IBA Rules on the Taking of Evidence in International Arbitration receive a light-touch update

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On 15 February 2021, the International Bar Association (IBA) formally adopted the revised Rules on the Taking of Evidence in International Arbitration (2020 IBA Rules). The 2020 IBA Rules replace the 2010 edition of the rules. The 2020 IBA Rules are supplemented by the Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration. The IBA Rules on the Taking of Evidence were initially established in 1999. In the meantime, they have become widely recognised and used in international arbitration. The recent revision addresses the current trend for remote hearings and clarifies some other provisions.

Important amendments in the 2020 IBA Rules:

- **Arbitral tribunal should consult early parties on issues cybersecurity and data protection**
- **Party may respond to the objections of the other party on a document production, only documents submitted to the arbitral tribunal need to be translated**
- **Parties are allowed to submit revised or additional witness statements or expert reports to address new (factual) developments**
- **Only arbitral tribunal has authority to decide any disputes over information and access to documents between the tribunal-appointed expert and a party**
- **Arbitral tribunal may allow remote hearings after consultation with the parties**
- **Arbitral tribunal has the authority to exclude evidence obtained illegally**

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Consultation on cybersecurity and data protection

The 2020 IBA Rules encourage the arbitral tribunal to consult the parties at the earliest appropriate time in the proceedings and to agree on an efficient, economical and fair process for the taking of evidence. The arbitral tribunal should consult the parties on issues including, but not limited to, scope, timing and manner of the taking of evidence. The 2020 IBA Rules add "issues of cybersecurity and data protection" (Article 2.2(e) 2020 IBA Rules) to the list of issues that the arbitral tribunal should consult the parties. The awareness for data protection in international arbitration has increased significantly due to the EU General Data Protection Regulation (GDPR) and other data protection legislation. It is expected that cybersecurity issues will become increasingly relevant too, especially in case of remote hearings.

Document production

Article 3.5 2020 IBA Rules now provides that a party who has requested the production of documents may respond to an objection of the other party if so directed by the arbitral tribunal. Article 3.7 2020 IBA Rules allows the arbitral tribunal to decide on a request for document production without consulting the parties. These changes reflect the established practice in international arbitration, in particular in relation to the Redfern Schedules.

Furthermore, Article 3.12(e) 2020 IBA Rules provides that by default, only documents that are submitted to the arbitral tribunal shall be accompanied by translations. In contrast, documents "to be produced in response to a Request to Produce need not be translated" (Article 3.12(d) 2020 IBA Rules). This change reflects prevailing practice and ensures that translation costs are incurred only when necessary. The 2020 IBA Rules do not address whether documents may be translated in part only. This issue is typically dealt with in the Term of References or Procedural Order No. 1.

Revised or additional witness statements or expert reports to address new (factual) developments

Already under the previous IBA Rules, the parties could submit revised or additional witness statements or expert reports to rebut matters contained in another party's witness statement or expert report (Article 4.6(a) and Article 5.3(a) 2020 IBA Rules). The 2020 IBA Rules clarify that parties may also submit a revised or additional witness statement or expert report to respond to new (factual) developments that could not have been addressed in a previous witness statement or expert report, respectively (Article 4.6 (b) and Article 5.3 (b) 2020 IBA Rules). This clarification ensures that parties can submit additional evidence, but at the same time limits the scope to matters that could not have been addressed in the previous witness statement or expert report, such as new factual developments or a new allegation by the other party discovered or made after submission of the first witness statement or expert report.

Clarification on authority of tribunal-appointed experts

According to Article 6.3 of the previous IBA Rules, the tribunal-appointed expert had the same authority as the arbitral tribunal to request information or access to documents from a party. This sentence has been deleted in the 2020 IBA Rules to avoid misinterpretations. Only the arbitral tribunal has authority to decide any disputes over information and access to documents between the tribunal-appointed expert and a party.

Remote evidentiary hearings

Due to technological progress – accelerated by the Covid-19 pandemic – remote evidentiary hearings have become a reality for many arbitration practitioners. The 2020 IBA Rules now expressly include the option to conduct an evidentiary hearing remotely. A hearing is remote if it is conducted "using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate" (Definitions, 2020 IBA Rules). It is possible that "the entire hearing or parts thereof" are conducted remotely "or only with respect to certain participants" (Definitions, 2020 IBA Rules).

According to Article 8.2 2020 IBA Rules, an arbitral tribunal can order a remote evidentiary hearing either at the request of a party or at its own motion. Article 8.2 requires the arbitral tribunal to consult with the parties before ordering a remote hearing, but does not require the parties' consent. This implies that under the 2020 IBA Rules, the arbitral tribunal may order a remote hearing even if a party disagrees.

In case of a remote hearing, the arbitral tribunal shall consult with the parties and prepare a remote hearing protocol "to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions" (Article 8.2 2020 IBA Rules). Such protocol may address the following issues: (i) the technology to be used; (ii) advance testing of the technology or training in use of the technology; (iii) starting and ending times in particular considering the time zones in which participants will be located; (iv) how documents may be placed before a witness or the arbitral tribunal; and (v) measures to ensure that witnesses giving oral testimony are not improperly influenced and distracted. These issues reflect the challenges that come with remote hearings and should to be addressed at an early stage.

Furthermore, relating to hearings in general, some uncertainty existed under the previous rules as to whether a party that presented a witness can still call the witness to give evidence at the hearing if the other party waived its right to cross-examination. Article 8.5 2020 IBA Rules makes clear that the arbitral tribunal "may nevertheless permit further oral testimony" in such circumstances.

Exclusion of illegally obtained evidence

Article 9.3 2020 IBA Rules now gives the arbitral tribunal the express authority to exclude, at the request of a party or on its own motion, evidence obtained illegally. The 2020 IBA Rules refrain from specifying the meaning of "evidence obtained illegally". The arbitral tribunal must determine based on the applicable law and the specific circumstances of the case whether the evidence was illegally obtained.

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No legal or tax advice

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