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Newly revised IBA Rules on the Taking of Evidence in International Arbitration

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The IBA Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**") have received an update, published on February 17, 2021 ("**2020 IBA Rules**"), primarily to bring them in line with technological and other market changes since they were last amended in 2010 ("**2010 IBA Rules**").[1] Promulgated by the International Bar Association ("**IBA**"), the IBA Rules are widely used as guiding principles in international arbitration and this year's refresh helps ensure that they stay relevant and contemporary. In this newsletter, we highlight key areas of the amendments.

I. What are the IBA Rules on Taking of Evidence in International Arbitration?

In most cases, evidence is critical to the adjudicative process. Yet international arbitration often involves parties from different legal traditions with various systems for the handling of evidence in court proceedings, including procedures for gathering and presenting both documentary and witness evidence. Little guidance is provided in most national laws and arbitration rules, which typically leave such matters to the discretion of the arbitrators. While this enables tribunals to tailor the procedures to the specific circumstances of a case, arbitrators themselves can vary widely in their views on what such tailoring should entail. The international arbitration community has responded to this by developing sets of rules for the taking of evidence that can be adopted by party agreement or tribunal decision. The most widely known and used of such rules is the IBA Rules, which attempt to strike a balance between various legal systems and traditions, whether civil law or common law.

First introduced in 1999, the IBA Rules have since taken on a prominent role in international arbitration around the world. They are not binding (in the absence of party agreement or a tribunal decision) and are typically adopted "as guidance" without being strictly applied, thus enabling Tribunals to both make use of the rules while also retaining flexibility to adapt the rules to the case at hand. In other words, the IBA Rules tend to provide "norms" and operate as "soft law" in the industry. Though not everyone is

[1] The 2020 IBA Rules, together with a redline version showing changes from the 2010 IBA Rules and a commentary provided by the IBA Rules Committee, can be found here: https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

pleased with the extent to which the IBA Rules have become prevalent in the industry,[2] they have had the effect of bringing more predictability to evidentiary procedures in international arbitration.

II. What is new in the 2020 IBA Rules?

The following is not an exhaustive list, but is a highlight of the amendments that were made in the 2020 IBA Rules.

1. Evidentiary Hearings Conducted Remotely (Article 8.2 and Preamble)

The most attention-getting amendment in the 2020 IBA Rules relates to virtual or remote hearing procedures. Prior to 2020, such procedures were rather rare and generally disfavoured by many. However, the impact of COVID-19 in the year 2020 forced many parties to hold hearings remotely or face indefinite delays, and so remote proceedings (also often referred to as "online" or "virtual" proceedings) have become far more common. By way of context, the 2010 IBA Rules provided at Article 8.1 that "[e]ach witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness." This text is deleted in the 2020 IBA Rules, and a new provision has been added in Article 8.2, outlining the procedure for the tribunal to order that the evidentiary hearing be conducted as a Remote Hearing.

As defined in the 2020 IBA Rules, a "Remote Hearing" may refer to the entire hearing being done remotely but also covers the circumstance which only a part of the evidentiary hearing is remote.

It is contemplated under Article 8.2 that arbitral tribunals "be pro-active and consider time, cost and environmental concerns when assessing whether the evidentiary hearing should be conducted remotely." Article 8.2 also requires the tribunal to establish a Remote Hearing protocol "to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions." The commentary on the 2020 IBA Rules indicates that "fairly" means "among other things, that time zones should be considered and that the arbitral tribunal may establish several shorter hearing sessions rather than one long session in a single day".

2. Exclusion of Evidence Obtained Illegally (Article 9.3)

A new provision has been added to Article 9.3 of the 2020 IBA Rules, which provides that "[t]he Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally."

However, Article 9.3 does not particularize the specific circumstances in which evidence should be excluded for illegality. The commentary states that the review task force concluded that "there was no clear consensus", given the variation in approaches taken under various national laws, as well as those taken by arbitral tribunals. Article 9.3 accordingly provides that the tribunal "may" exclude such evidence

[2] For example, an alternative set of evidentiary rules known as the "Prague Rules" has been developed as an alternative to the IBA rules, which are intended to provide a more civil-law style set of principles.

(in contrast with Article 9.2 which provides that evidence “shall” be excluded where a ground provided in there is established).

Article 9.3 has been newly referenced as grounds for objections and limitations for various areas on the taking of evidence. These range from obtaining and producing documents (Articles 3.5, 3.7, 3.9 and 3.10), tribunal’s order for a person to appear for testimony (Article 4.10), tribunal-appointed expert’s request for information (Article 6.3), inspections (Article 7), limitation or exclusion of an answer of a witnesses (Article 8.3), and request for a person to give oral or written evidence (Article 8.6).

3. Issues Pertaining to Document Production

Document production is an area where the general practice in international arbitration guided by the IBA Rules differ from those in Japanese or other civil law court proceedings. As an example, instead of being limited only to requests for a specific document, the IBA Rules also permit parties to request a “narrow and specific category” of documents. In practice, the idea of a “narrow and specific category” has significant elasticity and as a result the scope of document production in many international arbitrations will be significantly broader than would be the case in, for instance, Japanese courts. However, there are also some limits. There IBA Rules limit the scope of discovery by requiring, among others, the document to not only be "relevant to its case" but also "material to its outcome" at Article 3.7. Although these main features of document productions under the IBA Rules are unchanged, there are amendments in the 2020 IBA Rules with practical significance.

