THE GUIDE TO EVIDENCE IN INTERNATIONAL ARBITRATION

SECOND EDITION

Editors
Amy C Kläsener, Martin Magál and Joseph E Neuhaus

The Guide to Evidence in International Arbitration

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Second Edition

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Publisher's Note

Global Arbitration Review (GAR) is delighted to publish the second edition of *The Guide to Evidence in International Arbitration*.

For those unfamiliar with GAR, we are the online home for international arbitration specialists, telling them all they need to know about everything that matters. Most know us for our daily news and analysis service, but we also provide more in-depth content: books such as this one; insight and other know how (including regional reviews); conferences with a bit of flair; time-saving workflow tools; and, most recently, online training in advocacy, damages and the fundamentals of international arbitration.

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As the unofficial 'official journal' of international arbitration, we often spot gaps in the literature. Recently, we spotted one around 'evidence', not because there are no other books about it, but because there are none that bridge the law and practice in a modern way. Few topics divide the crowd as much as evidence-related ones at GAR Lives.

The Guide to Evidence in International Arbitration aims to fill this gap. It offers a holistic view of the issues surrounding evidence in international arbitration, from the strategic, cultural and ethical questions it can throw up to the specifics of what to do in certain situations. Along the way it offers various proposals for improvements to the accepted approach.

We trust you will find it useful. If you do, you may be interested in the other books in the GAR Guides series. They cover energy, construction, M&A, IP disputes, telecoms, investment arbitration, and the challenge and enforcement of awards in the same practical way. We also have guides to advocacy in international arbitration and the assessment of damages, and a handy citation manual (*Universal Citation in International Arbitration* (*UCIA*)).

We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you all.

And great personal thanks to our three editors – Amy, Martin and Joseph – for the energy with which they have pursued the vision, and to my Law Business Research colleagues in production on such a polished work.

David Samuels
GAR publisher
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Introduction

Amy C Kläsener, Martin Magál and Joseph E Neuhaus[1]

Nearly every arbitration involves the taking of evidence. The applicable procedures affect what evidence is introduced and how. This can, and often is, outcome determinative. Thus, procedural questions around the process for taking evidence are some of the most common and the most important in arbitration.

This book draws together a group of highly experienced practitioners who address the topic from both theoretical and practical perspectives. Although the first edition was timed to reflect the 2020 amendments to the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules), the book is not intended to be another commentary to the IBA Rules.[2] Rather, following in the tradition of some older publications,[3] this book addresses the topic from a number of perspectives. The Rules on the Efficient Conduct of

1 Amy C Kläsener is a partner at Jones Day, Martin Magál is a partner at Allen & Overy Bratislava, s.r.o. and Joseph E Neuhaus is of counsel at Sullivan & Cromwell LLP.

2 See, e.g., Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (2nd edition, Routledge, 2019); Roman Khodzkin, Carol Mulcahy and Nicholas Fletcher (eds), *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration* (Oxford University Press, 2019); Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide* (Cambridge University Press, 2013); Tobias Zuberbühler, Dieter Hofmann, Christian Oetker and Thomas Rohner (eds), *IBA Rules of Evidence: Commentary on the IBA Rules on the Taking of Evidence in International Arbitration* (Schulthess, 2012).

3 Frédéric G Sourgens, Kabir Duggal and Ian A Laird, *Evidence in International Investment Arbitration* (Oxford University Press, 2018); Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer, 2012); Magnum Y W Ng, *Evidence in Arbitration: The Law and Practice on Taking of Evidence in International Arbitration Proceedings: An Eclectic Approach of Common Law and Civil Law Systems* (VDM, 2009); Teresa Giovannini and Alexis Mourre, *Written Evidence and Discovery in International Arbitration: New Issues and Tendencies*

Proceedings in International Arbitration (the Prague Rules), published in 2018, have become an important counterpoint to the IBA Rules, and we have sought to include a wide variety of civil and common law viewpoints.

The book starts with a series of chapters providing high-level perspectives on the taking of evidence in international arbitration. In Chapter 1, 'Approaches to Evidence across Legal Cultures', James Hope and Marcus Eklund take a bird's-eye perspective, situating the taking of evidence in the wider context of various legal traditions.

In Chapter 2, 'The 2020 IBA Rules on the Taking of Evidence in International Arbitration: A History and Discussion of the 2020 Revisions', Joseph Neuhaus, Andrew Finn and David Blackman introduce the 2020 IBA Rules, both the paths taken and certain proposals that were deliberated by the IBA Rules Subcommittee but ultimately rejected. Joseph Neuhaus co-chaired the Guidelines and Rules Subcommittee tasked with the 2020 revisions, and David Blackman was one of the secretaries on the task force that proposed the revisions. Key changes included the addition of provisions on the taking of evidence in remote hearings, the inclusion of cybersecurity and data protection issues in the remit of the Article 2 consultation, and the introduction of new grounds for objections, namely to the production of evidence from third parties or to evidence procured by corrupt means.

In Chapter 3, 'The Prague Rules: Fresh Prospects for Designing a Bespoke Process', Janet Walker takes stock five years after the release of the Rules on the Efficient Conduct of Proceedings in International Arbitration in 2018. She applies a dual perspective, assessing both the intention behind a provision and how it may be perceived or misperceived by common law counsel. She concludes that the Prague Rules provide a number of fresh prospects for designing a bespoke arbitral process. She encourages practitioners to look beyond what may be initial misgivings and apply procedures that are suggested by those Rules, such as early assessment by the tribunal, greater restraint in document disclosure, assessing the need for witness statements by first evaluating summaries of the proposed testimony, joint commissioning of experts and tribunal-led settlement discussions.

In Chapter 4, 'Party and Counsel Ethics in the Taking of Evidence', Amy Kläsener and Courtney Lotfi address ethical issues in connection with taking evidence. They review approaches to counsel ethics in taking evidence under

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(ICC Institute, Dossier VI, 2009); Laurent Lévy and V V Veeder, *Arbitration and Oral Evidence* (ICC Institute, Dossier II, 2004); Peter V Eijsvogel, *Evidence in International Arbitration Proceedings* (Kluwer, 2001).

national laws and various ethical canons that can be applied in arbitration, including the International Council of Commercial Arbitration's 2021 Guidelines on Standards of Practice in International Arbitration, the 2018 Prague Rules, the 2010 and 2020 IBA Rules, the London Court of International Arbitration's 2014 and 2021 Rules, the IBA's 2013 Guidelines on Counsel Representation and the International Law Association's Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals of 2010. The authors conclude that ethical problems and disputes can be best prevented by means of active discussion of ethical issues in case management conferences and inclusion of specific rules and requirements in procedural orders.

