

IBA UPDATES RULES ON EVIDENCE IN INTERNATIONAL ARBITRATION

The IBA's updated rules on evidence address major developments and challenges arising from the COVID-19 pandemic and the modern age of cybersecurity threats.

The *IBA Rules on the Taking of Evidence in International Arbitration* ("**IBA Rules**") were published in 1999, and updated in 2010, and have the intention of providing a common framework for the main evidential issues that arise in international arbitration, balancing common law and civil law traditions. Since then, they have often been adopted by parties and tribunals, mostly as guidance in determining evidential matters rather than mandatory rules. Their great advantage is that such adoption provides a transnational approach and avoids arguments about the applicability of evidential rules of the *lex fori* and other potentially applicable sources of rules.

The IBA has undertaken a review of the IBA Rules and on 15 February 2021 published an updated version (adopted by the IBA Council on 17 December 2020).

The update leaves unchanged many of the provisions dealing with factual and expert evidence, document production, and grounds for withholding production. The update does contain a number of key additions that have been designed to reflect contemporary practices in international arbitration and the challenges posed by new technologies. In particular, it addresses major developments and challenges arising from the COVID-19 pandemic and the modern age of cybersecurity threats.

We identify below the key changes.

1. Remote Hearings

In light of the growing trend of COVID-19 related virtual hearings, the revised IBA Rules include a new provision on "Remote Hearing", which is defined broadly as a hearing conducted entirely, or partially, or only with respect to certain participants, using "*teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate*".

Article 8(2) removes the previous default requirement of in-person appearance of witnesses at the hearing, and now permits the arbitral tribunal to, at the request of a party or on its own motion, and after consultation with the parties, order that the evidentiary hearing be conducted remotely. The IBA commentary on the new IBA Rules encourages tribunals to be pro-active and to consider

Key issues

- The latest updates to the IBA Rules on evidence in international arbitration are aimed at addressing prevailing practices and challenges associated with the COVID-19 pandemic and the growing use of different technologies.
- Key additions include provisions on remote hearings, preventing improper influence of witnesses testifying remotely, and the exclusion of evidence obtained illegally.
- Other practical changes have been made to address challenges relating to data protection, cybersecurity and confidentiality of documents.

time, cost and environmental concerns when assessing the need for a remote hearing.

Where an order is made for a Remote Hearing, the tribunal is required to consult with the parties to establish a protocol to enable the hearing to be conducted "*efficiently, fairly and, to the extent possible, without unintended interruptions*". The IBA commentary makes clear that a protocol needs to be established.

Article 8(2) provides a non-exhaustive list of issues that the protocol may address, including in relation to the type of technology to be used, hearing times (to accommodate different time zones), and the electronic presentation of documents.

Neither Article 8(2) nor the IBA commentary, however, address issues such as the consequences of any technical failures and potential delays to the hearing. Parties should consider dealing with such issues in the Remote Hearing protocol in order to ensure the sufficient quality of transmission in the technology used, and the availability of any backup plans should that technology fail.

2. Preventing undue influence on witnesses

Article 8(2)(e) of the new IBA Rules further provides that a Remote Hearing protocol may cover "*measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted*".

The IBA commentary proposes a number of methods to ensure that witnesses are not improperly assisted or do not improperly refer to documents when giving oral testimony, including, questioning the witness at the outset of their examination about the room in which their testimony is to be given, the persons present and documents available in the room, installation of mirrors behind the witness, use of fish-eye lenses, or the physical presence with the witness of a representative of opposing counsel.

3. Exclusion of evidence obtained illegally

The new Article 9(3) expressly recognises that an arbitral tribunal "*may, at the request of a party or on its own motion, exclude evidence obtained illegally*". The tribunal's power appears to have been drafted deliberately broad, being expressed as "may" instead of "shall" (as is the case for Article 9(2)).

While the IBA Rules do not specify what constitutes "evidence obtained illegally", Article 9(3) suggests that acts that are illegal at a criminal or civil standard can both be captured. The IBA commentary offers an example of whether a recording of a conversation may be considered to be evidence obtained illegally; here, the law deemed applicable to the dispute as well as other factors such as the tribunal's background and experience will be influential to the tribunal's determination (i.e. does the law of the country where the recording was made prohibit recording without permission of those involved).

