

Global Arbitration Review

The Guide to Evidence in International Arbitration

Editors

Amy C Kläsener, Martin Magál and Joseph E Neuhaus

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Publisher's Note

Global Arbitration Review is delighted to publish *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; reviews; conferences with a bit of flair; and time-saving workflow tools. Do visit www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we often become aware of gaps in the literature. Recently, evidence emerged as one, not because there are no other books about it, just none that bridge the law and practice in a modern way. Indeed, few topics command as much attention as evidence and its related topics during our GAR Live sessions.

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 certain situations. Along the way it offers various proposals for improvements to the status quo.

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, and 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 citation manual (*Universal Citation in International Arbitration (UCIA)*). These will soon be joined by a volume on investment treaty arbitration.

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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7

Evidentiary Objections

Cinzia Catelli and Romana Brueggemann¹

As in state court proceedings, the success of a claim in arbitration proceedings will hinge on the parties' ability to corroborate their claims and allegations with evidence. Generally, the parties involved in an international arbitration are free to submit any evidence they deem fit to prove the relevant facts. The opposing party has the option of providing its own favourable evidence, or it may attempt to weaken the other party's evidence.

Although one option may be to attack the veracity or weight of the opposing party's evidence, another possibility may be to call into question its admissibility by way of evidentiary objections. It then falls within the power of the tribunal to evaluate the evidence,² including its admissibility.³ The rules of admissibility of evidence can be applied to all forms of evidence alike (e.g., documents, witness evidence, expert evidence).⁴

1 Cinzia Catelli is a partner and Romana Brueggemann is an associate at Bär & Karrer Ltd. The authors wish to thank Anastasia Monighetti, junior associate at the authors' firm, for her research assistance and critical review of this chapter.

2 Robert F Pietrowski, 'Evidence in International Arbitration' in William W Park (ed), *Arbitration International*, Vol. 22, Issue 3, 373 (Oxford University Press, 2006).

3 Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, para. 1319 (3rd ed., Stämpfli Verlag AG, 2015).

4 See Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, para. 6.142 and paras. 6.127 to 6.128 (6th ed., Oxford University Press, 2015); see also Roman Mikhailovich Khodykin, Carol Mulcahy and Nicholas Fletcher, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, para. 12.65 (Oxford University Press, 2019); Berger and Kellerhals, *op.cit.*, at para. 1319.

In view of the cross-border nature of international arbitration, the parties and tribunals may have different expectations for rules of evidence and admissibility. As one author notes: ‘The expectations of parties from different legal systems are never so likely to conflict as with questions of evidence.’⁵

This chapter examines these objections to the admissibility of evidence. After addressing the legal sources for evidentiary objections found in national arbitration laws, institutional rules and soft law, we then analyse key evidentiary objections. The chapter concludes with some remarks on the decisions by the tribunal on admissibility, as well as ensuing issues of annulment or recognition and enforcement of awards made pursuant to such decisions.

Legal sources for evidentiary objections

In keeping with the overriding principle of party autonomy in arbitration, national arbitration laws and institutional rules frequently leave the parties with the freedom to agree on the applicable evidentiary rules, including any issue of the admissibility of evidence.⁶ Examples would be where the parties agree that any statements made within settlement negotiations may not be used against a party in the ensuing proceedings, or where they agree either to exclude expert reports or to have the tribunal decide based on documents only.⁷ An exception may be made where such agreements would run counter to the principle of the equality of arms between the parties or other fundamental pillars of arbitral proceedings, in which case the tribunal may apply a different evidentiary rule than that agreed by the parties.⁸ However, it will exercise caution before doing so, as a violation of agreed procedural rules may leave an award susceptible to recognition and enforcement problems.⁹ In practice, however, the parties will rarely have made agreements on evidentiary objections or the admissibility of evidence in their arbitration agreement and will frequently also not see eye-to-eye on such issues during the arbitral proceedings.

5 David D Caron and Lee M Caplan, *The UNCITRAL Arbitration Rules*, 555 (2nd ed., Oxford University Press, 2013), also quoted by Gary B Born, *International Commercial Arbitration*, 2481 (3rd ed., Kluwer Law International, 2021).