In Chapter 5, 'Approaches to Managing Evidence as Criteria for Selecting Arbitrators', Michael McIlwrath considers the all-important question of whether and how to consider styles for the taking of evidence in the selection of arbitrators. He helpfully provides a list of specific issues to consider, including, in particular, whether it is strategic to 'domesticate' the procedure for taking evidence. Finally, he provides guidance on how to discern different styles in arbitrator candidates, including through appropriate interviews, arbitrators' self-disclosures and databases on the subject.

The next two chapters address practice tips for the taking of evidence. In Chapter 6, 'Planning and Organising Effective Procedures for Taking Evidence', Beata Gessel-Kalinowska vel Kalisz, Joanna Kisielińska-Garncarek, Barbara Tomczyk and Łukasz Ostas explore options for tailoring the procedure to the needs of the case. The authors discuss from a high-level perspective the various categories of evidence and common procedures for introducing and managing them in arbitral proceedings. In Chapter 7, 'Evidentiary Objections', Cinzia Catelli and Romana Weinöhrl-Brüggemann provide detailed guidance on the various grounds for objecting to requests for production of documentary evidence, witness questions or the admissibility of evidence more generally.

In Chapter 8, 'Standards of Proof and Requirements for Evidence in Special Situations', Michael Hwang and Clarissa Chern take on the more abstract, but very important, topic of standards and burden of proof. The special situations they consider include prima facie evidence and the switching of the burden of proof, allegations of fraud and corruption, and the use of estimations to prove damages.

In Chapter 9, 'Perspectives on Document Disclosure', Damián Vallejo and Esther Romay offer their views on what is probably the most controversial topic in evidence: document requests. They encourage the international arbitration community to draw from diverse legal traditions to mitigate unintended side effects of this mechanism and craft balanced solutions that work in an international context.

The next two chapters address the rapidly developing topics associated with electronic evidence. In Chapter 10, 'Using Technology and e-Disclosure', Julia Sherman, Himmy Lui, Kelly Renehan and Anish Patel explain how electronic evidence is handled in the United States and the United Kingdom, drawing on these regimes and on their experience in recommending best practices for managing electronic evidence in arbitration. In Chapter 11, 'Managing Data Privacy and Cybersecurity Issues', Erik Schäfer explains specifically what participants in the arbitral process need to know about these increasingly important issues. He provides practical suggestions, including a list of issues to address and proposed wording for procedural orders.

In Chapter 12, 'Best Practices for Presenting Quantum Evidence', Laura Hardin and Trevor Dick provide insights and best practice tips from quantum experts to counsel. These range from careful drafting of the expert's instructions to preserving the independence of the expert, and ensuring that experts stay within their expertise, in particular when multiple experts may address related issues. The authors also address the preparation of persuasive reports and of useful joint statements, and effective presentation at hearings, including online hearings.

In Chapter 13, Stefan Riegler, Oleg Temnikov and Venus Valentina Wong address 'Special Issues Arising when Taking Evidence from State Parties'. The involvement of state parties can create asymmetries in terms of access to information. The authors explore how objections raised by state parties, including those based on special political or institutional sensitivity, play out in practice. They also address the introduction of evidence that has been obtained illegally (for example, through leaks) and how both state and commercial parties use this evidence.

In Chapter 14, 'Special Mechanisms for Obtaining Evidence', Anna Masser, Lucia Raimanová, Kendall Pauley and Peter Plachý provide a clear overview of the recent developments in respect of Section 1782 of Title 28 of the US Code for harnessing US discovery in relation to foreign arbitrations. They also address the less well-known tool of freedom of information act requests under national legislation and international law. This mechanism can be a powerful tool for gathering evidence on state parties or in relation to regulated parties. They also address data subject access requests pursuant to EU rules on data protection and reliance on documents obtained in criminal proceedings.

Finally, in Chapter 15, 'Artificial Intelligence in Arbitration: Evidentiary Issues and Prospects', Martin Magál, Katrina Limond and Alexander Calthrop consider how artificial intelligence (AI) may impact the taking of evidence. They look first at AI's potential role in claim development, the preparation of pleadings,

the intelligent searching of documents, real-time analysis of an oral hearing and the prospect of AI-generated evidence. They then embark on an analysis of the limitations and potential risks of using AI to handle evidence in arbitration.

We are very grateful to all the authors for their valuable contributions and hope that this book proves to be an accessible and useful resource for a broad group of international practitioners and parties.

CHAPTER 2

The 2020 IBA Rules on the Taking of Evidence in International Arbitration: A History and Discussion of the 2020 Revisions

Joseph E Neuhaus, Andrew J Finn and David S Blackman[1]

The International Bar Association Rules on the Taking of Evidence in International Arbitration (the IBA Rules) is one of the most widely used soft law instruments in international arbitration practice.[2] While not without its critics,[3] the IBA Rules enjoy a high level of acceptance across regional, as well as civil and common law, divides.[4] This consensus may fairly be attributed, in no small part, to the recurring modernisation and revision programmes that have kept the Rules both a reflection of, and a useful model to guide the development of, best practices in international arbitration.

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1 Joseph E Neuhaus is of counsel, Andrew J Finn is a partner and David S Blackman was an associate at Sullivan & Cromwell LLP.

2 See IBA Arbitration Guidelines and Rules Subcommittee, 'Report on the Reception of IBA Arbitration Soft Law Products' (2016 Subcommittee Report) ¶¶ 12–18 (2016) (noting that 48 per cent of arbitrations known to survey respondents worldwide referenced the IBA Rules of Evidence, with rates of reference being 'particularly high in some of the most common arbitral seats' as well as a 'general consensus that the use of the Rules on Evidence will grow'); School of International Arbitration, Queen Mary University of London, White & Case, '2015 International Arbitration Survey: Improvements & Innovations in International Arbitration', 36 (2015) (finding that the IBA Rules of Evidence are used in approximately 60 per cent of arbitrations).

3 2016 Subcommittee Report ¶¶ 84–85.

4 id. ¶ 79.

Historical background

Before turning to the 2020 Revision in detail, we briefly review the history of the Rules.

A history of prior revisions

The precursor to the IBA Rules – the Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration (the 1983 Rules) – was adopted by the IBA on 28 May 1983.[5] The 1983 Rules, though different from the modern IBA Rules in material ways,[6] nevertheless represented an early attempt to bridge the gap in evidentiary traditions between common and civil law traditions.[7]

Although the 1983 Rules 'were generally well received and were frequently discussed at arbitration conferences as an example of the harmonisation procedures that can occur', they ultimately did not achieve the broad degree of acceptance and use that the IBA Rules now enjoy.[8] Consequently, in 1997, Committee D of the IBA Section on Business Law formed a 16-member working party, chaired by Giovanni Ughi of Italy, with a mandate to update and revise the 1983 Rules.[9] From 1997 to 1999, the working party produced successive drafts of the new IBA Rules on the Taking of Evidence in International Commercial Arbitration

5 International Bar Association, Supplementary Rules Governing the Presentation and Reception of Evidence in International Arbitration (1983 Rules) (1983).

