THE PRAGUE RULES – SPIRIT AND SCOPE OF APPLICATION

Vladimir Khvalei,
Partner at Baker McKenzie, Moscow, Member of the Prague Rules Working Group

Introduction

In recent years the draft Prague Rules on the Efficient Conduct of Proceedings in International Arbitration ("Prague Rules", see http://praguerules.com/prague_rules/) has been hotly debated in various places across the world (see http://praguerules.com/events/). Whilst the number of supporters is growing, it is impossible to ignore also the criticism of this initiative coming from our colleagues (http://praguerules.com/publications/). For instance, some opponents of the Prague Rules even call them a "little monster", regressive and dangerous.

At the same time this criticism often comes from lack of understanding why this initiative arose and the Prague Rules could be applied.

Why are the Prague Rules needed at all?

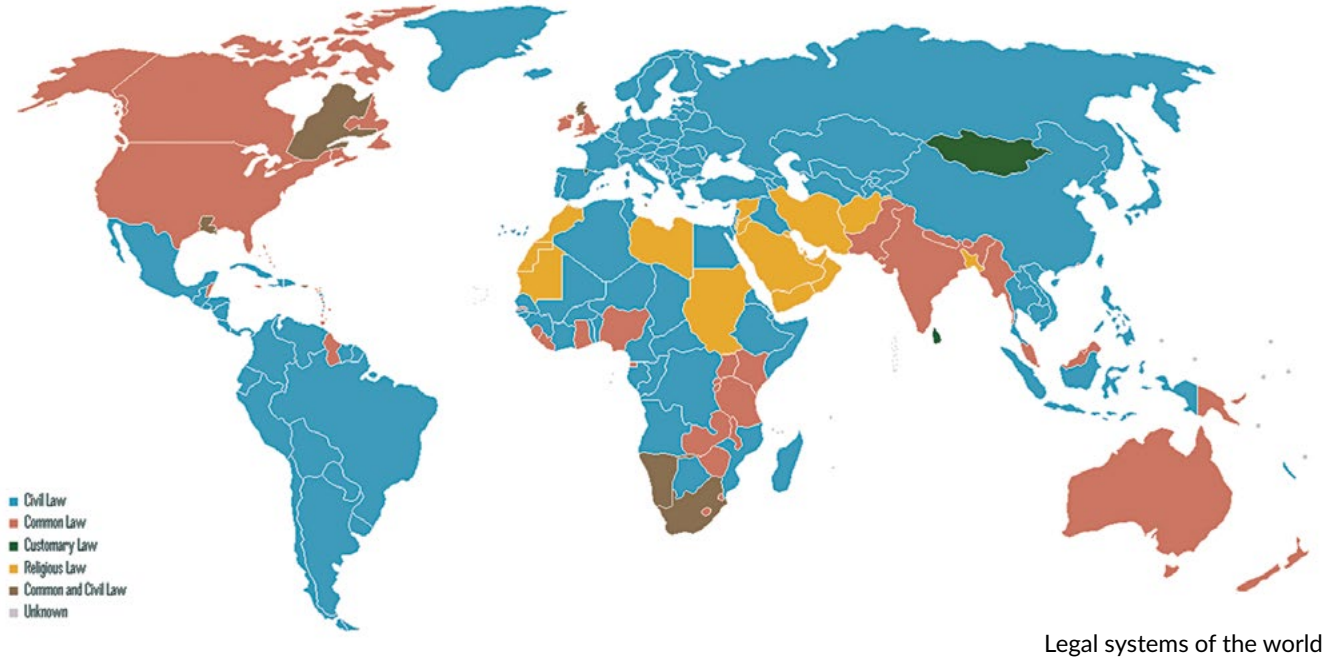
Despite the tendency towards globalization and universalization, the world is, unfortunately, still a long way from universal and uniform regulation, including in the field of international arbitration.

While the IBA carried out an impressive task in creating a compromise between common law and civil law countries, the IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules") are still considered in common law countries as close to a civil law model of proceedings, while in civil law countries many practitioners believe that it is mainly based on common law concepts.