To date, there have been two well-known cases where international tribunals have declared documents inadmissible on grounds of illegality:

- (a) *Methanex v USA* involved an illegal trespass on to another's property to take confidential documents from a dumpster. The Tribunal (after having heard witness evidence) held that "*the evidence shows beyond any reasonable doubt that Methanex unlawfully committed multiple*

acts of trespass over many months in surreptitiously procuring" the documents ultimately excluded from the record;¹

- (b) *Libananco v Turkey* involved the Turkish State's domestic Court-sanctioned interception of privileged communications between Claimant counsel and its witnesses, as part of the State's investigation into crimes allegedly committed by the Claimant in Turkey. The Tribunal (again after having heard witness evidence) held that the State's right and duty to investigate crimes did not mean that it could exercise that power "*without regard to other rights and duties, or that, by starting a criminal investigation, a State may baulk an ICSID arbitration*".²

The revised IBA Rules do not suggest any departure from the existing case law or that exclusion of evidence should be granted in anything less than exceptional standards.

4. Other practical developments

Further notable revisions to the IBA Rules include:

- the tribunal's obligation to consider, in consultation with the parties, the treatment of cybersecurity and data protection issues early in the arbitral proceedings.³ Parties and tribunals should consider issues of data privacy, cybersecurity and compliance with relevant laws (e.g. *General Data Protection Regulation 2016/679* in the EU) to ensure safe and cost-effective taking of evidence. The *ICCA-IBA Roadmap to Data Protection in International Arbitration* and the *ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration* may be helpful resources in this regard;
- clarifications with respect to document production that:
 - the requesting party may respond to objections from the counterparty "*if so directed by the Arbitral Tribunal, and within the time so ordered*";⁴
 - the tribunal is not required to consult with the parties when considering Requests to Produce, objections and any responses thereto;⁵
 - parties are not required to produce multiple copies of "*essentially identical*" documents;⁶
 - documents produced in response to a Request to Produce are not required to be translated (meaning that the party intending to rely on any documents produced in a foreign language as evidence must arrange for the translation of those documents), while foreign-language documents submitted to the tribunal are required to be translated;⁷

¹ *Methanex Corporation v United States of America* (UNCITRAL) Final Award, 3 August 2005, Part 2, Chapter I, para. 55.

² *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, para. 79.

³ Article 2(2)(e) of the revised IBA Rules.

⁴ Article 3(5) of the revised IBA Rules.

⁵ Article 3(7) of the revised IBA Rules.

⁶ Article 3(12)(c) of the revised IBA Rules.

⁷ Article 3(12)(d) and (e) of the revised IBA Rules.

- greater flexibility for witness and expert evidence to address new factual developments in a second round of written witness statements and expert reports;⁸
- clarification that a tribunal-appointed expert does not have authority to resolve any disputes between the parties relating to document production and access to information;⁹
- clarification that a tribunal may permit a witness who has produced a witness statement to provide further oral evidence at the hearing.¹⁰ This means that even if a party waives its right to cross-examine a witness, the counterparty that has introduced the witness in the arbitration may nevertheless request the witness to be called at the hearing to give further evidence; and
- clarification that the tribunal's discretionary power to afford confidentiality protection for evidence extends to documents produced in response to a Request to Produce (whether at the stage of document production or where they are introduced as evidence in the arbitration).¹¹ The IBA commentary suggests a range of measures that a tribunal may put in place to protect the confidentiality of documents produced (e.g. the use of non-disclosure agreements, redactions, or the exchange of documents on an "attorneys-eyes only" basis).

⁸ Articles 4(6)(b) and 5(3)(b) of the revised IBA Rules.

⁹ Article 6(3) of the revised IBA Rules.

¹⁰ Article 8(5) of the revised IBA Rules.

¹¹ Article 9(5) of the revised IBA Rules.

CONTACTS



Audley Sheppard QC
Partner

T +44 207006 8723
E audley.sheppard
@cliffordchance.com



Cameron Hassall
Partner

T +61 2 8922 8015
E cameron.hassall
@cliffordchance.com



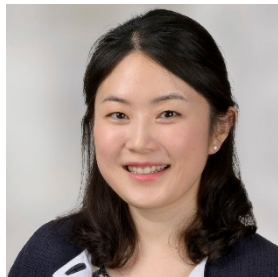
Benjamin Barrat
Senior Associate
Knowledge Lawyer

T +44 207006 1696
E benjamin.barrat
@cliffordchance.com



Alexandra Zhu
Senior Associate

T +61 2 8922 8566
E alexandra.zhu
@cliffordchance.com



Haeran Chung
Associate

T +61 2 8922 8092
E haeran.chung
@cliffordchance.com

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www.cliffordchance.com

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London, E14 5JJ

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