6 The 1983 Rules had only seven articles, and, for example, did not provide for disclosure of 'internal' party documents. See 1983 Rules, Article 4(4) (requiring requested documents to have been passed to or received from a third party).

7 See generally David W Shenton, 'Supplementary Rules Governing the Presentation and Reception of Evidence in International Arbitration', in Julian D M Lew (ed.), *Contemporary Problems in International Arbitration* (Springer Dordrecht, 1987), 188–94. Shenton was chair of Committee D of the IBA Section on Business Law, which produced the 1983 Rules. Committee D was the predecessor of the IBA Arbitration Committee.

8 See IBA Working Party, 'Commentary on the New IBA Rues of Evidence in International Arbitration', 2000(2) *Bus. L. Int'l* 16, 16. See also Jan Paulsson, 'Cross-Enrichment of Public and Private Law Dispute Resolution Mechanisms in the International Arena', 9(1) *J. Int'l Arb.* 59, 63 (1992) (the 1983 IBA Rules 'reflect a workable accommodation of diverse procedural traditions which greatly resembles what skilled arbitrators do in practice on a daily basis').

9 IBA Working Party, 'Commentary on the New IBA Rues of Evidence in International Arbitration', 2000(2) *Bus. L. Int'l* 16, 16–17.

(the 1999 Rules), which were circulated for public comment and discussion.[10] The 1999 Rules were adopted by the IBA on 1 June 1999. The working party also created a commentary to the 1999 Rules that was published the following year.[11]

The 1999 Rules revision was a fundamental departure from the 1983 Rules and the genesis of the modern IBA Rules of Evidence. The 1999 Rules created the article structure that has been retained since and was animated by principles that have likewise been retained in the Rules to this day.[12] The 1999 Rules, for example, articulated the familiar principles of document disclosure requests that are now fundamental to most practitioners' understanding of the IBA Rules, such as requiring that requested documents are 'relevant and material to the outcome', doing away with the restrictions of the 1983 Rules on the production of internal documents, and recognising, and providing a framework for, a party's right to object to these requests.[13]

The 1999 Rules were well received and became commonly used in international commercial arbitrations.[14] In 2008, the IBA Arbitration Committee established an IBA Rules of Evidence Review Subcommittee (the 2010 Subcommittee) to review and, as needed, update the 1999 Rules.[15] After conducting an online survey of arbitration stakeholders in 2008 and discussions at IBA open forums throughout 2008 and 2009, the 2010 Subcommittee set to drafting a revised version of the IBA Rules.[16] Their guiding principle was, in the words of Richard Kreindler, chair of the 2010 Subcommittee: 'If it ain't broke, don't fix it.'[17] Nevertheless, the

10 ibid.

11 id. at 17.

12 See generally International Bar Association, Rules on the Taking of Evidence in International Commercial Arbitration (1999). The nine articles in the 1999 Rules did not contain an Article 2, concerning the consultation on evidentiary issues, which was added in 2010. International Bar Association, Rules on the Taking of Evidence in International Arbitration (2010 Rules), Article 2 (2010). However, because the 1999 Rules treated its definitions section as an article, unlike the 2010 Rules, the numbering of articles has remained largely consistent.

13 1999 Rules, Articles 3(3), 9(2). cf. 1983 Rules, Article 4.

14 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcommittee, 'Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2010 Commentary), 2 (2010). On the reception and influence of the 1999 IBA Rules, see generally Gary Born, *International Commercial Arbitration*, 1896–917 (Kluwer, 2009).

15 2010 Commentary at 2.

16 ibid.

17 Lawrence S Schaner, 'Due Process in International Arbitration: A Report on the 12th IBA International Arbitration Day', *IBA Legal Practice Division Arbitration Newsletter*, March 2009, at 25 (reporting remarks at IBA panel on revisiting the IBA Rules of Evidence).

Subcommittee made relatively significant changes, including the addition of a new Article 2 regarding preliminary consultation on evidentiary issues; clarifying procedures for requesting, and objecting to, disclosure of documents, including electronic documents; and the addition of a new Article 9(3) on considerations applicable to a determination of legal privilege.[18] After public comment on the 2010 Subcommittee draft, the IBA adopted the Rules on the Taking of Evidence in International Arbitration (the 2010 Rules) on 29 May 2010.[19] Like its predecessor, the 2010 Rules revisions were well received and became widely used.[20]

The 2020 revision to the IBA Rules

In June 2015, the IBA Arbitration Committee organised the IBA Arbitration Guidelines and Rules Subcommittee (the Rules Subcommittee) and tasked it with conducting a worldwide survey on the use of IBA arbitration soft law instruments, including the IBA Rules.[21] The Rules Subcommittee, which included 120 members, prepared reports covering 57 jurisdictions worldwide and conducted a survey of arbitration stakeholders that garnered more than 800 meaningful responses.[22] Ultimately, the Subcommittee produced the '2016 Report on the Reception of the IBA Arbitration Soft Law Products'.[23] This survey showed a high degree of satisfaction with the existing text of the IBA Rules: fewer than 10 per cent of survey respondents said that the Rules should be amended.[24] The more detailed responses suggested certain areas that could be reviewed, however, in particular the provisions on document production,[25] burden of proof,[26] privilege,[27] sanctions,[28]

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18 Among many others. For a fuller discussion of the 2010 Subcommittee's changes, see the 2010 Commentary and Roman M Khodykin and Carol Mulcahy, *A Guide to the IBA Rules on the Taking of Evidence in International Commercial Arbitration* (Oxford University Press, 2019).

19 2010 Commentary at 2.

20 See footnotes 2 to 4, above, and accompanying text. See also Gary Born, *International Commercial Arbitration* (2nd edition, Kluwer, 2014), 2321 (describing the 'representative "international" approach . . . based generally on the [2010 Rules]').

21 2016 Subcommittee Report ¶ 1. The Rules Subcommittee also studied the reception of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration and 2013 IBA Guidelines on Party Representation in International Arbitration.

22 id., ¶¶ 2, 5.

23 id., ¶ 1.

24 id., ¶¶ 76–83.

25 id., ¶¶ 86–89.

26 id., ¶¶ 90–91.