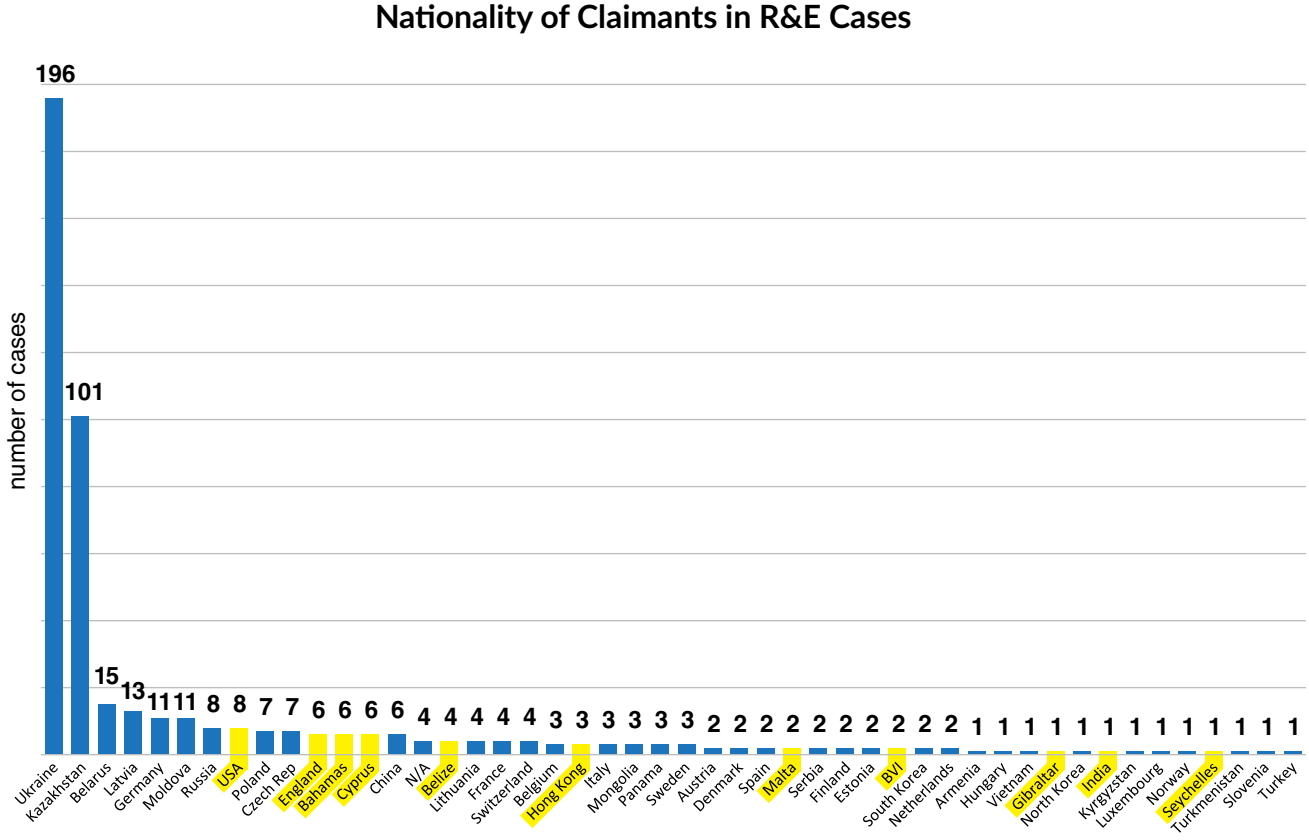
What are the common law features in the IBA Rules from a civil law perspective?

(i) Almost unlimited right of the parties to bring witnesses of fact and experts;
(ii) Assumption of a written witness statement;
(iii) Assumption of cross-examination;
(iv) Assumption of document production.

Whilst the use of these procedures is fully justified in the event of disputes between companies from different legal tradition, but why in the event of a dispute between two companies coming from the civil law countries they should use in the disputes the procedural traditions of common law? Especially if neither the companies nor their representatives know how to apply these instruments and are not used to doing so.



