DECLARATION ON DEVELOPMENT OF PRAGUE RULES-

INQUISITORIAL RULES OF TAKING EVIDENCE IN INTERNATIONAL ARBITRATION

I. INTRODUCTION

It became almost a commonplace these days that the users of arbitration are dissatisfied with time and costs involved in the proceedings. The procedures for taking of evidence, particularly document production, use of multiple fact and expert witnesses and their cross-examination at lengthy hearings are to a large extent responsible for that.

The drafters of the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") claim to have bridged a gap between the common law and civil law traditions of the taking of evidence and usually say the IBA Rules were very successful in developing nearly standardized procedure in international arbitration, at least for the proceedings involving parties from different legal traditions and significant amounts at stake.

However, from the civil law perspective the IBA Rules are still closer to the common law traditions, as they follow a more adversarial approach with document production, fact witnesses and party-appointed experts, as well as the party's entitlement to cross-examine the witnesses being taken almost for granted. Moreover, many arbitrators are reluctant to actively manage arbitration proceedings, including earlier determination of issues in dispute and the disposal of such issues, to avoid the risk of a challenge.

These procedures contribute greatly to the costs of arbitration, while their efficiency is rather questionable. For example, most commentators admit that it is very rare, if ever, that the document production brings to light a smoking gun. Likewise, many commentators express doubts as to the usefulness of fact witnesses and impartiality of party-appointed experts. Also, many of these procedural features are not known or used to the same extent in non-common law jurisdictions, such as continental Europe, Latin America, Middle East, Asia. In fact these procedures are almost never used in arbitrations between the parties coming from similar continental legal traditions, for example between Russian and German parties. Also these procedures, while admittedly useful for bigger cases, are not acceptable for smaller or middle-size arbitrations due to the costs involved.

In the light of all of this, we believe that developing the rules on the taking of evidence which are based only on the inquisitorial model of procedure would contribute to increasing efficiency in international arbitration.

By adopting a more inquisitorial approach, the new rules will help to reduce time and costs of arbitrations and will be acceptable even in smaller cases, where applying the IBA Rules would be disproportionally costly.

With the aim of signing the Rules in Prague at the conference with participation of practitioners from Europe and other civil law countries, the working group has decided to call them "the Prague Rules".

The Prague Rules will be based on a more active and inquisitorial role of the arbitral tribunal in conducting the arbitration and taking of evidence. More specifically, the main idea behind the Prague Rules may be outlined as follows.

II. MAIN PRINCIPLES OF PRAGUE RULES

2.1. Tribunal's Duty to Establish Facts

While the classical adversarial model means that the Tribunal does not, as a rule, have a duty to establish facts, the inquisitorial model imposes on the Tribunal a duty to investigate the circumstances of the case.

To exercise this duty the Tribunal has *sua sponte* a right to:

i. Request documentary evidence from the parties;

ii. Call fact witnesses (individuals who are employees or under a control of the party);

iii. To appoint the expertise and expert on issues, the Tribunal deems it is necessary.

2.2. Tribunal's Duty to Establish Law (Jura Novit Curia)

A classical adversarial model imposes on the parties an obligation to prove the issues of law. This principle becomes predominant in international arbitration, where international character of a dispute and a multinational composition of the tribunal's members make it difficult to apply the *jura novit curia* principle. In practice it means that the parties often have to submit lengthy expert reports on the issues of law, cross examination of legal experts takes up a lot of time and results in significant costs for the parties.

At the same time in order to make proceedings more efficient the parties might wish to impose on the tribunal a duty to find and apply the rules of law, the tribunal finds appropriate, of course, subject to giving the parties an opportunity to comment.