6 English Arbitration Act 1996, Section 34, paras. (1) and (2)(f) (see also Samir A Saleh, ‘Reflections on Admissibility of Evidence: Interrelation between Domestic Law and International Arbitration’ in William W Park (ed), *Arbitration International*, Vol. 15, Issue 2, 153 (Oxford University Press, 1999)); German Code of Civil Procedure, §§ 1042(3) and (4); UNCITRAL Model Law, Article 19; under Swiss arbitration law, see Swiss Federal Act on Private International Law [PILA], Article 182 and Marc D Veit, ‘Part II: Commentary on Chapter 12 PILS, Article 184 [Procedure: taking of evidence]’ (Chapter 2) in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide*, para. 14 (2nd ed., Kluwer Law International, 2018).

7 See Saleh, *op.cit.*, at 143; under Swiss arbitration law: Christian Oetiker, ‘Art. 184 IPRG’ in Markus Müller-Chen and Corinne Widmer Lüchinger (eds), *Zürcher Kommentar zum IPRG*, para. 19 (3rd ed., Schulthess Juristische Medien AG, 2018).

8 Born, *op.cit.*, at 2307. Under English law, if the tribunal is unwilling to comply with an evidentiary rule set up by the parties, they may resign as arbitrators (Robert Merkin, *Arbitration Act 1999, An Annotated Guide*, 58 (Lloyd’s Commercial Law Library, 1996)).

9 See New York Convention, Article V(1)(d).

In the absence of a party agreement on evidentiary rules, national arbitration laws and institutional rules generally afford tribunals considerable discretion in evidentiary matters, including the issue of admissibility.¹⁰ National arbitration laws also rarely contain express rules on the production of documents.¹¹

The International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules), most recently revised in 2020, provide detailed guidelines for an efficient, economical and fair process for the taking of evidence in international arbitration,¹² including detailed guidance on when evidence may be declared inadmissible.¹³ (These grounds to exclude evidence incorporated therein are reviewed in more detail below.) The IBA Rules reflect common practices used in international arbitration that harmonise civil and common law approaches. They are intended to supplement the institutional or ad hoc rules that apply to the conduct of international arbitration. Unless explicitly agreed by the parties, the IBA Rules are not binding on the arbitral tribunal.

In 2018, the Rules on the Efficient Conduct of Proceedings in International Arbitration (known as the Prague Rules) were released with the aim of providing an alternative to the IBA Rules. The drafters of the Prague Rules intended to increase efficiency and reduce costs in arbitral proceedings by encouraging the tribunal and the parties to avoid any form of document production, including any form of e-discovery.¹⁴ The Prague Rules openly adopt an inquisitorial approach that is more in line with the civil law tradition. When document production is provided as an exception, the requested documents must be relevant and material to the outcome of the case, not be in the public domain and must be in the possession of another party or within its power or control.¹⁵ The Prague Rules provide no further guidance on the admissibility of documentary evidence.

Typical objections to the admissibility of documentary evidence

Objections to evidence offered or requested by the opposing party can be of either a procedural nature (such as arguing that the submitting party did not adhere to time limits to file the evidence)¹⁶ or directed at the evidence itself. The latter is discussed further below.

10 English Arbitration Act 1996, Section 34, paras. (1) and (2)(f); German Code of Civil Procedure, § 1042(4); UNCITRAL Model Law, Article 19(2); see also Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration*, para. 647 (2nd ed., Thomson/Schulthess Juristische Medien AG, 2007); Pietrowski, op.cit., at 377; Born, op.cit., at 2317, 2428; Swiss Rules 2021, Article 26(1); UNCITRAL Rules 2013, Article 27(4); LCIA Rules 2020, Article 22.1(vi). According to Article 22(2) of the ICC Rules 2021 and Article 21.3 of the DIS Rules 2018, the tribunal shall, after consulting the parties, adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.

11 For one exception, see English Arbitration Act 1996, Section 34(2)(d).

12 Foreword to the IBA Rules.

13 IBA Rules, Article 9; Poudret/Besson, op.cit., at para. 647.

14 Prague Rules, Article 4.2.

15 *id.*, at Article 4.5.

