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This edition of “New Horizons of International Arbitration” collects the articles of the speakers at the “Russian Arbitration Day – 2019” conference held in Moscow on 25 March 2019, one of the most successful arbitration events in Russia (<http://rad.lfacademy.ru>).

This is the fifth collection of articles for that conference. The first three RADs were held in 2013, 2014, 2015 and 2018. The first four collections of articles, “New Horizons of International Arbitration”, were issued in the same years.

Articles in this book were selected through the strict competitive selection process by the moderators of “Russian Arbitration Day – 2019” with application of several criteria (in decreasing order of importance): novelty; depth of analysis; practical significance; and author. These diverse articles represent new approaches to development of practice of and academic studies in international commercial and investment arbitration in Russia and abroad.

This collection is intended for arbitrators and practicing lawyers, judges of the state courts, academics and other researchers, lecturers, postgraduates and students of legal universities and faculties, as well for all those who are interested in international commercial and investment arbitration.

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COMMON LAW VS. CIVIL LAW IN INTERNATIONAL ARBITRATION: THE BEGINNING OR THE END?

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The tendency of transnationalisation marks the recent development of international arbitration and helps to bridge the divide between common and civil law approaches. The adoption of soft law instruments, such as IBA rules and guidelines, is an important part of this tendency which is aimed at the creation of uniformed best practices on certain procedural issues. Does the competition between several soft law instruments in one field threaten the global paradigm of international arbitration? The author analyses this issue using the example of the 2010 IBA Rules on the Taking of Evidence in International Arbitration and the 2018 Prague Rules on the Efficient Conduct of Proceedings in International Arbitration.

Keywords: IBA Rules on the Taking of Evidence in International Arbitration; Prague Rules on the Efficient Conduct of Proceedings in International Arbitration; soft law; transnationalisation of international arbitration.

Тенденция транснационализации характеризует развитие международного арбитража в последние годы и способствует сближению подходов, принятых в континентальных странах и странах общего права. Утверждение инструментов мягкого права, таких как правила и руководства МАЮ, является важной частью этой тенденции, которая нацелена на создание единообразных лучших практик по определенным

процессуальным вопросам. Угрожает ли конкуренция между несколькими инструментами мягкого права в одной сфере глобальной парадигме международного арбитража? Автор анализирует этот вопрос на примере Правил МАЮ по получению доказательств в международном арбитраже 2010 г. и Пражских правил эффективной организации процесса в международном арбитраже 2018 г..

Ключевые слова: Правила МАЮ по получению доказательств в международном арбитраже; Пражские правила эффективной организации процесса в международном арбитраже; мягкое право; транснационализация международного арбитража.

Introduction

In the past decades, much has been written about ways to bridge the divide between common and civil law in international arbitration¹. In fact, international arbitration is regarded by some as a real-life labora-

¹ *S.H. Elsing & J.M. Townsend*, Bridging the Common Law-Civil Law Divide in Arbitration, *Arbitration International*, Vol. 18 (2002), Issue 1, p. 59–65 <https://doi.org/10.1023/A:1014200908066>; *J.H. Rubinstein*, International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions, *Chicago Journal of International Law*, Vol. 5 (2004), p. 303–310 (available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2926&context=journal_articles); *P. Karrer*, The Civil Law and Common Law Divide: An International Arbitrator Tells It Like He Sees It, *Dispute Resolution Journal*, Vol. 63 (2008), No. 1; *R. Trittmann*, Basics and Differences of the Continental and Common Law System and State Court Proceedings, in: K.H. Böckstiegel, K.P. Berger & J. Bredow (eds.), *The Taking of Evidence in International Commercial Arbitration* (= Schriftenreihe der Deutschen Institution für Schiedsgerichtsbarkeit. Bd. 26), Heymanns, 2010, p. 15, 23ff.; *M. McIlwrath*, Anti-Arbitration: Would You Prefer a Harmonized Approach or Just a Better One? (22 December 2011) (<http://arbitrationblog.kluwerarbitration.com/2011/12/22/anti-arbitration-would-you-prefer-a-harmonized-approach-or-a-just-a-better-one/>); *R. Trittmann & B. Kasolowsky*, Taking Evidence in Arbitration Proceedings between Common Law and Civil Law Traditions – The Development of a European Hybrid Standard for Arbitration Proceedings, *University of New South Wales Law Journal*, Vol. 31 (2008), Issue 1, p. 330–340 (available at: <https://www.austlii.edu.au/au/journals/UNSWLJ/2008/18.pdf>); L.M. Pair, Cross-Cultural Arbitration: Do the Differences between Cultures Still Influence International Commercial Arbitration Despite Harmonization?, *ISLA Journal of International & Comparative Law*, Vol. 9 (2002), No. 1, p. 61 ff. (available at: <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1409&context=ilsajournal>).

tory for the development of a “procedural Esperanto”¹ or “*Lex Mercatoria Processualis*”², i.e. the merging of both legal traditions into a single global paradigm for a private and truly transnational adjudicatory process³. An important consensus seemed to have emerged as a result of that development: unlike domestic arbitration, which is rooted in the tradition of the domestic legal system in which the proceedings have their seat⁴, international arbitration belongs to neither common nor civil law⁵. Instead, it constitutes a third

¹ S. Brekoulakis, Chapter 1. Introduction: The Evolution and Future of International Arbitration, in: S. Brekoulakis, J.D.M. Lew & L. Mistelis (eds.), *The Evolution and Future of International Arbitration* (= International Arbitration Law Library. Vol. 37), Kluwer Law International, 2016, p. 9.

² U. Draetta, The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization, *ASA Bulletin*, Vol. 33 (2015), Issue 2, p. 329; F. Marrella, La nuova lex mercatoria: principi Unidroit ed usi dei contratti del commercio internazionale (= F. Galgano (ed.), *Trattato di diritto commerciale e di diritto pubblico dell’economia*. Vol. XXX), CEDAM, 2003, p. 579 ff. (available at: <https://core.ac.uk/download/pdf/41104896.pdf>); L. Nottage, *The Procedural Lex Mercatoria: The Past, Present and Future of International Commercial Arbitration* (Sydney Law School Research Paper No. 06/51 (December 2006)) (https://papers.ssrn.com/abstract_id=838028); see also: H. Raeschke-Kessler, The Contribution of International Arbitration to Transnational Procedural Law, in: G. Aksen, K.-H. Böckstiegel, P.M. Patocchi & A.M. Whitesell (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publication No. 693), ICC Pub., 2005, 647 ff.

³ See, e.g.: J.C. Fernández Rozas, S.A. Sánchez Lorenzo & G. Stampa, *Principios Generales del Arbitraje*, Tirant lo Blanch, 2018, p. 247 ff.; see also: N. Blackaby, C. Partasides, A. Redfern & M. Hunter, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford University Press, 2015, para. 1.77 (“There are no compulsory rules of procedure in international arbitration, no volumes containing ‘the rules of court’ to govern the conduct of the arbitration. Litigators who produce their own country’s rulebook or code of civil procedure as a ‘helpful guideline’ will be told to put it aside”).

⁴ J. Paulsson, *International Arbitration is not Arbitration*, *Stockholm International Arbitration Review*, 2008, Issue 2, p. 1 (“You don’t think that international arbitration is arbitration because it has arbitration’ in its name, do you? Do you think a sea elephant is an elephant? International arbitration is no more a ,type‘ of arbitration than a sea elephant is a type of elephant. True, one reminds us of the other. Yet the essential difference of their nature is so great that their similarities are largely illusory”); see also: *Ibid.*, p. 20 (“If international arbitration is not arbitration, what should we call it? Let’s see – we will, I suppose, go on calling the sea elephant ,sea elephant,‘ and ,international arbitration‘ is not a bad appellation for international arbitration – but let’s remember what it is!”) (available at: https://www.arbitration-icca.org/media/4/38838389608773/media012331138275470siar_2008-2_paulsson.pdf).