27 id., ¶¶ 92–93.

28 id., ¶¶ 94–95.

and fact and expert witness testimony.[29] The 2016 Report recommended that such a review occur in 2020 on the 10th anniversary of the previous revision, and that a task force be established for that purpose.[30]

Following this recommendation, the IBA Arbitration Committee's Subcommittee on Rules and Guidelines (the Subcommittee) established a task force in May 2019 for the revision of the IBA Rules and the accompanying Commentary[31] (the Task Force). The Task Force, comprised of more than 30 practitioners divided into four working groups, two co-chairs and several committee secretaries,[32] determined that, although the 2016 Report was a starting point,[33] the Task Force was free to consider any revisions it deemed appropriate.[34] However, in light of the general satisfaction with the IBA Rules evinced in the 2016 Report, the Task Force recognised from the outset that the 2020 Revision would likely be a fine-tuning of the existing rules – seeking to clarify ambiguities, refine details and address any changes to international arbitral practice during the preceding decade – rather than a complete revision.[35]

Between May 2019 and April 2020, the Task Force exchanged numerous drafts of the IBA Rules and the Commentary. Although the Task Force itself represented practitioners from across the globe, so as to ensure that any changes to the Rules enjoyed consensus, support and legitimacy, the Task Force also

29 id., ¶ 96.

30 id., ¶ 236.

31 1999 IBA Working Party, 2010 IBA Rules of Evidence Review Subcommittee and 2020 IBA Rules of Evidence Task Force, 'Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration' (2020 Commentary), 1 n.3, 3 (2020).

32 For a complete list of members of the Task Force, see International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (2020 Rules), 30–33 (2020). The Task Force was divided into four 'teams', each primarily responsible for a specific portion of the rules and corresponding sections of the commentary. Each team offered commentary and revisions to the work of the others throughout the process. The Task Force was initially led by Álvaro López de Argumedo and Fernando Mantilla-Serrano, the then co-chairs of the Subcommittee. They were succeeded by Joseph E Neuhaus and Nathalie Voser in late 2019 as co-chairs of the Subcommittee and leaders of the Task Force.

33 Letter from Álvaro López de Argumedo and Fernando Mantilla-Serrano to Task Force Members, at 1 (3 May 2019) (on file with authors).

34 Memorandum from Álvaro López de Argumedo, Fernando Mantilla-Serrano, Diego Romero, Jesus Saracho, Nora Fredstie and Santiago Rodríguez to Carmen Martínez, Daniel Busse, Noiana Marigo and Sabina Sacco re call among Team Leaders and Co-Chairs of the Task Force in charge of reviewing the 2010 IBA Rules on the Taking of Evidence in International Arbitration, at 2 (30 April 2019) (on file with authors).

35 id., 2–3.

planned for a period of public comment.[36] In April 2020, the Task Force circulated its proposed draft of the Rules to the IBA Arbitration Committee for comment. In addition to the Arbitration Committee, the Task Force sought the comments of the members of the 1999 Rules' Working Party and of the 2010 Rules' Subcommittee, as well as more than 160 international arbitration institutions around the world. From these 198 persons or entities whose comments were solicited, the Task Force received 45 responses. The meaningful and thoughtful comments received as a result of this public comment process resulted in significant changes to the draft.

Following review of the public comments received, the Task Force finalised its draft of the Rules, which was submitted to the IBA Council for approval. The IBA Council adopted the 2020 Rules on 17 December 2020.

The 2020 revision: changes adopted

This section comprehensively discusses the changes made to the IBA Rules as a result of the 2020 Revision.[37] It first describes the more significant changes made by the Task Force, before briefly reviewing the more minor points.

Remote hearings: definition and Article 8.2

One of the most significant changes in the 2020 Revision was the inclusion of provisions on remote hearings. This change was prompted by the public comment process. Several respondents noted the absence of such a provision among the proposed revisions, and suggested express inclusion in the text of a provision, making clear that an arbitral tribunal's control over the arbitration hearing extended to its authority to order that a hearing be conducted as a remote hearing. Without doubt, the covid-19 pandemic explains the enthusiasm to fill this apparent lacuna.[38]

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36 To an extent, circumstances conspired against this plan. Whereas previous revisions to the IBA Rules of Evidence enjoyed the opportunity to be discussed and commented on in person at various meetings and conferences, 2010 Commentary at 2, the 2019 covid-19 global pandemic curtailed and disrupted plans for such meetings and conferences at precisely the time that the Task Force was seeking public comments on its draft of the Rules.

37 The capitalised terms used in this section of this chapter and not otherwise defined have the meaning set forth in the 2020 Rules. See 2020 Rules at 7–8 (Definitions).

38 See generally 'Joint Statement of Arbitral Institutions, Arbitration and Covid-19' (April 2020) (assuring users that 'pending cases may continue and that parties may have their cases heard without undue delay').

The 2020 Rules therefore included both a definition of 'remote hearing'[39] and the creation of a new Article 8.2 on remote hearings.[40] These provisions were intended to replace and modernise the last sentence of Article 8.1 in the 2010 Rules, which provided: 'Each witness shall appear in person unless the Arbitral Tribunal allows the use of videoconference or similar technology with respect to a particular witness.'[41] Article 8.2 of the 2020 Rules makes clear what was, in the Task Force's view, already implicit in Articles 8.1 and 8.2 of the 2020 Rules: that the arbitral tribunal's 'complete control over the Evidentiary Hearing' extends to its authority to order the use of videoconferencing or other technology for the conduct of the hearing.

The new definition defines the term 'remote hearing' to include both hearings that are conducted entirely remotely, with none of the participants in a single place at the same time, and hearings so conducted only in part.[42] A hearing might be conducted only in part remotely because, for example, a single witness or a single arbitrator is in a different place from the rest of the participants, or because some segment of the hearing is conducted remotely while other segments are conducted in person. The term 'hearing' is not defined but includes both evidentiary hearings (a defined term that refers to hearings where the arbitral tribunal receives oral or other evidence) and procedural hearings, or hearings to receive oral argument of counsel.

Article 8.2 introduces the concept of a remote hearing protocol for evidentiary hearings. If a party so requests, or on its own motion, the arbitral tribunal is to consult with the parties to establish a protocol as to how the remote hearing is to be conducted. Such a protocol may also be advisable for hearings other than evidentiary hearings, but because there are fewer participants and the proceedings are typically simpler, the protocol may likewise be somewhat streamlined. Akin to the provisions in Article 2 calling for consultation at an early stage in the process for taking evidence generally, the central idea is to draw the attention of all participants to some of the important points that should be considered to make a remote hearing work 'efficiently, fairly and, to the extent possible, without unintended interruptions'.[43]

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39 2020 Rules, at 6.