16 Gabrielle Nater-Bass and Stefanie Pfisterer, 'Part II: Commentary on the Swiss Rules, Article 24 [Evidence and hearings, I]' (Chapter 3) in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, para. 31 (2nd ed., Kluwer Law International, 2018); Berger and Kellerhals, op.cit., at para. 1321; see also Caron and Caplan, op.cit., at 572.

The following sections explore some of the most frequent evidentiary objections. Many of them will relate directly to document production requests as objections raised by the party against whom the request is directed. They also follow from Article 9 of the IBA Rules, which lists substantive objections, although the list is not exclusive.¹⁷

Objections concerning document production requests

Requested document does not exist

Although not specifically mentioned in Article 9(2) of the IBA Rules as a ground to object to document production, the existence of the documents sought is a basic precondition for a tribunal to order their production.¹⁸ The party proclaiming the non-existence of a document should, however, take reasonable efforts to provide evidence to the tribunal to support this assertion, to avoid being subjected to negative inferences for failing to comply with a production order.¹⁹ This requirement also means that the creation of new documents cannot be requested by means of a document production request, since this is limited to existing documents.²⁰

Possession or control of the document, unreasonably burdensome to produce

Under the IBA Rules, a party requesting document production by the opposing party must state that the requested documents are not in its possession, custody or control or that it would be unreasonably burdensome for the requesting party to produce such documents.²¹ In addition, it must explain why it assumes the documents requested are in the possession, custody or control of another party.²² These requirements seek to prevent unnecessary harassment of the opposing party by the requesting party.²³

Accordingly, the opposing party might try to resist the request by arguing that the requesting party has possession, custody or control of the documents, and that it would not be unreasonably burdensome for it to produce the documents. It may also argue that it has no control over the documents. In this context, the question of what is to be understood by 'control' is a frequent subject of arguments that arise with regard to documents held

17 See Tobias Zuberbühler, Dieter Hofmann, Christian Oetiker and Thomas Rohner, *IBA Rules of Evidence: Commentary on the Rules on the Taking of Evidence in International Arbitration*, Article 3, para. 170 (Schulthess Juristische Medien AG, 2012). For certain types of evidence, such as witness evidence, the parties may agree on other additional requirements for their admissibility. For example, against the IBA Rules, which provide that any person may be a witness, including a party's employee (Article 4(2)), the parties may agree that their employees may not serve as witnesses.

18 Hilmar Raeschke-Kessler, 'The Production of Documents in International Arbitration – A Commentary on Article 3 of the New IBA Rules of Evidence' in William W Park (ed), *Arbitration International*, Vol. 18, Issue 4, 422 (Oxford University Press, 2002); Zuberbühler, Hofmann, Oetiker and Rohner, op.cit., at Article 3, para. 124; Khodykin, Mulcahy and Fletcher, op.cit., at para. 12.62.

19 Raeschke-Kessler, op.cit., at 422.

20 Zuberbühler, Hofmann, Oetiker and Rohner, op.cit., at Article 3, para. 127.

21 IBA Rules, Article 3(3)(c)(i).

22 id., at Article 3(3)(c)(ii).

23 'Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration' [Commentary on the 2020 IBA Rules], p. 11; see also Khodykin, Mulcahy and Fletcher, op.cit., at para. 6.148; see also IBA Rules, Article 3(1).

by affiliates or subsidiaries of the requested party.²⁴ In such cases, a party may reason in its objection that its affiliate is an independent legal entity and that it does not have access to or the right to produce copies of such documents held by the affiliate.²⁵ The duty to produce documents under such circumstances is disputed in international arbitration.²⁶ In light of this, the precise structure of the involved entities and the likelihood of the requested party being able to obtain the document sought, as well as the individual facts of the case, will need to be analysed to determine whether a party has sufficient control to produce documents held by a group company.²⁷

Lack of specificity of the request

In international arbitration, there is a general recognition that document production should not lead to broad fishing expeditions. Under the IBA Rules, a party may request only either a specific document or a narrow and specific category of documents.²⁸

The description of an individual document should be sufficiently detailed to identify it and will usually include (1) a reference to the presumed author and the presumed recipient of the document, (2) the presumed date or time frame surrounding the origin of the document, and (3) the presumed content of the document.²⁹ If these requirements are not met, the opposing party may object that the document production request is too broad and therefore not admissible.