⁵ J.D.M. Lew, L.A. Mistelis & St.M. Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, para. 22-12 (“Rigid distinctions that exist between civil and common law approaches are not imposed upon international commercial arbitra-

category: a transnational, hybrid procedure which combines elements of both and is governed to a large extent by non-statutory practice-made rules: “The existence of a transnational arbitration law is an essential condition for arbitration to exist as a system of justice that is autonomous and disconnected from national legal systems. ... This transnational law can only be an emanation of the same international arbitral community. The way in which this law is generated and consolidated is... through the elaboration of non-binding guides, rules and norms, which nevertheless reach a certain level of normativity due to the general consensus they achieve and the consequent feeling of moral obligation to apply them, which they generate on the part of the arbitrators and the parties”¹.

It is this uniqueness of international arbitration which has led to the warning that arbitral proceedings should not be misused by domestic trial lawyers as “offshore litigation”².

tion... converging practices are now accepted in international arbitration practice as an acceptable non-national or transnational standard, irrespective of their legal background”).

¹ “La existencia de un derecho arbitral transnacional es una condición esencial para que el arbitraje pueda existir como sistema de justicia autónomo y desvinculado de los órdenes jurídicos nacionales. ... Este derecho transnacional solo puede ser una emanación de la misma comunidad arbitral internacional. La forma con la cual se genera y se consolida este... la elaboración de guías, reglas y normas no obligatorias, las cuales sin embargo acceden a un cierto nivel de normatividad por el consenso general que logran realizar y el consecuente sentimiento de obligación moral en aplicarlas, que generan por parte de los árbitros y de las partes” (*A. Mourre*, *La Soft law* como condición para el desarrollo de la confianza en el arbitraje internacional, CEU Ediciones, 2018, p. 28 (available at: [http://www.ideo.ceu.es/Portals/0/CIAMEN/Docuweb%20Hugo%20Grocioc%20n%C2%BA%208.pdf?ver=2018-10-01-180115-397](http://www.ideo.ceu.es/Portals/0/CIAMEN/Docuweb%20Hugo%20Grocio%20n%C2%BA%208.pdf?ver=2018-10-01-180115-397)) (translation by the author)); see also: *H. Smit*, Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence, in: A.J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (International Council for Commercial Arbitration Congress Series No. 7), Kluwer Law International, 1996, p. 161–172; *M. Wirth*, Preface, in: M. Wirth (ed.), *Best Practice in International Arbitration* (= ASA Special Series No. 26), ASA, 2006.

² See, e.g.: *C.A. Rogers*, Fit and Functional in Legal Ethics: Developing a Code of Conduct for International Arbitration, *Michigan Journal of International Law*, Vol. 23 (2002), p. 352–353 (available at: https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1238&context=fac_works) (“In its final incarnation, international arbitration is less recognizable as a form of ‘alternative dispute resolution’ than as a type of ‘offshore litigation’. This transformation has been both celebrated and described as the ‘judicialization’ of arbitration”); see also: *A. Redfern*, Stemming the Tide of Judicialisation in International Arbitration, *World Arbitration & Mediation Review*, Vol. 2 (2008), No. 5, p. 37; *R.P. Alford*, The American Influence on International Arbitration, *Ohio State Journal on Dispute Resolution*, Vol. 19 (2003), p. 69 (available at: https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1559&context=law_faculty_scholarship).

Because of this conception of international arbitration as being largely detached from domestic laws and procedural traditions, it is generally accepted today that the seat of an international arbitration is nothing but an abstract legal nexus to the *lex loci arbitri*. It links the proceedings to the arbitration law at the seat, without, however, grounding them in the general procedural law, let alone the legal traditions, of that jurisdiction¹. After all, it is the very *raison d'être*² of international arbitration that such alternative dispute resolution processes between international businessmen should not be trapped in the straitjacket of mandatory rules of domestic procedural law which they and their lawyers may not even know. Rather, they should allow for speedy justice³ within a truly transnational procedural

¹ *Blackaby, Partasides, Redfern & Hunter*, Op. cit., paras. 3.53ff; N.D. O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (Informa 2012), para. 1.21 ("It may be said that in many instances the choice of international arbitration represents not only an aspiration to have the case judged by arbitrators of a neutral nationality but also to subject the dispute to a neutral procedure...").

² See for a 17-century perspective: *G. Malynes, Consuetudo, vel Lex Mercatoria, or The Ancient Law-Merchant*, Adam Islip, 1622, Ch. XV, p. 323 (available at: <http://www.translex.org/104980>) ("The second Mean or rather ordinarie course to end the questions and controversies arising between Merchants, is by way of Arbitrement, when both parties do make choice of honest men to end their causes, which is voluntary and in their own power, and therefore called Arbitrium, or Free will, whence the name Arbitrator is derived: and these men (by some called good men) give their judgments by Awards, according to equity and conscience, observing the Custome of Merchants, and ought to be void of all partiality more or less to the one and to the other; having only care that right may take place according to the truth, and that the difference may be ended with brevity and expedition"); see for an analysis of Justinian's *Corpus Juris* and other Roman texts: *D. Roebuck & B. de Loynes de Fumichon, Roman Arbitration*, The Arbitration Press, 2004, p. 24 ff.; for a brief historical note on arbitration see: *K.P. Berger, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, 3rd ed., Vol. II: Handbook, Kluwer Law International, 2015, para. 16-5; see for a plea to return to this basic notion of arbitration in which an arbitrator would "simply listen to both sides of the dispute and then issue his decision", asking for additional information "only as necessary": *D.W. Rivkin, Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, *Arbitration International*, Vol. 24 (2008), Issue 3, p. 375-386. <https://doi.org/10.1093/arbitration/24.3.375>

³ See from a historical perspective: *N. Isaacs, The Merchant and His Law*, *Journal of Political Economy*, Vol. 23 (1915), p. 536 ("Before the judges of the common law the merchants were compelled to set out and prove their customs in each case as matters of fact not recognized as part of the law of the land nor dignified by judicial notice. In these courts the merchants must have felt decidedly like fishes out of water. They had been accustomed to speedy justice. Coke, however faulty his etymology may be, pictures the court of piepowder as dispensing justice as quickly as dust falls from the foot. In the ordinary courts of common law 'the law's delay' had already won its place among the recognized ills of this life").

framework with maximum scope for party autonomy¹ and minimum statutory and judicial interference.

2. 14 December 2018: The End of the Global Paradigm?

The widespread consensus that international arbitration constitutes a category of its own and does not belong to either common or civil law was challenged on 14 December 2018. On that day, the “Rules on the Efficient Conduct of Proceedings in International Arbitration” – or “Prague Rules” for short – were presented to the public at a conference in the capital of the Czech Republic². As the Working Group³ of the Prague Rules emphasizes in its Introductory Note to the Rules, the principal reason for the revival of a debate that seemed to have been put to rest years ago is the need for a more proactive case management by international arbitrators as a reaction to the dissatisfaction of many users with the time and costs involved in arbitral proceedings.

It is true that many users of arbitration have raised this concern during the past years. Data collected in a number of recent surveys on the preferences and expectations of the users of international arbitration confirm this finding⁴. They have put arbitration stakeholders on the alert. Under pressure from the users and faced with various efforts to make other forms of ADR, such as

¹ See: *A.M. Steingruber*, *Consent in International Arbitration*, Oxford University Press, 2012, para. 2.04 (“Indeed, the first and foremost principle of law in commercial arbitration is that it is founded on the autonomy of the parties’ will”); *K.P. Berger*, *Institutional Arbitration: Harmony, Disharmony and the “Party Autonomy Paradox”*, *Arbitration International*, Vol. 34 (2018), Issue 4, p. 473–493. <https://doi.org/10.1093/arbint/aiy028>

² Text available at: http://www.pragerules.com/prague_rules/; see also: Report from the Prague Rules inaugural conference (24 December 2018) (<http://pragerules.com/news/report-from-the-prague-rules-inaugural-conference/>); see generally: *V. Khvalei*, *Join GAR for Launch of Prague Rules this Friday* (10 December 2018) (<https://globalarbitrationreview.com/article/1177783/join-gar-for-launch-of-prague-rules-this-friday>); *D.G. Henriques*, *The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?*, *ASA Bulletin*, Vol. 36 (2018), Issue 2, p. 351–363.

³ The author of the present contribution was a member of the Working Group for the Prague Rules.