2.3. Active Tribunal's Role In Managing of Proceedings

In line with the tribunal's duty to establish the facts and the law, tribunal should take an active role in managing proceedings, which means:

i. The tribunal shall promptly after receiving the case file hold a case management meeting with the parties (including by phone, video conference or other means of communications) to discuss with the parties a procedural timetable and the actions to be taken by the parties and the tribunal in preparing the case file.

ii. The tribunal should identify during the case management conference:

   a. the facts which are not in dispute between the parties and the facts which are disputed;

b. with regard to the disputed facts- the evidence the tribunal would like to request from the parties or to obtain on its own initiative;

c. legal provisions which could assist the tribunal in resolving the dispute, and parties' and tribunal's role in clarifying these provisions;

iii. The arbitral tribunal shall, following the consultation with the parties, be entitled to limit the number of rounds of written submissions, impose page and other limits on the parties' written submissions and set strict time limits for filing the relevant submissions, always bearing in mind the requirement to ensure a fair and equal treatment of the parties and to conduct the proceedings efficiently.

iv. The tribunal could freely share with the parties its views with regard to the relief sought by the parties, issues to be resolved, weight and relevance of evidence submitted by the parties or to be received during the proceedings. Expressing such views would not be considered as bias or partiality of the tribunal and cannot by itself lead to disqualification of arbitrators.

2.4. Priority of Documentary Evidence

There should be a presumption that arbitration proceedings shall be conducted on the documents-only basis, to the extent it is permissible under the applicable law.

However, the tribunal should have a broad discretion in allowing or denying witnesses to testify on disputed facts.

2.5. Limiting Documents Production

As each party has its own burden of proof, no documents production should be generally available. A party should not be considered as having a general obligation to disclose to the other party all evidence related to the case.

However, a party may request the arbitral tribunal to order the production of specific and properly identified document(s) which are relevant and material for resolution of a specific issue to be determined and which the party is unable to obtain itself.

The arbitral tribunal can also request any document from the party upon its own initiative.

2.6. Limiting Fact Witnesses

A party wishing to rely on a witness of fact, must first obtain a permission from the arbitral tribunal. The party needs to specify the role of the witness in the events leading to the dispute, the issues on which the witness will be testifying, the materiality and relevance of potential witness statements to the outcome of the case.

As a general rule, no written witness statements shall be submitted prior to the hearing. The party relying on a witness statement needs to identify in its submission the issues on which the witness may testify and provide a short information about his or her professional background and involvement in the events leading to the dispute.

At the same time, the Tribunal can, instead of calling a witness to give testimony, order the party to submit a written witness statement from a particular witness (witnesses).

If a fact witness is to testify at the hearing, examination of the witness shall be conducted by the arbitral tribunal. The parties' counsel shall be entitled to ask the witness follow-up questions after the end of the examination, but the arbitral tribunal may impose time restrictions.

2.6. Use of the Tribunal's Experts

The Tribunal should have a broad discretion in appointing the expert examination and for this purpose to appoint the tribunal's expert.

For this purpose the Tribunal:

i. Shall consult with the parties on the issues to be resolved by the expert;

ii. Shall identify for the parties the requirements for potential experts, such as qualification, availability, costs etc;

iii. Shall seek from the parties candidates to be appointed as expert. At the same time Tribunal shall not be bound by the candidates proposed by the parties and can appoint as Tribunal's expert a candidate proposed by one of the parties, a joint expert commission from candidates proposed by the parties or seek a proposal from a neutral organization such as a chamber of commerce or professional associations;

iv. instruct and control of the work the appointed expert keeping the parties aware of all communications between the Tribunal and the expert.

Appointment of expert by the Tribunal does not preclude the parties from having their own experts, if the parties deem it necessary.

2.7. Tribunal's Duty to Assist Parties in Reaching Settlement

It is the Tribunal's duty to actively assist the parties in reaching a settlement. For this purpose it shall not be improper for an arbitral tribunal to express its preliminary views with respect to the parties' respective cases, provided that both parties agreed to this.

Upon the consent of both parties the tribunal can also act as a mediator, which will not disqualify it from subsequent arbitration proceedings in case the mediation does not result in settlement.