40 id., Article 8.2.

41 2010 Rules, Article 8.1.

42 2020 Rules, Definitions.

43 id., Article 8.2(b).

Article 8.2 sets out five issues that, experience suggests, might be addressed in the protocol:

- the technology to be used – all anticipated participants must have access to that technology and have hardware capable of using it;
- advance testing or training in the technology – a step that may not be obvious but may turn out to be critical to enabling all participants to join the hearing at the appointed time and to use the features of the chosen technology;
- the starting and ending times, considering the time zones in which participants will be located – it may sometimes not be easy to find a time that is reasonable and fair to all participants; an additional consideration in choosing start and end times may be to recognise that participation in a videoconference can be particularly exhausting for prolonged periods;
- how documents will be placed before a witness or the arbitral tribunal. Consideration may need to be given to whether the witness and the tribunal will be able to review an entire document or only view the particular page to which an examining party may wish to draw attention; whether the documents will be shared with the witness or the tribunal in advance of their use with a witness or in argument; and whether both translations and the original document can be made available via the remote technology; and
- measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted – this could be positioning a video camera so that the entire room in which a witness sits can be seen, having an additional person in the room with the witness to ensure that there is no influence or distraction, or simply calling for an affirmation as to who is in the room or the material to which the witness has access.

Evidence obtained illegally: new Article 9.3

Another significant change to the 2020 Rules was the inclusion of a new Article 9.3, providing that the 'Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally'.[44] The Task Force chose not to add this ground for exclusion to the mandatory bases of exclusion under Article 9.2, such as privilege or lack of relevance and materiality (this evidence 'shall' be excluded), but instead created a new category that gave the arbitral tribunal flexibility to decide whether to exclude illegally obtained evidence, and what law is applicable to the question. Arbitral practice suggested that no single rule could be crafted to address the treatment of such evidence; the result depends

44 id., Article 9.3.

heavily on the facts and applicable law.[45] The Task Force's Commentary provides a brief outline of the factors that arbitral tribunals may consider, including the culpability (or lack thereof) of the party offering the evidence in the underlying illegal conduct, proportionality concerns, the importance of the evidence to the outcome of the case, whether the evidence has entered the public domain through 'leaks', and the clarity and severity of the illegality.[46]

Cybersecurity and data protection: Article 2.2

Another significant change to the text of the IBA Rules proposed by the Task Force was the addition of a new Article 2.2(e). Article 2 provides for an arbitral tribunal to consult with the parties on an efficient, economical and fair procedure for the taking of evidence,[47] and Article 2.2 suggests subjects that may prudently be addressed in that consultation. The new subsection (e) adds 'any issues of cybersecurity and data protection' to the list.

Cybersecurity and data protection are distinct, but closely related, issues,[48] and each has grown significantly in importance since the 2010 Subcommittee's revision. Perhaps most obviously, the European Union promulgated the General

45 See, e.g., *Methanex Corp v. United States*, UNCITRAL Arbitration, Final Award on Jurisdiction and Merits, Part II, chapter 1, ¶¶ 55–59 (NAFTA Chapter 11 Arb. Trib., 3 August 2005) (excluding documents obtained by an investor's hiring of investigators to trespass and steal respondent witness's discarded documents from a dumpster); *Libananco Holdings v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶¶ 72–82 (23 June 2008) (respondent state's use of police power to intercept claimant's communications with counsel and witnesses required documents to be destroyed and a firewall to be set up between the respondent's criminal investigations and counsel in the arbitration); *Ahongalu Fusimolohi v. Fédération Internationale de Football Association*, CAS Case No. 2011/A/2425 Award, ¶¶ 74–82 (8 March 2012) (declining to exclude evidence where it was first obtained by a journalist posing as a lobbyist who secretly recorded a meeting with official in which the latter agreed to bribery, and the evidence was subsequently published in the newspaper); *ConocoPhillips Petrozuata BV v. Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision of Respondent's Request for Reconsideration, Dissenting Opinion of Georges Abi-Saab, ¶¶ 24–32 (10 March 2014) (considering diplomatic cables released into public domain through Wikileaks after being illegally hacked).

46 2020 Commentary, at 30–31.

47 2020 Rules, Article 2.1.

48 'Data protection' generally refers to compliance with applicable laws on the processing and use of data, whereas 'cybersecurity' generally refers to the identification and prevention of unauthorised access to digital information. See generally ICCA, NYC Bar, CPR, Protocol on Cybersecurity in International Arbitration (2020); ICCA-IBA Draft Roadmap to Data Protection in International Arbitration (2020).

Data Privacy Regulation in 2016 (implemented in 2018),[49] which quickly became a model for data protection regimes worldwide.[50] Likewise, cybersecurity threats have garnered increased attention, and international arbitration practitioners must necessarily be increasingly alert to them. Consequently, the Task Force considered that it would be an essential modernisation of the IBA Rules to highlight the advisability of addressing these issues early and thoughtfully.

Objections to requests for evidence: Articles 3.10 and 4.10

Another modernisation of the IBA Rules was to account for multiparty arbitration and the issue of affiliated entities in Articles 3.10 and 4.10. Article 3.10 deals with the production of documents by third parties and Article 4.10 with witness testimony by third parties. The arbitral tribunal may request any party – that is, one of the parties to the arbitration – to produce third-party documents or testimony or 'to use its best efforts' to obtain the documents or testimony.[51] The 2010 Rules contemplated that '[a] Party to whom such a request' for documents or testimony was addressed could raise objections for any of the reasons set forth in Article 9.2.[52] The Task Force concluded that there are situations in which another party to the proceeding might properly have objections to the request for documents or testimony. For example, the third party might be in possession of privileged or confidential information in which the potential objecting party has rights; or the objecting party might have obligations to indemnify the third party for the costs of complying with these requests (as when the third party is a former agent of the objecting party). To make clear that other parties might assert objections to the revelation of this information, the 2020 Rules provide that '*[a]ny Party* may object' for 'any of the reasons set forth in Articles 9.2 or 9.3'.[53]

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49 Regulation 2016/679 of the European Parliament and Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Privacy Regulation), 2016 O.J. (L 119) 1.

50 e.g., California Consumer Privacy Act, Cal. Civ. Code § 1798.100 et seq. For a discussion of the extraterritorial effect (both de facto and de jure) of EU data protection legislation, see generally Anu Bradford, The Brussels Effect: How the European Union Rules the World, 131–69 (2020).

51 2020 Rules, Articles 3(10), 4(10).

52 2010 Rules, Articles 3.10, 4.10.