⁴ According to the 2018 Queen Mary University / White & Case International Arbitration Survey (<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey-report.pdf>), 60% of in-house counsel and 46% of private practitioners who participated in the survey responded that a combination of international arbitration with other means of ADR is their preferred method of resolving cross-border disputes (see for similar figures: *Cumulated Data Results* (March 2016 – September 2017) (2017), Session 2, Question 5 (<https://www.globalpound.org/gpc-series-data/#397-gpc-series-final-report>)).

international mediation¹, more attractive, the stakeholders have considered ways and means to prevent the users from pursuing a “search of something better”². Early in the debate, the ICC Commission on Arbitration published the first edition of its well-known Report on Techniques for Controlling Time and Costs in Arbitration in 2007³. That Report had a considerable influence on the 2012 revision of the ICC Arbitration Rules. It led to the inclusion of Appendix IV which contains a non-exhaustive list of “Case Management Techniques” to which reference is made in Art. 24 (1) of the Rules. That provision mandates that ICC arbitrators must hold a case management conference with the parties at an early stage of the proceedings⁴. In the wake of the ICC Report users called for “*Woolf-Reforms*” in international arbitration⁵. Subsequently, an intense discourse commenced and is still ongoing today among users, counsel and arbitrators about ways to achieve a more efficient and predictable conduct of arbitration proceedings⁶.

In the context of that discourse, the Prague Rules Working Group has also stressed in the Introductory Note that proactive case management – for which it seeks to provide a best practice framework – “is traditionally done in many

¹ On 20 December 2018, the UN General Assembly passed resolutions to adopt the UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (see Resolutions A/RES/73/198 and A/RES/73/199; see also: *N. Alexander*, Singapore Convention on Mediation (24 July 2018) (<http://mediationblog.kluwerarbitration.com/2018/07/24/singapore-convention-mediation/>)).

² *L. Brierly*, Is it Time for Arbitration to Face Its Woolf Reforms? (7 December 2016) (<http://arbitrationblog.practicallaw.com/is-it-time-for-arbitration-to-face-its-woolf-reforms>).

³ Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration (ICC Publication No. 843) (<http://gjpi.org/wp-content/uploads/icccontrolling-time-and-cost.pdf>); see also: Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives (ICC Publication No. 866-3) (<https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf>).

⁴ See: *Th.H. Webster & M.W. Bühler*, Handbook on ICC Arbitration, 3rd ed., Sweet & Maxwell, 2014, paras. 24–9 ff.

⁵ *P. Hobeck, V. Mahnken & M. Koebke*, Time for Woolf Reforms in International Construction Arbitration, *International Arbitration Law Review*, Vol. 11 (2008), Issue 1, p. 84–99.

⁶ See for a comprehensive conspectus on the current debate: *N. Pitkowitz and 26 co-authors*, The Vienna Predictability Propositions: Paving the Road to Predictability in International Arbitration, *Austrian Yearbook on International Arbitration*, 2017, p. 115–160; *K.P. Berger*, The Need for Speed in International Arbitration: Supplementary Rules for Expedited Proceedings of the German Institution of Arbitration (DIS), *Journal of International Arbitration*, Vol. 25 (2008), Issue 5, p. 595–612.

civil law countries” and is “generally welcomed by arbitration users”. With this comment, the Working Group establishes a direct connection between the benefits of civil law style procedures and the preferences of arbitration users. Such a statement raises various questions: Is it still true that we have reached the end of the decade-long debate on the evolution of a transnational procedural template for international arbitration, as reflected for example in the IBA Rules on the Taking of Evidence in International Arbitration?¹ Are we at the beginning of a new retrograde era in the discussion on the transnationalisation of arbitral procedure? Or do the Prague Rules constitute an overreaction to a non-existent problem?²

3. Transnationalisation of International Arbitration: History and Overview

The increasing global consensus regarding the transnational nature and quality of the international arbitral process that seemed to have emerged over the past decades has largely been fueled by two parallel developments, one of which has overtaken the other in recent years.

The first relates to the gradual liberalization and harmonization of domestic laws for international arbitrations. The different approaches taken towards drafting laws for international arbitrations were once regarded as “marketing strategies” of domestic legislatures in their world-wide competition to attract international arbitration proceedings to their territory³. Since the late 1980s,

¹ See: *Mourre*, Op. cit., p. 29; *M. Kocur*, Why Lawyers from Civil Law Jurisdictions Do Not Need the Prague Rules (19 August 2018) (<http://arbitrationblog.kluwerarbitration.com/2018/08/19/why-lawyers-from-civil-law-jurisdictions-do-not-need-the-prague-rules>) (“The IBA Rules codify the procedures developed in international arbitration over the years. They provide clear standards for arbitration proceedings and unify diverging practices. The Prague Rules are intended to undermine the uniform character of arbitration practices by setting out different standards for ‘intra-civil law’ disputes. This is unfortunate because the convergence of arbitration practices leads to the increased predictability of the tribunals’ behaviour, and ultimately to the success of international arbitration. This is deplorable also because the common law features of international arbitration, if used properly, help to make the arbitral process fairer and assist the arbitrators in reaching better decisions”).

² *G.R. Amaral*, Prague Rules v. IBA Rules and the Taking of Evidence in International Arbitration: Tilting at Windmills (<http://praguerules.com/upload/iblock/360/3602b5ce4008cd4e32842c9cd2c60789.pdf>), p. 4 (“The Prague Rules operate under the shadow of an apparent war between common law and civil law armies for dominance over the international arbitration landscape. Yet, just like Don Quixote, they mistake windmills for giants”); see also: *Mourre*, Op. cit., p. 29.

³ See: *K.P. Berger*, International Economic Arbitration, Kluwer Law and Taxation Pub., 1993, p. 7 ff.

however, these laws have gradually been converging under the influence of the UNCITRAL Model Law on International Commercial Arbitration. More than thirty years after its adoption by UNCITRAL on 21 June 1985¹, and the UN General Assembly's recommendation for adoption by its member states on 11 December 1985², the Model Law and its 2006 amendment, still serves as a "transnational benchmark" to evaluate the user-friendliness of domestic statutes for international arbitrations around the globe³. As of January 2019, legislation based on the Model Law has been adopted by 111 jurisdictions in 80 states around the globe⁴. Even countries like England, France, Sweden or Switzerland, which have decided not to adopt the Model Law, but to continue their own independent, successful legislative approach to the (de-)regulation of international arbitration, have sought inspiration and guidance from the text and systematic structure of the Model Law for their own reform projects in the past years. In some jurisdictions like Germany⁵ and Bulgaria⁶, the

¹ See: Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17 (1985), para. 332 (available at: <https://digitallibrary.un.org/record/90550/files/a-40-17-e.pdf>).

² See: Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, G.A. Res. 40/72, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/72 (1985) (available at: <http://www.un.org/documents/ga/res/40/a40r072.htm>).

³ The Model Law "reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world" (https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration); see also: *G.B. Born*, International Commercial Arbitration, 2nd ed., Vol. I, Kluwer Law International, 2014, § 1.04(B)(1)(a) (concluding that "the Model Law's contributions to the international arbitral process are enormous and it remains, appropriately, the dominant 'model' for national legislation dealing with international commercial arbitration"); *Blackaby, Partasides, Redfern & Hunter*, Op. cit., paras. 1.220 ("It may be said that if the New York Convention put international arbitration on the world stage, it was the Model Law that made it a star, with appearances in states across the world").

⁴ See for UNCITRAL's status report and a list of countries with legislation based on the Model Law at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (with the indication in a disclaimer note that "since States enacting legislation based upon a model law have the flexibility to depart from the text, the... list is only indicative of the enactments that were made known to the UNCITRAL Secretariat").

⁵ See: *K.-H. Böckstiegel, St.M. Kröll & P. Nacimiento*, Part I: Germany as a Place for International and Domestic Arbitrations – General Overview, in: *K.-H. Böckstiegel, St.M. Kröll & P. Nacimiento* (eds.), *Arbitration in Germany: The Model Law in Practice*, 2nd ed., Kluwer Law International, 2015, para. 12.