Legal systems of the world



Source: The RAA study on the application of the New York convention in Russia during 2008-2017

Whether people like it or not, it is the reality that the most of the world, at least geographically, is made up of countries based on a civil law system (see map).

As a result, significant number of disputes in international trade disputes arise between companies from the same legal tradition.

Just to have an idea, the author would like to use as an example a research carried out by the Russian Arbitration Association (RAA) in 2018. This research involved 472 foreign arbitral awards that were sought for recognition and enforcement in Russia over 10 years (2008-2017). These cases involved the parties from the following countries: Ukraine (196), Belarus (101), Kazakhstan (15), Latvia (13), Germany (11), Moldova (11), Russia (8), USA (8), Bahamas (6), Cyprus (6), Belize (4), Hong Kong (3), Panama (3), Malta (2), BVI (2), Gibraltar (1), Luxemburg (1), and Seychelles (1), as depicted on the graph.

From the graph it is clear that disputes with companies from common law countries make up only a small fractions of the overall number of arbitration cases involving Russian companies.

Of course the proportion will not be the same for other major civil law countries, such as for example Germany, France and China. However, one conclusion is indisputable: the number of disputes between companies from civil law countries is significant and sufficient to justify the idea of developing the rules of evidence based on a traditional civil law model only.

What is the essence of the Prague Rules?

The heart of the Prague Rules, as follows from the spirit of inquisitorial model of proceedings, lies in the active role of the tribunal in establishing the facts and in managing the procedure.

The active role of the tribunal in establishing facts is reflected in the tribunal's authority to:

(i) request evidence at its own initiative;
(ii) appoint an expert examination at its own initiative;
(iii) appoint an expert of the tribunal; and
(iv) decide which witnesses are to be called for examination during the hearing.

The tribunal is also expected to take an active role in determining the rules of law applicable to the dispute (*iura novit curia*) (of course, taking into account the specificity of international arbitration).

The active role of the tribunal in managing the procedure is seen in:

(i) the early determination of the issues to be resolved;
(ii) the right of the tribunal to freely share with all Parties its preliminary views with regard to the burden of proof or the relief sought, the disputed issues and the weight and relevance of evidence submitted by the Parties; and
(iii) the right of the tribunal to facilitate an amicable settlement (without the risk of being disqualified).

Finally, the civil procedural model restricts document production (including, and all the more so, electronic document production). A party may still request only a particular document (documents) which it could identify, but there should not be room for extensive document production.

10 Misconceptions about the Prague Rules

There are a lot of misconceptions about the Prague Rules, mainly caused by a lack of their understand or sufficient lack of information. However, it is worth to consider the 10 most popular.

Misconception 1. The Prague Rules are a Russian product.

Apparently, the implied message of this misconception is that everything that comes from Russia is bad and potentially dangerous.

Leaving aside an interesting discussion about whether such a generalization is justified, it is worth saying here that the Prague Rules were not a "Russian" initiative. They were created by the group of arbitration practitioners from more than 30 countries from around the world, and the geography of the group is constantly extended.[1]

Misconception 2. The Prague Rules are not different from the IBA Rules.

Some of our colleagues believe that the Prague Rules are not substantially different from the IBA Rules.

[1] See http://praguerules.com/working_group/

Indeed, the IBA Rules also call for an active role on the part of the tribunal; they also allow the number of witness statements to be limited, they do not exclude tribunal-appointed experts and authorize the tribunal to efficiently manage the hearing.

However, the scope of the Prague Rules is broader: the Prague Rules are not only about evidence, they are also about managing conduct of the arbitration proceedings.

Further, as it was explained above, there is a substantial difference in approach to evidential issues under the IBA Rules and the Prague Rules, in particular:

(i) The Prague Rules exclude production of "categories of documents", even "narrow and specific" ones. Only "a document" or "documents" should be submitted.
(ii) The Prague Rules change the procedure for producing the documents: the party requesting the documents should directly approach the tribunal, thus there is no stage of exchange of communications between the parties and thus there is no Redfern schedule.
(iii) The Prague Rules do not allow the parties to bring an unlimited number of witnesses (the witnesses shall be called upon the permission of the tribunal).
(iv) As a rule, written witness statements should not be used.
(v) In case of expert reports, the preference is given to the tribunal-appointed expert.