As the requesting party, in many cases, will not know the exact details of a specific document, it can frame its request by referring to a category of documents.³⁰ This entails a group of documents relating to the same topic for which the requesting party seeks to obtain evidence.³¹ As per the wording of Article 3(3)(a)(ii) of the IBA Rules, the request must describe the narrow and specific category of the documents sought in sufficient detail, including the subject matter. Even though the terms ‘narrow’ and ‘specific’ are – depending on the legal background of the arbitrators – likely to be interpreted differently, the request should not be drafted too widely, to avoid it being considered a ‘fishing expedition’.³² The description provided by the requesting party must be sufficiently precise to enable the party to whom the document production request is addressed to assess whether documents in its possession fall within the scope of the request.³³

Pursuant to Article 4.5 of the Prague Rules, only specific documents may be requested.

24 Reto Marghitola, *Document Production in International Arbitration*, 66 (Kluwer Law International, 2015);

Khodykin, Mulcahy and Fletcher, *op.cit.*, at paras. 6.173, 6.186.

25 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 6.187.

26 Marghitola, *op.cit.*, at 66; in this context, see also Blackaby, Partasides et al., *op.cit.*, at para. 2.43 et seq. on the ‘group of companies doctrine’; Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 6.190 et seq.

27 Khodykin, Mulcahy and Fletcher, *op.cit.*, at paras. 6.188 to 6.189.

28 IBA Rules, Article 3(3)(a).

29 Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 3, para. 110; Raeschke-Kessler, *op.cit.*, at 418.

30 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 6.56.

31 Raeschke-Kessler, *op.cit.*, at 418; Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 3, para. 112.

32 Switzerland: DSC of 15 March 2021, 4A_438/2020, in which the Court of Arbitration for Sport rejected a request for production of broad categories of ‘any and all documents’. The appeal against the final award for alleged violation of the right to be heard was dismissed.

33 See Khodykin, Mulcahy and Fletcher, *op.cit.*, at paras. 6.56 to 6.61.

Lack of materiality or relevance

Common law-style pretrial discovery is considered unusual in international arbitration.³⁴ The requested party can object to document production if the request – on a prima facie basis – lacks sufficient relevance to the case or is not material to its outcome.³⁵ In this context, a document is deemed to be relevant if it is suited to prove a factual allegation of the requesting party relating to the case at hand or to reject allegations by the other party.³⁶ The requirement of materiality is a separate, additional requirement and provides that the respective document is necessary to arrive at the desired outcome of the case and the factual allegation has not already been proven otherwise.³⁷

There is some discussion around whether the requesting party must carry the burden of proof for the factual allegations to which the document requested is said to relate, especially as such a requirement is not explicitly mentioned in the IBA Rules. Although some authors advocate the application of this requirement for the sake of efficiency,³⁸ others object to this opinion, inter alia by arguing that such an approach might compromise the benchmarks of materiality and relevance and lead to an unequal treatment of the parties.³⁹

Unreasonable burden, loss or destruction of document

The tribunal may exclude evidence if its production may create an unreasonable burden on a party, for example, because of the sheer quantity of the requested documents or when a document is extremely difficult to extract (IBA Rules, Article 9(2)(c)).⁴⁰ The tribunal has considerable flexibility when it comes to a decision as to whether the action necessary to provide the evidence is a reasonable action to be expected of a party or if it represents an unreasonable burden. In this context, among other things, the proportionality of the alleged burden and the likely evidential value of the requested evidence should be considered.⁴¹ The objection of unreasonable burden will arise mostly in connection with document production requests based on Article 3(2) of the IBA Rules.⁴² However, the claim of unreasonable burden can also be relevant to documents already introduced into evidence, for example, when a large volume of documents subsequently loses its significance because of changes in the case under consideration and their inclusion in the hearing bundle would cause unreasonably high costs.⁴³

34 Commentary on IBA Rules on the Taking of Evidence 2020, p. 8.

35 IBA Rules, Articles 3(3)(b) and 9(2)(a); Khodykin, Mulcahy and Fletcher, op.cit., at para. 6.125; Zuberbühler, Hofmann, Oetiker and Rohner, op.cit., at Article 3, para. 141.