⁶ See: *D. Dragiev*, Bulgaria Reforms Arbitration Law by Imposing More Control and Restrictions (8 February 2017) (<http://arbitrationblog.kluwerarbitration.com/2017/02/08/bulgaria-reforms-arbitration-law-by-imposing-more-control-and-restrictions>).

outstanding quality of the Model Law as a liberal, state-of-the-art statutory framework for arbitral proceedings has led legislatures to expand its scope to domestic arbitrations having their seat in those countries.

The second catalyst for the development of a global consensus on transnational procedural structures in international arbitration is the multitude of best practice standards that have flooded international arbitration over the past decades¹. These have been developed and published by various formulating agencies such as the International Bar Association (IBA) and the United Nations Commission on International Trade Law (UNCITRAL), arbitration organizations like the London-based Centre for Efficient Dispute Resolution (CEDR) and Chartered Institute of Arbitrators, arbitral institutions or – admittedly also as a means of self-marketing – law firms² and private arbitration practitioners³. Best practice standards provide specific rules for specific areas of international arbitration law, such as document production, written or oral proceedings, written witness statements, the use of expert testimony, conflicts of interest, arbitrator interviews, counsel conduct, *etc.* Some of these rules even extend to substantive issues such as damage calculation⁴. New proposals and drafts are produced constantly and provided to the

¹ See: *Mourre*, Op. cit., p. 12 ff. (stating that the only method for the elaboration of norms for the international arbitration process that does justice to its particular nature is the formulation of “non-obligatory” or “semi-obligatory” rules through soft laws).

² See: Debevoise & Plimpton Protocol to Promote Efficiency in International Arbitration (www.debevoise.com/~media/files/capabilities/russia%20comercial%20arbitration/%20arbitration%20protocol.pdf).

³ See, e.g., the *Redfern Schedule* for document production (*Berger*, Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, 3rd ed., Vol. II: Handbook, para. 26–47), the *Kaplan Opening* (*N. Kaplan*, If It Ain’t Broke, Don’t Change It, Arbitration, Vol. 80 (2014), Issue 2, p. 172–175 (available at: https://www.arbitration-icca.org/media/4/44493740788727/media314050030194870kaplan_if_it_aint_broke_dont_change_it.pdf), the *Reed Retreat* (*L. Reed*, The Kaplan Lecture 2012 “Arbitral Decision-Making: Art, Science or Sport?” (https://www.arbitration-icca.org/media/4/42869508553463/media113581569903770reed_tribunal_decision-making.pdf); the *Sachs Protocol* (*K. Sachs & N. Schmidt-Ahrendts*, Protocol on Expert Teaming: A New Approach to Expert Evidence’, in: A.J. van den Berg (ed.), Arbitration Advocacy in Changing Times (International Council for Commercial Arbitration Congress Series No. 15), Kluwer Law International, 2011, p. 135–148; *M. Hunter*, “Experts” in International Arbitration (7 February 2011) (<http://arbitrationblog.kluwerarbitration.com/2011/02/07/experts-in-international-arbitration/>)).

⁴ See for an overview of some of these soft law instruments, L.W. Newman & M.J. Radine (eds.), *Soft Law in International Arbitration*, Juris Pub., 2014; see generally for the phenomenon of professional guidelines and other non-governmental “soft law” instruments in international arbitration: *W.W. Park*, Arbitration’s Protean Nature: The Value of Rules and the Risks of Discretion (2002 Freshfields Lecture), in: J.D.M. Lew & L.A. Mistelis,

global market for international arbitration services. While some are triggered by the real or perceived need for guidance with respect to specific procedural issues, others are the result of technological advancements¹.

This development is a striking example of self-regulation which has become a defining feature of many areas of domestic and international business². In the field of international arbitration, it began with the IBA Code of Ethics of 1987 and the first edition of the UNCITRAL Notes on Organizing Arbitral Proceedings in 1996. By far the most influential formulating agency in the area of international arbitration is the IBA. While the IBA has issued best practice standards for international arbitration in the area of conflict of interest³, counsel conduct⁴ and the drafting of arbitration clauses⁵, the most successful and generally accepted set of best practice standards are the IBA Rules on the Taking of Evidence in Inter-

Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration, Sponsored by Freshfield Bruckhaus Deringer, Kluwer Law International, 2007, paras. 17-91 ff.

- ¹ See, e.g., the Korean Commercial Arbitration Board's recently released draft protocol on video conferencing: *M. McClure & K. Sanger*, KCAB Releases Draft Protocol on Video Conferencing (28 November 2018) (<https://hsfnotes.com/arbitration/2018/11/28/kcab-releases-draft-protocol-on-video-conferencing/>).
- ² See generally: *F. Cafaggi*, New Foundations of Transnational Private Regulation, *Journal of Law and Society*, 38 (2011), Issue 1, p. 20–49; *J. Braithwaite & P. Drahos*, *Global Business Regulation*, Cambridge University Press, 2000; *K. Ronit & V. Schneider*, *Global Governance through Private Organizations*, (1999) 12 *Governance: An International Journal of Policy, Administration and Institutions*, Vol. 12 (1999), Issue 3, p. 243–266 <https://doi.org/10.1111/0952-1895.00102>; for a broader perspective: *F. De Ly*, 5. *Lex Mercatoria* (New Law Merchant): Globalisation and International Self-regulation, in: R.P. Appelbaum, W.L.F. Felstiner & V. Gessner (eds.), *Rules and Networks: The Legal Culture of Global Business Transactions*, Hart Pub., 2001, p. 159–188.
- ³ IBA Guidelines on Conflicts of Interest in International Arbitration (adopted by resolution of the IBA Council on Thursday 23 October 2014), IBA, 2014 (available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918>); see also: *J. Gill*, *The IBA Conflicts Guidelines – Who's Using Them and How?*, *Dispute Resolution International*, Vol. 1 (2007), Issue 1, p. 58–72.
- ⁴ IBA Guidelines on Party Representation in International Arbitration (adopted by a resolution of the IBA Council 25 May 2013 International Bar Association), IBA, 2013 (available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F>).
- ⁵ IBA Guidelines for Drafting International Arbitration Clauses (adopted by a resolution of the IBA Council 7 October 2010 International Bar Association), IBA, 2010 (available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=D94438EB-2ED5-4CEA-9722-7A0C9281F2F2>).

national Arbitration¹. Since they were first published in 1999, these Rules have been applied in the vast majority of international arbitrations taking place around the globe every day – either having been agreed on by the parties or serving as a source of guidance and inspiration for the arbitrators’ exercise of their procedural discretion granted by the Model Law, other domestic arbitration statutes and most arbitration rules². In light of this global success of the IBA Rules, it has been stated that they “manage to steer a path between common and civil law standards and expectations”³.

Looking at this achievement of the IBA Rules and other best practice rules for the transnationalisation of international arbitration, it appears paradoxical that the Prague Rules as the most recent set of best practice standards seem to question the very same achievements reached by the very same type of rules. Rather than adding another element – perhaps even the missing cornerstone – to the global transnational paradigm, the Prague Rules seem to have reopened the common law / civil law divide by reigniting the global discussion on the benefits of either legal tradition for the efficient conduct of international arbitral proceedings.

4. Transnationalisation in International Arbitration: Benefits and Downsides

While the transnationalisation of arbitral procedure began with the liberalization of arbitration laws, the driving force behind the evolution of a *Lex Mercatoria Processualis* are best practice rules⁴. It is interesting

¹ IBA Rules on the Taking of Evidence in International Arbitration (adopted by a resolution of the IBA Council 29 May 2010 International Bar Association), IBA, 2010 (available at: <https://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>).

² See: Report on the Reception of the IBA Arbitration Soft Law Products (September 2016) (<https://www.ibanet.org/Document/Default.aspx?DocumentUid=105d29a3-6261-4437-84e2-1c8637844beb>), p. 8.

³ P. Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration*, Cambridge University Press, 2013, p. VII.