Misconception 3. The Prague Rules are not needed, as the IBA Rules allow the same to be done.

Yes. This is correct. In theory, tribunals can do everything which the Prague Rules envisage, even when the parties agree to the application of the IBA Rules, as the IBA Rules are flexible enough to allow it.

I could say even more: tribunals can do it even without the IBA Rules, because in case the parties do not agree on the procedure of the arbitration, the tribunal can conduct the arbitration in such manner as it considers appropriate.[2]

However, as a matter of practice, tribunals very often abstain from the active management of proceedings. For example, the terms of reference under the ICC Arbitration Rules shall include a list if issues to be determined, which should be identified by the tribunal at the case management conference.[3] This provision was intended to "force" tribunals to review and analyze the parties' position and crystallize the disputed issues already at the time of the case management conference.

Unfortunately, in the majority of cases, the tribunals do not do it, excusing themselves by the reason that at this stage it is premature to establish the issues in dispute.

The real reasons for it, however, are different.

First, many arbitrators who are often appointed by the parties and the institutions are overloaded: they handle more arbitrations than they can efficiently manage. Despite the efforts made by the institutions in recent years to broaden the pool of arbitrators, it would take years to pour new blood into the arbitration system. Today, unfortunately, it is not uncommon for arbitrators to come to the case management conference without even opening the boxes with documents submitted by the parties. As a result, they use the "standard" drafts of the terms of reference and procedural order no 1, which they used in tens of other cases.

This problem, of course, would not be resolved by using the Prague Rules. Overloaded arbitrators would remain overloaded and less proactive (simply because they do not have time to review the case file and to be proactive).

However, the second reason for such behavior is that some arbitrators think that it is *inappropriate* to actively manage the proceedings, because it would interfere with the principle of the parties' autonomy or the arbitrator could be considered biased.

This problem can be cured with the Prague Rules. The Prague Rules intend to send a message to the international arbitration community: there is a different style in conducting arbitration proceedings. Thus, it is not inappropriate to earlier express the view on disputed issues, burden of proof, evidence already submitted and to be submitted by the parties, especially when the parties agree that this is what they expect from the tribunal.

[2] UNCITRAL Model Law, Article 19.

[3] ICC Arbitration Rules, Article 23.

Misconception 4. The Prague Rules detract the world of international arbitration from developing a "one fits all" standard, i.e., the IBA Rules.

One of the most popular misconceptions heard today at arbitration conferences is that the IBA Rules have become a universal standard in international arbitration. However, this is far from reality.

Indeed, in the world of "luxury arbitration", i.e., in major part of arbitration cases under ICC, LCIA, ICSID, etc., rules, where a lot of money is at stake and the parties are represented by top law firms, this is indeed the case.

However, there is a much larger segment of arbitration outside of the "luxury world". Again, the reference is made to the RAA study carried with regard to the Russian enforcement cases in the last 10 years.