53 2020 Rules, Articles 3.10, 4.10 (emphasis added). For a discussion of the 2020 Rules' addition of a new Article 9.3, see 'Evidence obtained illegally: new Article 9.3', above.

The Task Force considered, and circulated for public comment, a proposal that would also have contemplated that third parties might object to the request for documents or testimony. Several of those who commented expressed concern that the IBA Rules should not purport to regulate the rights of third parties, as they necessarily could not be bound by those Rules. Rather, in this view, the scope of a third party's right to object to the scope of a document request was the proper province of other law, such as that of the domestic courts asked to assist in obtaining the documents or testimony sought. Ultimately, the Task Force decided to delete an express reference to objections that third parties might raise. We submit, however, that the arbitral tribunal is not prevented from hearing and considering objections that third parties might wish to raise with the tribunal, because under Articles 1 and 8 of the IBA Rules, the tribunal has a broad inherent power to determine evidentiary issues.[54]

Translations and form of documents produced and submitted: Article 3.12

Article 3.12 concerns the form of (1) production of documents in response to a document request or (2) submission of documents to the arbitral tribunal.

In Article 3.12(d), the 2010 Rules addressed only submissions to the tribunal, and specified that documents were to be 'submitted together with the originals and marked as translations with the original language identified'. The Task Force was concerned that this formulation might be read to require such translations for the *production* of documents in response to a document request, insofar as the word 'submitted' might not be a sufficient signal that only submission to the arbitral tribunal was being discussed. The public comments received by the 2020 Task Force revealed some confusion about the matter. In contemporary practice, documents that are merely produced from one side to the other are usually

54 Article 1 of the IBA Rules of Evidence provides that the arbitral tribunal has the power to resolve any conflict in meaning between the provisions of the IBA Rules of Evidence and the General Rules (Article 1.3), the power to interpret the meaning of the IBA Rules of Evidence as applied to the particular arbitration (Article 1.4) and, in the event of any lacuna in the IBA Rules of Evidence or General Rules, to 'conduct the taking of evidence as it deems appropriate' (Article 1.5). Likewise, Article 8.3 of the IBA Rules of Evidence provide that the arbitral tribunal has 'at all times complete control over the Evidentiary Hearing'. 2020 Rules, Article 8.3; see also 2010 Rules, Article 8.2 (same). This general authority over evidentiary matters is in accordance with some of the most frequently used general rules, which provide that tribunals are to 'establish the facts by all appropriate means'. 2020 Commentary at 8, 8 n.7 (citing, e.g., ICC and LCIA arbitration rules).

not produced with translations.[55] Although this approach can mean that each party generates its own translations of some documents, which can increase costs, the translation of all documents produced can also increase costs. It is often the case that documents are produced that are not ultimately submitted to the arbitral tribunal; and receiving parties have widely varying capacity to deal with foreign-language documents and can use a variety of techniques (e.g., summary translations or translations only of relevant parts) to avoid commissioning full translations of all produced documents.

Article 3.12, paragraphs (d) and (e) of the 2020 Rules thus make clear that, ordinarily, documents to be produced – as opposed to submitted to the arbitral tribunal – need not be translated, whereas documents to be submitted into evidence must be. The revised Rules also dropped the requirement that translations to be submitted must identify the original language; the Task Force concluded that the original language would almost always be self-evident, such that an express requirement was unnecessary.

The Task Force also made a further change to Article 3.12, so as to make clear that all the provisions of that Article were subject to the contrary agreement of the parties or order of the arbitral tribunal. Article 3.12 contains three formal requirements for submission or production of documents in addition to the provisions on translation, namely that (1) copies conform to the originals and, at the request of the arbitral tribunal, the originals be provided for inspection, (2) electronic documents be produced or submitted in the form reasonably usable by the receiving party that is most convenient to the producing or submitting party, and (3) multiple copies of essentially identical documents need not be produced. Logically, each of these provisions – and the provision on translations – should be subject to contrary agreement of the parties (because the parties can agree to depart from any of the provisions of the Rules)[56] or order of the arbitral tribunal (exercising its general powers under Article 1).[57] But the 2010 version of the Rule specified that the parties could agree otherwise, or the arbitral tribunal could decide otherwise, only with respect to subparts (b) (dealing with electronic documents) and (c) (dealing with identical documents).[58] The Task Force moved the

55 2020 Commentary at 14.

56 2010 Rules, Preamble ¶ 2 ('Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures.'); 2020 Rules, Preamble ¶ 2 (same).

57 2020 Rules, Articles 1.3–1.5.

58 2010 Rules, Article 3.12.

general reference to agreement of the parties or direction of the arbitral tribunal to the chapeau of Article 3.12 to make clear that all the formal requirements dealt with in that Article could be departed from.

New matters in replies: Articles 4.6 and 5.3

Articles 4.6 and 5.3 deal with new matters in reply witness statements and expert reports, respectively. Both Articles confine reply submissions to 'matters in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration'.[59] Although this scope is properly confined to new material, the Task Force considered that, in particular cases, there might be new developments outside the matters addressed in another party's submissions that might be relevant and material to the outcome. In recognition of the tribunal's inherent flexibility to allow a fact witness to testify to such new factual developments,[60] the Task Force added Article 4.6(b), providing that additional witness statements may respond to 'new factual developments that could not have been addressed in a previous Witness Statement'.[61] Article 5.3 makes a slightly broader revision, permitting reply expert reports to respond to 'new developments that could not have been addressed in a previous expert report'.[62] The omission of the word 'factual' acknowledges that expert reports may need to respond to, for example, new scientific or technical developments in the expert's field of expertise.

Oral direct testimony: Article 8.5

There have been frequent debates in practice regarding whether, notwithstanding the use of witness statements in lieu of direct testimony pursuant to Article 8, a party may nevertheless summon its own witness to the hearing, even if the other side does not intend to cross-examine that witness. The public comments that the Task Force received tracked those debates. Some practitioners, pointing to the language of Article 8.5 that in such circumstances 'the Witness Statement or Expert Report shall serve as that witness's direct testimony',[63] were of the view that only a party against whom a witness was offered could summon that witness to the hearing, lest a witness be given two opportunities for direct examination.

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59 2020 Rules, Articles 4.6(a), 5.3(a).

60 See id., Article 8.3 ('The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing.'); 2010 Rules, Article 8.2 (same).

61 2020 Rules, Article 4.6(b).

62 id., Article 5.3(b).

63 2020 Rules, Article 8.5. See also 2010 Rules, Article 8.4 (same).