⁴ Draetta, *Op. cit.*, p. 331: “It is this *corpus* of constantly evolving transnational procedural rules applicable to arbitration which one may, in an empirical and non-dogmatic sense, call *lex mercatoria processualis*. It is a *corpus* of delocalized and a-national rules because they are the spontaneous product of the international arbitration community and do not relate to any particular State legal system. To dismiss these transnational procedural rules as a set of non-binding rules which simply complement those of the domestic arbitration laws would appear arbitrary, or at least unacceptably reductive”).

to note the terminology used to denote these best practice standards: “Notes”, “Rules”, “Guidelines”, “Checklists”, “Principles”, or “Protocols”. The purpose of this deliberate choice of terminology is to emphasize their nature as practice-made rules¹ and to avoid any misunderstanding to the effect that these standards are of a statutory nature². In fact, during the drafting of the UNCITRAL Notes which had been named a “planning checklist” and had been characterized by the UNCITRAL Working Group as “guidelines”, two concerns were raised by the *Comité français de l'arbitrage*. It argued that the French translation of the term “guidelines” (“*directives*”) might convey an element of compulsion that was not intended by the UNCITRAL Working Group. The French Committee also raised the concern that “in the very near future these guidelines will become law” due to UNCITRAL’s high prestige in the unification of international business law, including the law of international arbitration. In reaction to these observations, the Notes were redrafted so as to avoid “any risk that the UNCITRAL checklist might be misunderstood as being a ‘code’”³. The IBA Working Group for the IBA Guidelines on Conflict of Interest has specifically emphasized the non-statutory nature as practice-made rules: “These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, it is hoped that... the... Guidelines will find general acceptance within the international arbitration community and that they will assist parties, practitioners, arbitrators, institutions and courts in dealing with these important questions of impartiality and independence. The IBA Arbitration Committee trusts that the Guidelines will be applied with robust common sense and without unduly formalistic interpretation”⁴.

¹ See: *N. Voser*, Best Practices: What Has Been Achieved and What Remains to Be Done?, in: M. Wirth (ed.), *Best Practice in International Arbitration* (= ASA Special Series No. 26), p. 2 (“‘Best Practice’ means a practice-made rule. It is, in other words, impossible to speak about Best Practice if there is an applicable authoritative rule (*i.e.* statutory provision or a binding precedent rule) on the very same issue”).

² See generally for the conflict “law versus rules” in international arbitration: *J.F. Morrissey & J.M. Graves*, *International Sales Law and Arbitration: Problems, Cases, and Commentary*, Kluwer Law International, 2008, p. 311 ff.

³ *H.M. Holtzmann*, Questions Concerning the Desirability and Text of the UNCITRAL Project to Improve Planning of Arbitral Proceedings, in: A.J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (International Council for Commercial Arbitration Congress Series No. 7), p. 178.

⁴ IBA Guidelines on Conflicts of Interest in International Arbitration, Introduction, para. 6.

In spite of their private nature, best practice standards assume the quality of “soft normativity”¹, *i.e.* they have a norm-like effect in practice for the very reason that they appear like statutory law². However, best practice rules have four perceived advantages over statutory law³. Firstly, because they are based on a consensus of practitioners from different legal systems and legal families, they are said to have the best potential for merging different procedural cultures⁴, thereby developing a truly global arbitration practice⁵ and a level playing field for parties from different legal traditions⁶. Secondly, because best practices establish a high level of basic principles shared by a mutual or even global international consensus, they provide more predictability and legal certainty for the conduct of the arbitral procedure, thereby eliminating what has been called the “dark side of arbitral discretion”⁷. Thirdly, best practices

¹ *G. Kaufmann-Kohler*, *Soft Law in International Arbitration: Codification and Normativity*, *Journal of International Dispute Settlement*, Vol. 1 (2010), Issue 2, p. 283–289 <https://doi.org/10.1093/jnlids/idq009>; *Mourre*, *Op. cit.*, p. 17.

² See: *Railroad Development Corp. v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Provisional Measures (15 October 2008), ¶ 32 (<https://www.italaw.com/sites/default/files/case-documents/ita0700.pdf>) (“...informal documents, such as the IBA Rules, reflect the experience of recognized professionals in the field and draw their strength from the intrinsic merit and persuasive value rather than from their binding character”); for the “quasi normative” potential of private texts see: *N. Jansen*, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective*, Oxford University Press, 2010, p. 43 ff. (concluding at p. 138 that “non-legislative reference texts may gain similar or even greater authority than legislative codifications”).

³ See generally: *Mourre*, *Op. cit.*, p. 17 ff.

⁴ See: *G. Kaufmann-Kohler*, *Globalization of Arbitral Procedure*, *Vanderbilt Journal of Transnational Law*, Vol. 36 (2003), p. 1323 (available at: <https://archive-ouverte.unige.ch/unige:38011/ATTACHMENT01>); AS Rau, *The Culture of American Arbitration and the Lessons of ADR*, *Texas International Law Journal*, Vol. 40 (2005), p. 450; *Mourre*, *Op. cit.*, p. 16.

⁵ See, *e.g.*: *Lew, Mistelis & Kröll*, *Op. cit.*, para. 2-46; see also: IBA Guidelines on Conflicts of Interest in International Arbitration, Introduction, para. 4 (“The Guidelines reflect the understanding of the IBA Arbitration Committee as to the best current international practice, firmly rooted in the principles expressed in the General Principles below”).

⁶ *Mourre*, *Op. cit.*, p. 29.

⁷ *Park*, *Op. cit.*, para. 17-16ff; see also: *Voser*, *Best Practices: What Has Been Achieved and What Remains to Be Done?*, p. 3 (“Parties who choose arbitration as their dispute resolution mechanism must be able to rely to a large extent on the predictability of the arbitration procedure that will be applied without having to go through the cumbersome and difficult (and sometimes impossible) exercise of agreeing on procedural issues in their arbitration clause. <...> Best Practices that encompass a harmonized set of rules regarding certain specific arbitration issues, are well suited to fulfill this need for predictability. This is – in my opinion – the most impor-

facilitate the work of arbitrators and counsel by sparing them the effort of “reinventing the wheel” when it comes to the decision on procedural issues. Finally, in an era of increased pressure on the legitimacy of the arbitral process¹, self-regulation through best practice standards may provide a means to avoid more invasive forms of external regulation which may be imposed by domestic legislatures and other poorly informed “outsiders” with less benevolent intentions².

Despite these obvious benefits with respect to both the efficiency of best practices and the legitimacy of the process, there are also dangers inherent in the production of best practices³. These dangers relate to the restrictive effect that such pre-formulated, detailed and authoritative written texts may have on the exercise of arbitral discretion by international arbitrators. Indeed, due to their “soft normativity”, these code-like texts have a high potential to work as a bar to the arbitrators’ independent legal thinking⁴. Arbitral discretion and the flexibility of the arbitral process, which have long been regarded

tant advantage of establishing Best Practices”); see also: *Idem*, Harmonization by Promulgating Rules of Best International Practice in International Arbitration, *Zeitschrift für Schiedsverfahren (SchiedsVZ)*, 2005, Heft 3, p. 116 (“Formulating what leading arbitrators consider (based on their considerable experience) to be the ‘Best International Practice’ enhances harmonization without forcing a specific solution on anyone”).

¹ See for the “public challenge” to arbitration: *J. Paulsson*, *The Idea of Arbitration*, Oxford University Press, 2013, p. 98 ff.; see also: *Ibid.*, p. 177 (“Arbitration is under recurrent attacks by those who fear it may undercut the authority of regulations and regulators”).

² See: *Paulsson*, *Op. cit.*, p. 57; *Mourre*, *Op. cit.*, p. 30.

³ *D. Greineder*, *The Limitations of Soft Law Instruments and Good Practice Protocols in International Commercial Arbitration*, *ASA Bulletin* Vol. 36 (2018), Issue 4, p. 908 ff.; see also: *W.W. Park*, *Explaining Arbitration Law*, in: J.C. Betancourt (ed.), *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators*, Oxford University Press, 2016, para. 1.12 (available at: <http://www.williamwpark.com/documents/ExplainingArbLawCIAWWP.pdf>) (“Not all scholars feel comfortable with a porous membrane between government and non-government authorities. To count as law, some would argue, a decision-making system should clearly bear essential features such as public accessibility, normative coherence, and steadiness over time”); *W.M. Reisman*, *Soft Law and Law Jobs*, *Journal of International Dispute Settlement*, Vol. 2 (2011), Issue 1, p. 30 <https://doi.org/10.1093/jnlids/idq014> (“While soft law is a useful notion for students and scholars seeking to understand and to manipulate the sequential processes of international law-making and for non-governmental organizations trying to make new law, it is not a useful notion for the appliers of law and especially for participants in the international arbitral process”).