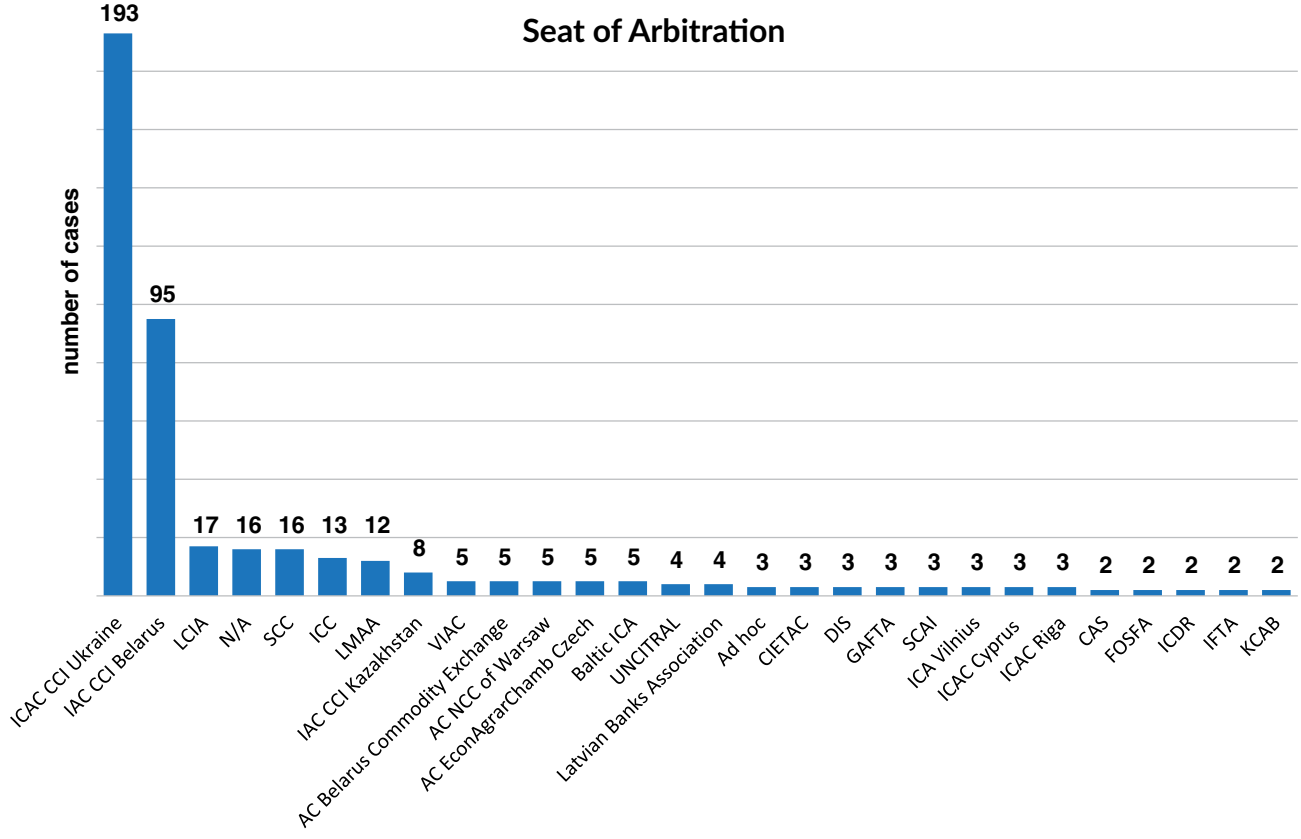
One might be surprised to know that the majority of Russian enforcement cases come not from ICC, LCIA or SCC, but from arbitration courts at the Ukrainian and Belarusian Chambers of Commerce. If one were to ask the question about how often the IBA Rules are used in these arbitrations, the answer would be "never": the procedure is traditionally conducted in accordance with the principles common to this region (which are now embodied in the Prague Rules).

Thus, in essence, the Prague Rules are not intended to "detract" the users of the arbitration from a "one fits all" standard. The Prague Rules are intended to fill a niche, which, as a matter of reality, has not been filled by the IBA Rules.

Misconception 5. The Prague Rules are intended to replace the IBA Rules.

There is no need to replace the IBA Rules. The IBA Rules were and will remain a very good instrument to assist parties in international arbitration, especially those coming from different legal cultures.[4] The Prague Rules are not intended to *replace* the IBA Rules, they are intended to *supplement* them, i.e., to provide users of international arbitration with one more option.

[4] 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... (IBA Rules, Foreword).



Source: The RAA study on the application of the New York convention in Russia during 2008-2017

In other words, if you live with your friend on the same bank of the river, you do not use the bridge, not because the bridge is bad, but simply because there is no need for it. However, if you go to the other side of the river, the bridge would be a great help to you.

Moreover, the Prague Rules can be used *together* with the IBA Rules, as the parties could use both rules as LEGO, selecting from the two sets those blocks that are most appropriate for them.

Misconception 6. The Prague Rules are inconsistent with the basic principle of arbitration, i.e., party autonomy.

Some opponents of the Prague Rules say that the inquisitorial approach is not consistent with the principles of international arbitration: if the parties want the tribunal to act as a judge, they should go to a state court.