However, other practitioners took a more liberal view and argued that under the tribunal's general Article 8.1 power to call for witnesses to appear at a hearing, the tribunal was empowered to permit a party to summon its own witnesses. Both sides recognised, however, that the IBA Rules were insufficiently clear and had engendered competing interpretations in practice. The Task Force therefore proposed a revision to clarify this issue.

The 2020 Rules make clear, consistent with the principle that the arbitral tribunal has complete control over the evidentiary hearing,[64] that the tribunal may order oral direct testimony if it wishes, even if witness statements have been submitted (and whether or not the other side has called for the witness to be cross-examined).[65] This new provision is consistent with the pre-existing power of the arbitral tribunal under Article 8.1 to summon any witness for testimony;[66] the Task Force's revision clarifies that this power is not extinguished by the use of witness statements that stand in for direct testimony. We submit that a tribunal may well wish to permit oral direct testimony in these cases so as to allow, for example, a witness to respond directly to the latest submission of the other side before being cross-examined, to address new factual developments that have arisen since submission of the witness statement, or to provide the witness a brief 'warm up' to summarise or highlight their written testimony for the tribunal, in view of the greater impact that oral testimony can have.[67]

Powers of a tribunal-appointed expert: Article 6.3

The 2020 Task Force also revised the provisions of Article 6.3, which addresses the powers of a tribunal-appointed expert to request information or access to materials or a site for inspection. The 2010 version of Rule 6.3 included a sentence stating: 'The authority of a Tribunal-Appointed Expert to request . . . information or access shall be the same as the authority of the Arbitral Tribunal.'[68] Yet Article 6.3 also provides that '[a]ny disagreement between a Tribunal-Appointed

64 2020 Rules, Article 8.3. See also 2010 Rules, Article 8.2 (same).

65 The Task Force added the emphasised language to Article 8.5: 'The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony, i*n which event the Arbitral Tribunal may nevertheless permit further oral direct testimony*.' (emphasis added).

66 2020 Rules, Article 8.1 ('Each witness (which term includes, for the purposes of this Article, witnesses of fact and any experts) shall, subject to Article 8.3, appear for testimony at the Evidentiary Hearing if such person's appearance has been requested by any Party *or by the Arbitral Tribunal*.') (emphasis added). See also 2010 Rules, Article 8.1 (same).

67 See 2020 Commentary, at 27.

68 2010 Rules, Article 6.3.

Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8'.[69] This would imply that the tribunal-appointed expert does not, in fact, have the same authority to request access to information, as the expert's decisions can effectively be appealed to the tribunal.

Moreover, the 2020 Task Force concluded that a tribunal-appointed expert should not be considered to have the same authority as the tribunal on all questions that might relate to the expert's access to information. For example, it would often be anomalous for an expert on quantitative financial modelling to have the arbitral tribunal's authority to resolve, for instance, a dispute about applicable legal privilege. Consequently, the 2020 Task Force deleted the sentence stating that the tribunal-appointed expert has the same authority as the tribunal, and simply leaves it to the tribunal to resolve any disputes.[70] This does not imply, however, that the arbitral tribunal cannot empower the tribunal-appointed expert to resolve in the first instance questions that arise in connection with the expert's request for information or access, and as a practical matter the expert will generally do so, leaving it to the parties to raise any disagreement with the tribunal.

Other changes

The 2020 Task Force also made a number of other, more technical revisions. These were largely directed to improving the 2020 Rules' usability or clarity.

In Article 1.2, which addresses which version of the Rules applies to any particular arbitration, the Task Force clarified that, where the parties have agreed to apply the IBA Rules 'in whole or in part' to their arbitration, they are deemed to have agreed (in the absence of contrary indication) to the version in effect on the date of the agreement. The addition of the phrase 'in whole or in part' is consistent with Paragraph 2 of the Preamble, which explains that the parties or tribunal may adopt the rules 'in whole or in part'.[71]

Similarly, with respect to Article 2.2 (which relates to the arbitral tribunal's preliminary consultation with the parties on evidentiary issues), the Task Force amended the language of the chapeau to include the phrase 'to the extent applicable' to make clear that the IBA Rules do not prescribe that all the procedures outlined in Article 2.2 are appropriate for every arbitration. The 2016 Report (which reviewed the acceptance of various IBA guidelines) noted that some

69 ibid.

70 2020 Rules, Article 6.3.

71 See footnote 56, above, and accompanying text.

survey respondents had suggested the IBA Rules required production of documents to the opposing party.[72] Although Rule 2.2 already included the word 'may' in addressing the topics that might be addressed in the consultation on evidentiary issues ('[t]he consultation on evidentiary issues *may* address'), the Task Force concluded that it would be appropriate to further emphasise the point by adding 'to the extent applicable'.

The 2020 Task Force added similar language to Article 9.2, but for different reasons. Article 9.2 delineates grounds for excluding evidence (such as privilege or lack of sufficient relevance or materiality). The Task Force's amendment clarified that the arbitral tribunal has flexibility to exclude documents in whole or in part, as is commonly the case when a document is, for example, partially privileged or can be redacted to exclude information of special commercial or technical confidentiality or political or institutional sensitivity.

Article 3 sets forth the procedure for a party to make a request for documents (called a request to produce) and for the requested party either to produce the requested documents or state an objection to the request. In contemporary practice, arbitral tribunals commonly provide for the requesting party to reply to the objection, either presenting arguments in support of its request or withdrawing or modifying the request to accommodate the objection. This procedure can serve to narrow disputes before calling for resolution by the arbitral tribunal. In recognition of this widespread and useful practice, the 2020 Task Force added a sentence to the end of Article 3.5 providing: 'If so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection.'[73] The Task Force likewise amended Articles 3.6 and 3.7 to provide, respectively, that the arbitral tribunal might invite the parties to consult with each other on receipt of 'any such objection *and response*' and that the tribunal, may, if a party requests a ruling, 'consider the Request to Product, the objection *and any response thereto*'.[74]

The Task Force further tweaked Article 3.7 to delete the reference to the arbitral tribunal considering the requests and objections 'in consultation with the parties'.[75] This language, which suggests that the tribunal should seek a second round of comments from the parties after first receiving the objection

72 2016 Subcommittee Report, ¶ 235.

73 2020 Rules, Article 3.5.

74 id., Articles 3.6, 3.7 (emphasis added).

75 2010 Rules, Article 3.7 ('Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection.').

to a request (and any response thereto), is not consistent with how practice has evolved. Tribunals today do not typically engage in a second round of consultation but rather commonly rule directly on objections without further submissions or consultation after receiving the requests, objections and replies (and sometimes rebuttals) – often in the form of a Redfern or Stern schedule that sets out the requests, objections and replies in a single document.