⁴ *Voser*, *Best Practices: What Has Been Achieved and What Remains to Be Done?*, p. 17 (“Based on the justified concern of over-judicialization of the arbitration process, the formulation and establishing of general Best Practices is in my opinion only justified where the parties could otherwise be taken by surprise or where there is an inherent risk of unequal treatment due to the parties’ varied legal backgrounds”).

as major advantages of arbitration over dispute resolution before domestic courts, are substituted by a straitjacket of pre-formulated “best practices”, *i.e.* by what the producers of soft law instruments believe the participants in the arbitral process should think or do. These rules are observed by parties, their counsel and the arbitrators not because they are mandatory law, but because these texts *exist*¹. At the same time, the over-regulation caused by the large number of best practices, covering almost every area of the arbitration process, coupled with their code-like effect, is regarded as a driving force for the increasing judicialization of and the “creeping legalism”² in international arbitration. The sheer mass of these rules and guidelines is regarded by some as overshooting the mark: “cure the disease but kill the patient”³.

5. The Prague Rules and Their Best Practice Potential

Like any other set of best practice standards, the new Prague Rules are no panacea to the problems the international arbitration service industry is currently facing. They share all of the benefits and deficits of best practice rules. Consequently, their quality and potential for success in the new global competition for best practice rules must be evaluated within that framework.

Most provisions of the Prague Rules are a manifestation of the ideal that the arbitral tribunal manages the proceedings proactively. Proactive case management means that international arbitrators should actively search for procedural management tools which they have at their disposal and should,

¹ See for the phenomenon that “non-legislative reference texts may gain similar or even greater authority than legislative codifications”: Jansen, *Op. cit.*, p. 43 f. (“the abstract authority of a text giving expression to a legal norm consists in the legal profession accepting it as an ultimate source of the law, without requiring further legal reasons to do so... authority is assigned to legal texts by those working with them, *i.e.* by professional lawyers applying and interpreting such texts in the course of legal argument”).

² *W.W. Park*, *Arbitrator Integrity: The Transient and the Permanent*, *San Diego Law Review*, Vol. 46 (2009), p. 693.

³ See: *M.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: L. Lévy & Y. Derains (dir.), *Liber Amicorum en l’honneur de Serge Lazareff, Pedone*, 2011, p. 567 (available at: https://www.lalive.law/data/publications/The_Essential_Guidelines.pdf) (“Progressively, the reflex of turning to the guidelines overcomes any residual reflexes of independent thinking. <...> If the process of guideline production continues, all aspects of arbitration will be fully covered by guidelines which are accepted as ‘best practices’ and ‘state of the art’. When this happy moment is reached, the international arbitration community need not think any more”).

in the interest of furthering the efficiency of the proceedings, not hesitate to make use of them and to sanction unreasonable procedural conduct of the parties. Thus understood, proactivity refers to the arbitrator's task of "taking charge and staying in charge of the arbitral process"¹. Such proactive case management is considered an effective tool to reduce time and costs in arbitration. It is generally accepted today that so-called "*Due Process Paranoia*", i.e. the exaggerated concern of arbitrators that their award might automatically be set aside if they do not grant every single procedural request that comes from the parties, should not prevent arbitrators from managing the proceedings effectively. A review of court cases from around the globe brought to light the "*Procedural Judgment Rule*", a safe harbor for arbitrators' exercise of their procedural discretion. State courts accept an arbitral tribunal's unreviewable decision-making prerogative when it comes to the determination of individual procedural situations².

This prerogative is the foundation on which the Prague Rules are based. Article 2, one of the Prague Rules' defining provisions, extends the proactive role of the tribunal to early clarification of issues of substantive law and to factual issues. Article 2.2(b) encourages the tribunal to use the case management conference to:

"b. clarify with the Parties their respective positions with regard to:

i. the relief sought by the parties;

ii. the facts which are not in dispute between the Parties and the facts which are disputed;

iii. the legal grounds on which the Parties base their positions".

But Art. 2 does not stop there. It also encourages the tribunal to indicate: "2.4. ...At the case management conference or at any later stage of the arbitration, if it deems it appropriate... to the parties:

a. the facts which it considers to be undisputed between the parties and the facts which it considers to be disputed;

¹ G. Aksen, On Being a Pro-Active International Arbitrator, in R. Briner, L.Y. Fortier, K.P. Berger & J. Bredow (eds.), *Law of International Business and Dispute Settlement in the 21 Century / Recht der internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel*, Heymanns, 2001, p. 13–19.

² K.P. Berger & J.O. Jensen, *Due Process Paranoia and the Procedural Judgment Rule: A Safe Harbor for Procedural Management Decisions by International Arbitrators*, *Arbitration International*, Vol. 32 (2016), Issue 3, p. 415–435 <https://doi.org/10.1093/arbint/aiw020>; the observations of the authors are confirmed in the IBA Draft Report "Annulment of arbitral awards by state court: Review of national case law with respect to the conduct of the arbitral process" (October 2018) (<https://www.ibanet.org/Document/Default.aspx?DocumentUid=b4b532bb-90e1-40ab-ab3d-f730c19984fb>).

b. with regard to the disputed facts – the type(s) of evidence the arbitral tribunal would consider to be appropriate to prove the parties’ respective positions;

c. its understanding of the legal grounds on which the parties base their positions;

d. 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;

e. its preliminary views on:

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.

Expressing 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.

2.5. When establishing the procedural timetable, the arbitral tribunal may decide – after having heard the parties – to determine certain issues of fact or law as preliminary matters, limit the number of rounds for exchange of submissions, the length of submissions, as well as fix strict time limits for the filing thereof, the form and extent of document production (if any)”.

The extremely proactive approach enshrined in this provision deviates from the more careful and balanced approach of the transnational arbitration paradigm. It goes much further than most arbitration rules or best practice standards. Article 24(1) of the ICC Arbitration Rules, a signature provision of the 2012 reform of the ICC Rules, contains a reference to the various case management techniques in Appendix IV of the Rules. However, it does not encourage tribunals to clarify substantive or factual issues at the case management conference, let alone to offer preliminary views at that early stage of the proceedings. In fact, it is hardly conceivable that a tribunal would be willing, let alone be in a position, to pursue that option at this early stage in complex international arbitrations. In any event, a tribunal would certainly never do it without the prior consent of the parties. Even Art. 27 of the 2018 DIS Arbitration Rules, the signature provision of the 2018 revision, with its heavy emphasis on proactive case management by the tribunal¹, does not go as far as Art. 2 of the Prague Rules.

Other provisions of the Prague Rules which deviate from the transnational paradigm in their effort to encourage a much more hands-on con-

¹ See: *K.P. Berger*, Institutional Arbitration “Made in Germany”: The New Arbitration Rules of the German Arbitration Institute (DIS), *New York Dispute Resolution Lawyer*, Vol. 11 (2018), No. 2, p. 75–78.

duct of the proceedings by the tribunal are those concerning the proactive role of the tribunal in the establishment of the facts (Art. 3) and the law (Art. 7.2), the restrictive use of document production (Art. 4) (which is limited to “specific documents” rather than encompassing “categories of documents” like Art. 3 IBA Rules), the power of the tribunal to decide that witnesses nominated by a party shall not be called for examination at the hearing (Art. 5.6) (contrary to the cross-examination paradigm enshrined in Art. 4 IBA Rules), the emphasis on tribunal instead of party-appointed experts (Art. 6) and the encouragement of documents-only arbitration without a hearing (Art. 8.1).