This is a rather unusual understanding of the principle of party autonomy. In fact, if the parties want to have a dummy as an arbitrator, they are entitled to have it. If they want a judge, they should have a judge. If they want the arbitrator dropping a coin, and on the basis of it deciding who is right and who is wrong, they are entitled to such "coin arbitration". Thus, giving the parties to arbitration more options, including the option to select the Prague Rules, is more in line with the principles of party autonomy than the situation where the parties do not have a real choice.

Just to give an example, the ICCA Drafting Sourcebook for Logistical Matters in Procedural Orders[5] provides four options for choosing procedure in international arbitration. However, all four options have references to the IBA Rules.

Thus, the existence of the Prague Rules rather contributes to party autonomy than derogates from it.

Misconception 7. The Prague Rules could create a risk for challenging or non-enforcement of the award.

This misconception is a reflection of the so called "*due process paranoia*", a phenomenon worth a special research. However, as any other paranoia, it has nothing to do with reality.

How many cases one could recollect were the arbitral award was set aside because the tribunal restricted a number of witnesses and limited the length of cross-examination? Or did not allow extensive document production? Or put more weight on the report of the tribunal-appointed expert and not that of the party-appointed expert?

Indeed, there are cases when awards were set aside or refused enforcement when a party was not properly notified about the proceedings or the hearing. But where there cases when the award was set aside because the tribunal conducted the proceedings in a different manner from the one the parties expected? One could hardly find few, if any.

The real reason for the "due process paranoia" is that arbitrators want to be nice to the parties and their counsel. They are afraid that if they are not nice enough to them, they will not get future appointments. Thus, the "*due process paranoia*" is in fact a "*please appoint me again, because I am nice*" paranoia.

But where is room for the "due process paranoia" if the Prague Rules are agreed by the parties? How can the parties challenge the award of the tribunal that applied the procedural principles agreed by the parties?

Clearly, there is no room for it. It is just a speculation.

Misconception 8. Limitations of procedure in the Prague Rules are too severe to use them in practice.

Some people say: I am not prepared to go to arbitration *without* the possibility of document production, *without* written witness statement and *without* the cross-examination of witness or expert.

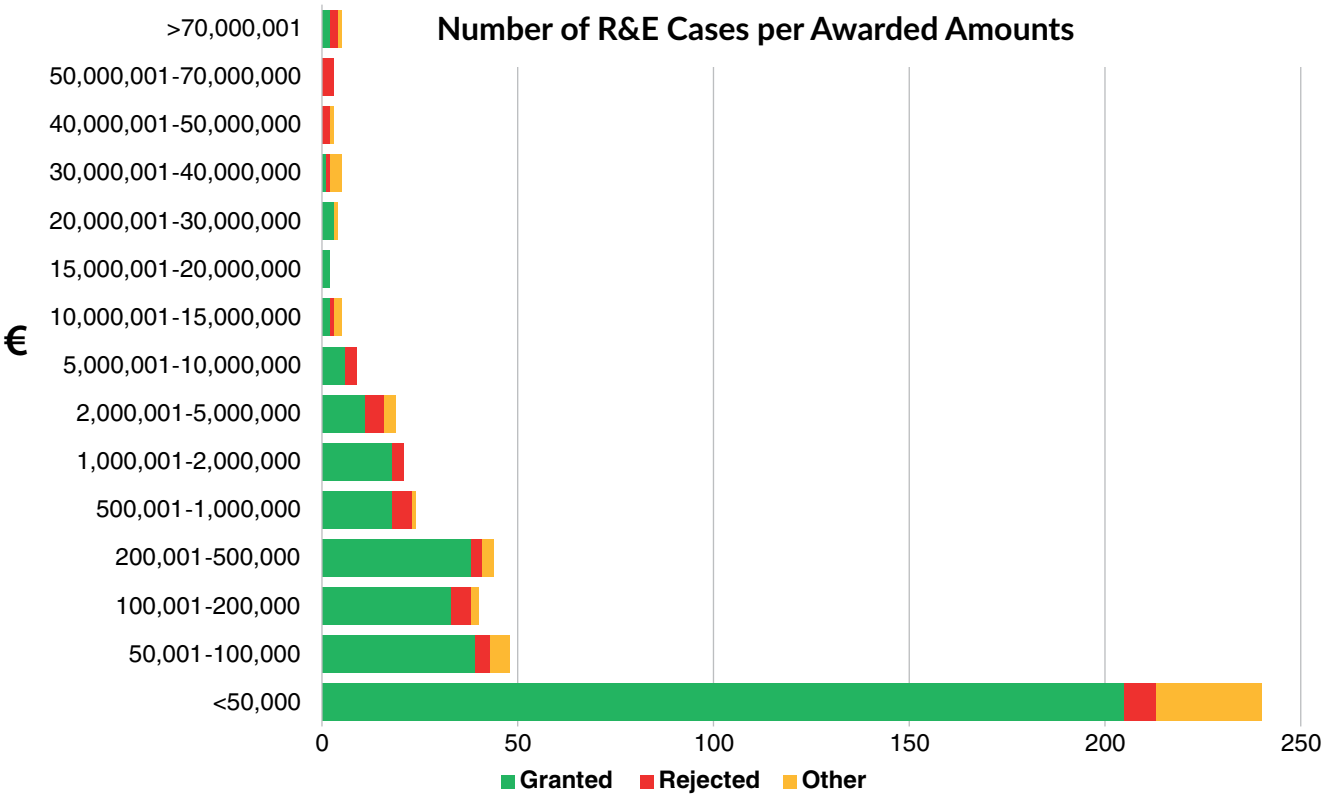
And they are right. If the amount at stake is so significant that the parties are prepared to spend significant funds on arbitration costs, where is the problem? Do not use the Prague Rules. Use the IBA Rules or any other rules.