Article 1.3 deals with the hierarchy of rules potentially addressing the taking of evidence, namely the IBA Rules and the General Rules, which are 'the institutional, ad hoc or other rules that apply to the conduct of the arbitration'.[76] In the 2010 Rules, Rule 1.3 provided:

> *In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.*

In explaining this provision, the 2010 Commentary noted that it might not always be possible to reconcile the two sets of Rules, stating:

> *if a conflict exists regarding the meaning of the IBA Rules of Evidence, or if both the IBA Rules of Evidence and the General Rules are silent on a particular issue, then the IBA Rules of Evidence instruct the arbitral tribunal to apply the general principles of the IBA Rules of Evidence, such as those set forth in the Preamble, to the greatest extent possible.*[77]

The Task Force concluded that, for the sake of completeness, the Rule itself should recognise that a conflict between the two Rules might be resolvable only in part by reference to the purposes of the two sets of rules, and added the phrase 'to the greatest extent possible' to the text of the Rule.[78]

In Article 7, which provides for the arbitral tribunal's power to order inspection by an expert of any 'site, property, machinery, or any other goods, samples, systems, processes or Documents', the 2020 Task Force made a small change to make the word 'arrangement' in the following sentence plural: 'The Arbitral Tribunal shall, in consultation with the Parties, determine the timing and *arrangements* for the

76 2020 Rules, Definitions.

77 2010 Commentary at 5 (emphasis added).

78 2020 Rules, Article 1.3.

inspection.' The change carries some substantive content. It underlines that there can be a range of issues that the arbitral tribunal will need to consider in ordering an inspection, and the 2020 Task Force added several examples of such considerations in amending the Commentary: whether the parties may make submissions prior to or during the inspection; what experts, witnesses or representatives may lead the inspection; and how the inspection can be incorporated into evidence.[79]

The Task Force also revised Article 9.5 (formerly Article 9.4) to clarify that the arbitral tribunal may make appropriate confidentiality arrangements not only for documents that will be submitted as evidence, but also for documents that are merely produced in response to a request to produce in accordance with Article 3.

Finally, the Task Force also implemented three more or less purely technical changes, namely the addition of cross-references to Articles 9.2(b),[80] the revision of former cross-references to Article 9.2 to also refer to the new Article 9.3,[81] and the correction of typographical errors.[82]

The 2020 revision: changes discarded

Although the changes made to the IBA Rules by the Task Force were always intended to be relatively light, the range of proposals considered was substantial.[83] The internal discussions of the proposed revisions that the Task Force considered stretched to well over 100 pages. This section highlights three of the more significant revisions considered and explains briefly why they were ultimately set aside.[84]

Duty to specify possession, custody or control

One change that the 2020 Task Force initially proposed, but then abandoned in light of public comments, was a proposal to amend Article 3.3 to add the phrase 'where not self-evident' to qualify the duty to specify that documents being requested were in the possession, custody or control of the requested party, and not of the requesting party. The Task Force's proposal was based on the intuition that it is often obvious that a request seeks documents that are in the possession of

79 2020 Commentary, at 24.

80 2020 Rules, Article 9.2(b).

81 id., Articles 3.5, 3.7, 3.9, 3.10, 4.10, 6.3, 7, 8.3, 8.6.

82 id., Article 5.4.

83 See footnotes 33 to 35, above, and accompanying text.

84 One other change that the Task Force considered but ultimately rejected was a proposal that would provide that third parties might object to the request for documents or testimony, described in 'Objections to requests for evidence: Articles 3.10 and 4.10', above.

the requested party, and not of the requesting party, as when a party is requesting the internal documents of the other side, and the required statement often results in the addition of mere boilerplate to document requests.

The public reaction to the proposal was negative, however, from standpoints of both principle and efficiency. On the one hand, certain respondents believed that such a change would upset the compromise between civil and common law systems with respect to document disclosure that the IBA Rules struck, by easing the requirements for a valid request to produce and diminishing the formal role of the arbitral tribunal in such a request. However, some respondents felt that a test of 'where not self-evident' was in the eye of the beholder, and might result in dilatory objections and unnecessary expense of time and resources, which could be avoided by requiring the statement, even if obvious, to be made.

The Task Force carefully considered these comments and concluded that a change was not warranted.

Definition of 'relevant' and 'material'

One of the relatively frequent comments received in the course of the 2016 Report was a desire for additional guidance on the meaning of 'relevant to the case and material to its outcome', as used in the 2010 Rules.[85] Thus, the Task Force initially considered whether it might be useful to include a definition of 'relevant' or 'material' in the text of the 2020 Rules.

The Task Force ultimately did not propose such a revision. In the course of exchanging drafts and comments during the summer of 2019, it became apparent that reaching a wide consensus among the arbitral community on a precise and concise definition of the terms 'relevant to the case' and 'material to the outcome' would be extremely difficult. Further, such definitions might restrict the arbitral tribunal's flexibility to measure materiality to the outcome of the case and relevance to the issues as needed in light of the circumstances of the particular case.

Adverse inferences

The Task Force also sought to address concerns that arbitral tribunals are reluctant to draw adverse inferences under Articles 9.6 and 9.7 when a party fails without satisfactory explanation to make available documents or other evidence (such as testimony) ordered by the arbitral tribunal or sought by another party and not objected to in due time. The 2016 Report on the reception of IBA instruments had specifically noted one respondent's request that the provisions on adverse

85 2010 Rules, Article 3.3(b).

inferences be made mandatory.[86] The Task Force proposed an amendment that would have required that the arbitral tribunal 'shall consider', either at the request of a party or its own motion, whether an adverse inference was warranted in these situations (as opposed to the prior provision that stated simply that 'the Arbitral Tribunal may' draw such an inference). The aim was to provide some greater teeth to the provision without constraining the arbitral tribunal's discretion to consider all the circumstances in deciding how to respond.

This proposal was met with criticism when circulated for public comment, and ultimately withdrawn from the final draft of the 2020 Rules. Some felt that the proposed change was superfluous. Others worried that the mandatory language might impose some obligation on the tribunal to document its consideration – and invite comment from the parties – at the risk of exposing the award to challenge, thereby unnecessarily increasing the time and expense of the proceedings.

Conclusion

The revisions made in the 2020 IBA Rules were significant but not sweeping. There was little reason to make wide-ranging changes to the well-used provisions of the 2010 Rules, or to disturb the carefully balanced compromises between civil and common law practice that the IBA Rules embody. That there were some provisions needing modernisation or refinement as a result of a decade of intervening developments is not surprising; but that there was relatively little that needed to be revisited is a testament to the care and foresight with which they had been drafted and previously revised.

86 2016 Subcommittee Report, ¶ 95.

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