Finally, Art. 9 Prague Rules encourages the tribunal to facilitate the amicable settlement of the dispute at any stage of the proceedings. It even allows “any member” of the tribunal to “act as mediator to assist in the amicable settlement of the case”, provided that all parties have given their prior written consent to this procedure. If the mediation fails, the arbitrator who has acted as mediator may only continue to act as arbitrator once all parties have given their consent in writing at the end of the mediation. That provision seems to be rooted in the civil law tradition of countries like Switzerland or Germany, in which both courts and arbitral tribunals play a very active role in the promotion of settlements¹. That role is reflected in the well-known Art. 26 of the 2018 DIS Arbitration Rules². Both Art. 9 Prague Rules and Art. 26 2018 DIS Rules seem to deviate from the transnational paradigm of international arbitration as being characterized by a reluctance to accept that arbitrators have a role to play in the facilitation of an amicable settlement of the dispute. However, that view is in the process of changing. Recent surveys have revealed a strong preference of users for a combination of adversarial and conciliatory dispute resolution methods.³ Also, General Standard 4(d) IBA Guidelines on

¹ See: *K.P. Berger*, The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, *Journal of International Arbitration*, Vol. 35 (2018), Issue 5, p. 501–516; *K.P. Berger & J.O. Jensen*, The Arbitrator’s Mandate to Facilitate Settlement, *Fordham International Law Journal*, Vol. 40 (2017), No. 3, p. 902 ff. (available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2653&context=ilj>).

² 2018 DIS Arbitration Rules (Art. 26) (http://www.disarb.org/upload/varia/180119_DIS_NewRules_EN.PDF) provides: “Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues”. The provision was contained in the previous 1998 version of the DIS Rules. It was initially adopted from the German Code of Civil Procedure (see generally: *K.P. Berger*, Is the “German Approach” Really Incompatible with the Role of the Arbitrator?, *New York Dispute Resolution Lawyer*, Vol. 9 (2016), No. 2, p. 46–49.

³ See *supra* n. 15.

Conflict of Interest, unnoticed by many, has elevated the role of arbitrators as mediators to a best practice standard, provided the essential requirement of “informed consent” of all parties is met¹. Interestingly, Art. 9(3) Prague Rules is more conservative than Art. 4 IBA Guidelines. While under the latter provision, the parties’ consent to the arbitrator’s change of roles is regarded as an effective waiver of any right of challenge should the proceedings continue, Art. 9(3)(a) Prague Rules requires the separate written consent of all parties at the end of the mediation, thereby implementing a more restrictive notion of informed consent.

6. The Need to Abandon Traditional Distinctions

A survey of the Prague Rules’ most important provisions reveals that it would be short-sighted to diminish their value to a boilerplate for a “civil law-style” approach to the conduct of international arbitration. Likewise, it would be a fatal misunderstanding to see them as a means to displace the IBA Rules. This was never the intention of the Working Group². The initial draft of the Prague Rules expressly emphasized the opposition to the IBA Rules on the Taking of Evidence in International Arbitration, which, as the Draft Note stated, have become too associated in practice with lengthy common law procedures. However, that direct opposition to the IBA Rules was dropped in the final version of the Note.

Like the IBA Rules, the Prague Rules should be regarded simply as a repository of state-of-the-art techniques to save time and costs in the conduct of international arbitrations. Unless the parties specifically agree on their application by the tribunal, international arbitrators may seek inspiration from them in the exercise of their procedural discretion³.

¹ IBA Guidelines on Conflicts of Interest in International Arbitration (General Standard 4(d)) provides: “An arbitrator may assist the parties in reaching a settlement of the dispute, through conciliation, mediation or otherwise, at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator”).

² See: *Khvalei*, Op. cit. (“The Prague rules are not intended to *replace* the IBA rules but to *supplement* them: to provide users of international arbitration with one more option” (emphasis in original)); see also: *Henriques*, Op. cit., p. 354 (“...it must be stated very clearly that the Prague Rules are not a competitor of the IBA Rules on Taking Evidence in International Arbitration”).

³ See: *Th.J. Stipanowich*, Soft Law in the Organization and General Conduct of Commercial Arbitration Proceedings, in: L.W. Newman & M.J. Radine (eds.), *Soft Law in International Arbitration*, p. 74 (“...Soft Law guidelines usually function as a compass – a non-compulsory touchstone for arbitrators and other stakeholders – rather than a straitjacket...”).

This means that, as with the IBA Rules, the Prague Rules remain a non-binding soft law instrument which cannot be more effective than the arbitrators called to interpret and apply them¹. Whether the quest for efficiency can be achieved does not so much depend on the rules adopted for the proceedings, but on how the arbitrators choose to apply them (or not) in a given case and how they otherwise conduct the proceedings²: “*l’arbitrage vaut l’arbitre*”³. Thus, an arbitration in which the tribunal handles Art. 4 Prague Rules on document production in a liberal way, may look very similar to an arbitration in which the tribunal applies Art. 3 IBA Rules restrictively, for example, by denying document production requests of the parties that relate to the famous “any and all”-category of documents. In the end, the crucial test for a document production request is that of the “relevance and materiality” of the requested documents. This twin test is contained in both the IBA and the Prague Rules⁴. It is and will remain open to divergent interpretations, which is why the scope of document production will remain one of the thorniest issues in arbitral practice, on occasion leaving lawyers from common and civil law jurisdictions bitterly divided⁵.

The need to rely on the arbitrator’s ability to handle best practice rules in a way that best suits the special features of the given dispute reveals that

¹ See: *Khvalei*, Op. cit. (“In theory, tribunals can do everything which the Prague rules envisage where the parties agree to the application of the IBA rules, as the IBA rules are flexible enough to allow it”).

² *M. McIlwrath*, The Prague Rules: The Real Cultural War Isn’t Over Civil vs Common Law (12 December 2018) (<http://arbitrationblog.kluwerarbitration.com/2018/12/12/the-prague-rules-the-real-cultural-war-isnt-over-civil-vs-common-law>).

³ See for the lack of easily accessible information about the procedural preferences and soft skills of the persons that parties may consider to appoint as arbitrators: *E. Vidak-Gojkovic, L. Greenwood & M. McIlwrath*, Puppies or Kittens? How to Better Match Arbitrators to Party Expectations (http://res.cloudinary.com/lbresearch/image/upload/v1460717417/puppies_or_kittens_a_modest_proposal_to_help_arbitrators_better_match_themselves_with_user_expectations_evlg_mm_for_aay_2015_153116_1150.pdf).

⁴ See: *P. Baysal & B.G. Çevik*, Document Production in International Arbitration: The Good or the Evil? (9 December 2018) (<http://arbitrationblog.kluwerarbitration.com/2018/12/09/document-production-in-international-arbitration-the-good-or-the-evil/>) (“Leaving aside the above discussion that is based on the purposes of the IBA Rules and the Prague Rules, there are numerous similarities between them. Both rules leave the ultimate control of the document production to the tribunal. It is the tribunal who will eventually satisfy both parties’ expectations by ensuring the production of those documents that are material to the outcome of the case and at a moderate cost”).

⁵ *Greineder*, Op. cit., p. 909; see also: *R. Marghitola*, Document Production in International Arbitration, Kluwer Law International, 2015, p. 11 ff., 47 ff.; *O’Malley*, Op. cit., para. 3.68 ff.

the transnational paradigm for the conduct of international arbitrations is not carved in stone. Instead, it must be understood as a continuum of various ways in which the paradigm may be interpreted and handled by the arbitrators. They might even fill the continuum with a “menu approach”¹, which combines elements of the Prague Rules, the IBA Rules and other best practice standards. What really matters is that the parties as the “owners” of the arbitration process must know early on what they have to expect from the tribunal constituted to decide their case². Thus, “[t]he fundamental best practice rule is ‘no surprises’”³. Transparency of the process early in the proceedings not only prevents surprises. It also provides the crucial key to resolve the eternal conflict between flexibility and predictability in international arbitration⁴.