But have a look again at the statistics produced by the RAA. The chart below demonstrates not only the rate of enforcement of foreign awards, but also the amount thereof and type of disputes.

What follows from this table is that the vast majority of cases are the disputes arising out of sales contracts with an awarded amount below EUR 1 million.

For such a low value and straightforward dispute, if the party is prepared to give their lawyers only EUR

[5] The ICCA Reports No. 2, available at: https://www.arbitration-icca.org/publications/ICCA_Sourcebook.html



Source: The RAA study on the application of the New York convention in Russia during 2008-2017

50,000 for the whole case, would you be prepared to handle it *with* document production, *with* written witness statements and *with* cross-examination? It would definitely be the counsel who would insist in such case on application of the Prague Rules in order to squeeze into the approved budget.

Some people say that such low-value cases should go to mediation instead of arbitration. Well, the same could be said with regard to the big stake cases. But in essence, are we denying small businesses, even in theory, access to arbitration in international transactions because they are too small? What is better for international trade: to have a quick and efficient arbitrator, even sometimes acting as a judge, or simply that claims should be forgotten about because they are too small and businesses could not afford the arbitration expenses?

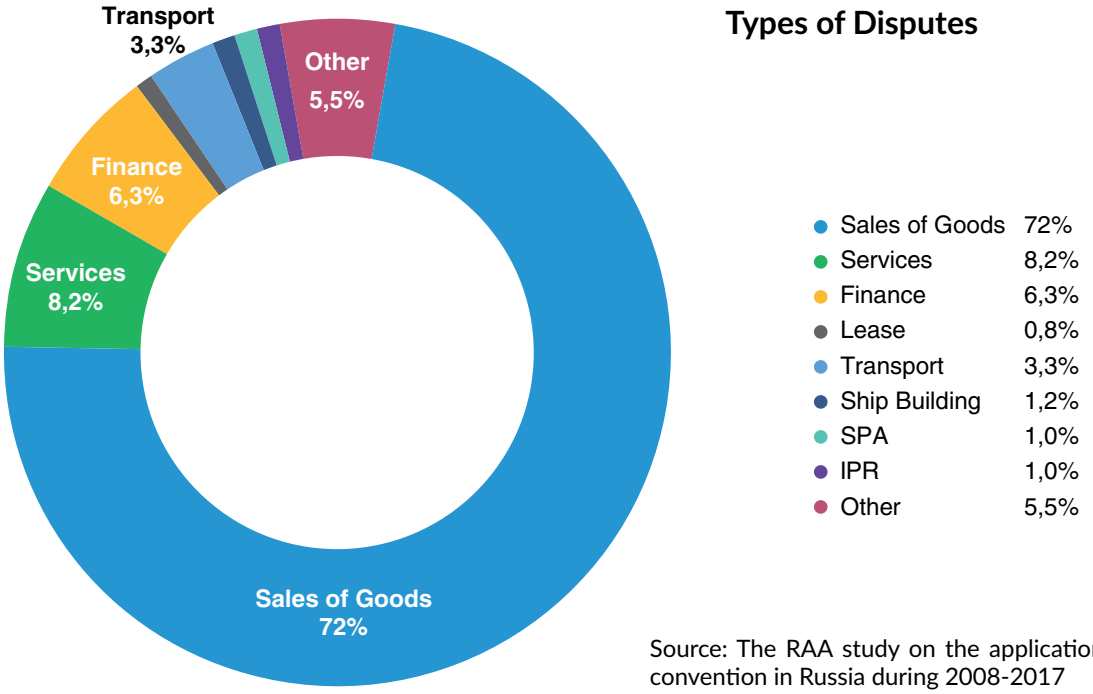
Misconception 9. Earlier expression of the tribunal's view on disputed issues creates prejudgment and goes against the interests of the parties.

The Prague Rules provisions whereby the tribunal is entitled to express its earlier view on the parties' case have provoked a lot of criticism. Opponents say that it creates prejudgment as arbitrators are taking a position on the case without hearing all the arguments of the parties.

First of all, this is human nature that an arbitrator takes a position after reading the request for arbitration and the answer to the request anyway. This position can be preliminary and may not be strong, but still the arbitrator has taken it. He or she could not read the parties submissions without having reflections on them. The only difference is whether the arbitrator shares his/her preliminary position with the parties or not. Not sharing the position does not eliminate the problem: the arbitrator still has take already a preliminary position.

At the same time, sharing preliminary views with the parties has a number of advantages:

First, the parties would better know whether the tribunal has understood their respective cases. It would allow the parties to concentrate in their subsequent submissions on the issues that are really important for them, omitting evidence on those issues which are already clear to the tribunal.



Source: The RAA study on the application of the New York convention in Russia during 2008-2017

Second, the parties would get an understanding of the extent to which the tribunal is prepared to "buy" their arguments. It would allow the parties to settle the case, which is much better for them than to spend years in arbitration, wasting their time and resources.

If you ask in-house lawyers whether, if they were going to lose the case, they would prefer to know about it as early as possible or as late as possible, 9 out of 10 would say: as early as possible, because it allows them to settle.

If you put the same questions to law firms, the answer would most likely be different.

Misconception 10. Arbitrators should not act as mediators.

The Prague Rules refer not only to the right of the tribunal to act as a mediator, but also encourage them to do so. Again, some opponents of the Prague Rules say that it is not appropriate, as during mediation the tribunal would know the real position of the parties, thus, they could not continue as a neutral tribunal if the mediation fails.

First of all, the Prague Rules say that the tribunal continues its function if mediation fails only upon a written agreement of the parties. If there is such an agreement, this is the risk which the parties accept.

Second, if the parties do not agree that the arbitrators continue their function, it could result in the replacement of the tribunal (or only one arbitrator, acting as a mediator) and the delay of the arbitration. However, if the parties, realizing this risk, still prefer the tribunal to do so, it means that they expect that their case would be settled. Indeed, replacing the tribunal would hardly change the outcome of the arbitration, as the new tribunal would most likely have the same or similar view on the parties' respective cases.

Finally, one should not forget that in some parts of the world, the parties expect the tribunal to act as mediator. For example, traditionally in Islamic legal culture arbitration was a mixture of mediation, conciliation and arbitration. The idea of arbitrators assisting the parties in reaching settlement is also supported by many practitioners from Asia.

Conclusion

Arbitration is indeed about party autonomy and diversity. Diversity does not mean only gender or race diversity. Diversity also means respect for different legal cultures and arbitration better than anything else fits this need. This is obvious, although it may take time for some people to realize it.