, with a focus on high-value and complex international arbitration in the energy, infrastructure and construction, telecommunications and financial sectors. She conducts arbitrations under the rules of all of the major institutions and rules including the LCIA, the ICC, DIAC, the Swiss, Stockholm, Hong Kong and UNCITRAL Rules, and has also represented both investors and states in BIT and ICSID cases.

Quadrant Chambers members have authored Arbitration Law: 2018 in Review.
To be published by Informa, March 2019

London International Disputes Week 2019

Quadrant Chambers is proud to support the inaugural London International Disputes Week, 7-10 May.

To find out more visit **www.lidw.co.uk**

RECENT EVENTS

- 13 March - Junior Breakfast Workshop - **Challenging Arbitration Awards** - David Semark, Paul Toms, Saira Paruk and Tom Bird.
- 12 February - our event **What *on earth* happens next? Foreseeing the impact of Brexit on international arbitration, on London as a seat … and more** was chaired by Chris Smith QC. Our panel included Dr Jacomijn van Haersolte-van Hof, Director General of the LCIA, Andrew Cannon, Herbert Smith Freehills, Prof Loukas Mistelis, Queen Mary University and Liisa Lahti.

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