In other words, the transnational paradigm does not tell us what an international arbitration *should* look like, but how it *can* look like depending on the particularities of the case. That has nothing to do with an alleged superiority of civil law over common law or *vice versa*⁵, but with the right blend of flexibility, transparency, predictability (of the proceedings), ability (of the arbitrator) and enforceability (of the final award). Neither the use of traditional binary distinctions such as “common vs. civil law”, “adversarial vs. conciliatory”, “inquisitorial vs. party-driven”, nor the use

¹ *McIlwrath*, The Prague Rules: The Real Cultural War Isn’t Over Civil vs Common Law; *Khvalei*, Op. cit. (“...the Prague rules can be used *together* with the IBA rules, with the parties picking and choosing from the two sets of rules and procedures that are most appropriate to build their ideal process, much like children choosing LEGO blocks” (emphasis in original)).

² See: *K.H. Böckstiegel*, Case Management by Arbitrators: Experiences and Suggestions, in: G. Aksen, K.-H. Böckstiegel, P.M. Patocchi & A.M. Whitesell (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publication No. 693), p. 118 (“Clarify the rules of the game early”).

³ *Wirth*, Op. cit., p. V.

⁴ See for this dilemma: *H.M. Holtzmann* in: *Uniform Commercial Law in the Twenty-First Century Proceedings of the Congress of the United Nations Commission on International Trade Law* (New York, 18–22 May 1992), UN, 1995, p. 268 f. (available at: https://www.uncitral.org/pdf/english/texts/general/Uniform_Commercial_Law_Congress_1992_e.pdf) (“...flexibility is of course desirable at some points in an arbitration... <...> However, when rules are flexible as they must be, parties may be uncertain as to the procedures the arbitrators will adopt. Flexibility can lead to unpredictability, and unpredictability can result in surprise”).

⁵ See: *Baysal & Çevik*, Op. cit. (“Is common law justice better than civil law, or vice versa? Is American justice better than, French or German, or is it the other way around? It cannot be said that either common law or civil law countries produce a better quality of justice”).

of terminology rooted deeply in domestic legal systems like “discovery”¹ helps here. To the contrary, because these distinctions and terminologies are rooted in domestic legal traditions, they have a highly counterproductive potential in the field of transnational dispute resolution. They should therefore be abandoned². The transnational paradigm of arbitration as an efficient means of alternative dispute resolution requires thinking outside the box of traditional distinctions. That thinking must be pragmatic, rather than dogmatic³. It must be based on the understanding of international arbitral procedure as a flexible concept that gains shape through the creative interaction between parties and arbitrators in each individual case, inspired by own ideas or those enshrined in best practice standards.

7. Conclusion

All those involved in international arbitration have made the experience that the current transnational paradigm of international arbitral procedure could benefit from fresh ideas and initiatives, whether they relate to specific techniques or to general approaches to the proactive management of complex international arbitration proceedings. Even though a standard argument in favor of arbitration has always been that proceedings can be tailor-made to the specificities of a given dispute, many contemporary proceedings are in fact based on a procedural scheme that is uniform and based on the standard PO1 template, rather than bespoke⁴. Proactivity in the conduct of the proceedings

¹ See for the catastrophic effect of the use of the term “discovery” in international arbitration: *Elsing & Townsend*, Op. cit., p. 61 (“Most civil lawyers and arbitrators now accept that it is reasonable to permit a party to obtain some documents from its adversary, as long as the process is not called ‘discovery’ (a term which, to most civil lawyers, resonates with all of the positive associations of bubonic plague) and does not permit an adversary to ‘fish’ for documents that it does not have some reason to believe to exist”).

² Statement made by Homayoon Arfazadeh, Member of the Arbitration Court of the SCAI Swiss Chambers’ Arbitration Institution (Geneva) during a panel discussion at the official launch of the Prague Rules on 14 December 2018 in Prague.

³ *P. Costa e Silva*, Arbitration, Jurisdiction and Culture: Apropos the Rules of Prague (16 July 2018) (<http://praguerules.com/upload/iblock/14f/14fc2df4fe3e8028a0d663abb9c3785c.pdf>), p. 3 (“From a methodological point of view, I suppose the Prague Rules must be evaluated from the angle of the rules themselves, of their ability to solve problems in the best way one can idealize; the political statements or intentions that justify or determine their enactment must be placed in second”).

⁴ See: *P.J. Rees*, Arbitration – Elastic or Athritic?, *Asian Dispute Review*, Vol. 19 (2017), No. 3, p. 105 f. (“We are all familiar with the ‘standard’ approach to an arbitration and how long it takes... the chair of the tribunal takes out his tried and trusted Procedural Order No 1

could help to overcome this dilemma. However, proactivity is a matter of the mindset of parties and arbitrators alike. As such, it is never the rules or best practice standards applicable to the proceedings that stand in the way of proactivity, but the reality of the “hands-off arbitrator”¹.

For arbitration practitioners, arbitration is not only a fascinating field of work and a source of revenues. It is also a constant learning process and a permanent dialogue with colleagues from around the world: “Above all, we must ensure that rules or guidelines do not constitute a straitjacket which fetters our innovative ideas and abilities to change. As a very distinguished Law Lord has said, there are no permanent solutions to the problems of commercial dispute resolution and each generation must think again”².

The participants of that dialogue are necessarily rooted in their own legal traditions³. There is no doubt that arbitration benefits from the multiculturalism of these practitioners, since it is the need to find a neutral system that promotes the resolution of conflicts through arbitration⁴. Rather than thinking

and directions are made for service of submissions – sometimes simultaneous with attached witness statements and expert reports and sometimes consecutive – in more English style. However, there are still directions as to witness statements and expert reports which usually say no more than ‘they shall be submitted’ and a time for doing so. Then there is document disclosure and the default position – ‘the tribunal will be guided by Article 3 of the IBA rules on the Taking of Evidence in International Commercial Arbitration’... It is all standard stuff. There is no flexibility. It is very arthritic”).

¹ See with respect to the facilitation of settlement: *Berger*, The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing, p. 515; see also: *M.E. Schneider*, Chapter 25. The Uncertain Future of the Interactive Arbitrator: Proposals, Good Intentions and the Effect of Conflicting Views on the Role of the Arbitrator, in: S. Brekoulakis, J.D.M. Lew & L. Mistelis (eds.), *The Evolution and Future of International Arbitration* (= International Arbitration Law Library. Vol. 37), p. 385 ff. (“arbitral tribunals do not become involved in the substance of the case until the very end. <...> ...Instead of being more interactive, arbitrators seem increasingly to follow what may be described as a hands-off approach, even in those parts of the world where traditionally a more interactive approach was almost the norm”).

² *A.L. Marriott*, Pros and Cons of More Detailed Arbitration Laws and Rules, in: A.J. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (International Council for Commercial Arbitration Congress Series No. 7), p. 72.

³ See: *K.P. Berger*, The International Arbitrator’s Dilemma: Transnational Procedure versus Home Jurisdiction: *A German Perspective*, *Arbitration International*, Vol. 25 (2009), Issue 2, p. 217–238. <https://doi.org/10.1093/arbitration/25.2.217>

⁴ *J.M. Alonso*, The Globalization of Arbitration (13 June 2017) (<https://globalarbitrationnews.com/the-globalization-of-international-arbitration>); see also: *Khvalei*, Op. cit. (“...arbitration is about party autonomy and diversity – not just the gender and race di-

in a one-dimensional way and being content with the current paradigm of the international arbitral process as the best means to bridge the common law / civil law divide, that dialogue must continue in order to maintain the nature of international arbitration as a “market place for ideas”¹. As a result of that process, the Prague Rules provide an additional option, thereby making arbitration more attractive for its users. Nothing more, nothing less². After all, being able to choose is not a bad thing. It is the essence of party autonomy, the very foundation of arbitration!

versity of which much is written but the diversity of legal cultures around the world. Arbitration provides scope for this diversity – although it seems it is taking time for people to realise and embrace this”).

- ¹ *Greineder*, Op. cit., p. 911 (“In arbitral practice, different approaches should be allowed to compete freely in a marketplace of ideas. Above all, arbitrators and counsel should embrace rather than fear their relative procedural freedom”).
- ² *Henriques*, Op. cit., p. 355 (“Not only may the Prague Rules supplement the IBA Rules – and *vice versa* – but, more importantly, they play a fundamental role in according the parties with more options with a tailor-made process to fit their interests and needs. More options in international arbitration is, of course, a way to promote its use”).