(1) Form of submission or production of documents (Article 3.12)

One such amendment concerns translation of documents being produced. On this point, the 2010 IBA Rules provides at Article 3.12 (d) that “translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.” Based on this text, it has been occasionally argued by parties that all documents be translated into the language of arbitration before being produced. Although experienced arbitrators tend to reject such requests on the view that the text requires translations only of documents at the point a party submits them into evidence, such procedural objections can add unnecessarily to the time and costs of an arbitration.

On this issue, the 2020 IBA Rules provide at Article 3.12 at item (d) that “Documents to be produced in response to a Request to Produce need not be translated” and at item (e) that “Documents in a language other than the language of the arbitration that are submitted to the Arbitral Tribunal shall be accompanied by translations marked as such.” This clarification is helpful because even if the prevailing practice has been that documents need not be translated before production, going forward the issue should be clear to the parties, thus minimizing procedural disputes on this point.

Aside from translation, the main body of Article 3.12 has been revised to clarify that all items under this

Article are subject to the parties' agreement and tribunal's decision[3].

(2) Confidentiality arrangements (Article 9.5)

Another notable amendment relates to confidential treatment of documents being produced. While arbitration is a private process (meaning the public has no right of participation), this does not necessarily mean all materials and contents must be kept "confidential" by the parties unless that has been agreed to specifically. Article 9.5 of the 2020 IBA Rules specifically empowers tribunals to require confidential handling of documents ordered to be produced where justified by the circumstances. The provision now reads "[t]he Arbitral Tribunal may, where appropriate, make necessary arrangements to permit Documents to be produced, and evidence to be presented or considered, subject to suitable confidentiality protection." Such "necessary arrangements", for example, might include a requirement that parties give a confidentiality undertaking with regard to designated documents or the appointment of an independent expert to review and advise on whether portions of documents (for instance, trade secrets or material that is commercially sensitive and of limited probative value) ought to be excluded or redacted from review by the requesting party and/or the tribunal. By adding "documents to be produced" to Article 9.5, it has been clarified that such arrangements are available not only for introduction of evidence, but also for document production.

(3) Others issues on document production (Article 3.5, 3.7 and 3.10)

Other amendments related to document productions include a provision for the party requesting document production to have the opportunity to express their views on the other party's grounds for objecting to production (Article 3.5). This has been common in practice, so this rule change should be no surprise. Also, Article 3.7 has had deleted from its text the requirement that the arbitral tribunal confer with the parties after the requests and objections are submitted to the tribunal. This, too, reflects common practice in international arbitration. Article 3.10 was also amended to clarify that the party that can object to a request for document production is not limited to the party whom such request is addressed to.

4. Other Amendments

Apart from those stated above, the amendments made in the 2020 IBA Rules include the following.

- Article 2.2 has been amended so as to clarify that the evidentiary issues listed in this article need be consulted only "to the extent applicable". Concurrently, a new item "treatment of any issues of cybersecurity and data protection" has been added as item (e), acknowledging the importance of such issues in contemporary data handling practices.[4]

[3] The 2010 IBA Rules contained these reservations for some but not all of the items.
[4] The commentary cites as resource the (i) ICCA-IBA Roadmap to Data Protection in International Arbitration (https://www.arbitration-icca.org/icca-reports-no-7-icca-iba-roadmap-data-protection-international-arbitration) and the (ii) ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (https://www.arbitration-icca.org/icca-reports-no-6-icca-nyc-bar-cpr-protocol-cybersecurity-international-arbitration).

- Articles 4.6 (b) and 5.3 have been amended to provide that witness statements and expert reports can be revised or supplemented to include “new factual developments that could not have been addressed in a previous” witness statement or expert report even if the content is not directly responsive to the submissions of another party.

- Article 4.10 has been amended to provide that any party (not limited to the party whom the request has is addressed, as in the 2010 IBA Rules) can object to the tribunal’s order for a person to appear for testimony. Reference to Article 9.3, which provides for evidence obtained illegally, has been expressly added as a ground for objection.

- Article 6.3, which concerns the scope of authority of a Tribunal-Appointed Expert, omits the declaration that “[t]he authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal” as unnecessary. According to the commentary, the review task force took the view that it is sufficient to provide for the power to request information and access “to the extent relevant to the case and material to its outcome”, as already provided in the first sentence of Article 6.3.

- Article 8.5, which concerns fact witness testimony at an oral evidentiary hearing has been amended to clarify that, even where it has been agreed that the written statement of the witness shall serve as the witness’ “direct” evidence, the “Arbitral Tribunal may nevertheless permit further oral direct testimony.” Among other things, this would provide a basis for a Tribunal to permit a witness to testify orally at the hearing even if the opposing party has not requested to cross-examine the witness, which has sometimes been a point of contention between parties.

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