36 Zuberbühler, Hofmann, Oetiker and Rohner, op.cit., at Article 3, para. 131; Khodykin, Mulcahy and Fletcher, op.cit., at para. 6.96.

37 Zuberbühler, Hofmann, Oetiker and Rohner, op.cit., at Article 3, para. 136.

38 Zuberbühler, Hofmann, Oetiker and Rohner, op.cit., at Article 3, para. 138 et seq.

39 Khodykin, Mulcahy and Fletcher, op.cit., at para. 6.134 et seq.; Marghitola, op.cit., at 56 et seq.

40 Zuberbühler, Hofmann, Oetiker and Rohner, op.cit., at Article 9, para. 38.

41 Raeschke-Kessler, op.cit., at 429; Khodykin, Mulcahy and Fletcher, op.cit., at paras 12.250, 12.253.

42 Khodykin, Mulcahy and Fletcher, op.cit., at paras. 12.244, 12.248.

43 Khodykin, Mulcahy and Fletcher, op.cit., at para. 12.249.

Based on Article 9.2(d) of the IBA Rules, the tribunal may further reject a document production request if it can be demonstrated with reasonable likelihood that a document is lost or has been destroyed. If it can be shown that a party has deliberately destroyed evidence relevant to the dispute with a view to pending or foreseeable legal proceedings, the tribunal may draw respective adverse inferences.⁴⁴

Legal impediment or privilege

Legal basis

A piece of evidence requested at the document production phase or submitted during the proceedings may be protected by legal privilege, or a party may be prevented from submitting a document by a legal impediment. Except for the rules under the International Centre for Dispute Resolution,⁴⁵ institutional rules do not generally provide any detailed guidelines covering such objections.

According to the IBA Rules,⁴⁶ the arbitral tribunal shall, at the request of a party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection, in whole or in part, for legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable. There are different kinds of privileges that may give rise to an evidentiary objection, such as those arising from national statutes such as medical professional privilege, a reporter's privilege, a priest's privilege or settlement privilege. In the following, we review typical legal impediments and the most common of the privileges, attorney-client privilege. Without-prejudice and settlement privileges are discussed further below.

Legal impediments

Depending on the jurisdiction, there may be many types of different legal impediments that can be relied on as an evidentiary objection. In many jurisdictions, legal impediments include the risk of violating:

- prosecution or blocking statutes, such as where the production of documents would render a party liable to sanctions;⁴⁷
- banking secrecy provisions, such as where the producing party (bank) would be at risk of sanctions if it discloses documents regarding the clients of a bank;⁴⁸ or
- data protection or privacy laws, such as when the producing party, in producing protected private correspondence, would violate data privacy laws.⁴⁹

44 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.270; Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 41.

45 ICDR Rules, Article 25: 'The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.'

46 IBA Rules, Article 9(2)(b).

47 Khodykin, Mulcahy and Fletcher, *op.cit.*, at paras. 12.95 to 12.96.

48 *id.*, at paras. 12.97 to 12.98.

49 *id.*, at paras. 12.99 to 12.101.

Legal privilege

Legal privilege can be defined as the confidentiality of evidence because it stems from or concerns an attorney–client relationship.⁵⁰

Parties from different jurisdictions may have contrasting understandings of legal privilege. For example, whereas work produced by in-house counsel is protected by attorney–client privilege in some jurisdictions (such as the United States), this is not the case in others (such as Austria or Switzerland⁵¹).⁵²

If the parties come from jurisdictions with different degrees of legal privilege, the question will be which of these should apply. By and large, national arbitration laws and institutional rules do not answer this question. How then should the arbitral tribunal determine the rules governing legal privilege for a piece of evidence?

It is widely accepted that the parties are free to agree on the applicable legal privilege.⁵³ In the absence of such a choice, authorities generally take several factors into consideration to arrive at a suitable solution.

First, they consider that the tribunal should aim at doing justice. In principle, therefore, the tribunal would wish to see the privileged documents, to establish the best idea of the truth.⁵⁴ However, they also note that there is a clear need for clients to trust their attorneys and for the attorneys to be able to communicate freely with their clients, which entails that any communication between the two be given a special status, which is also reflected in Article 9(4), paragraphs (a) and (c) of the IBA Rules.⁵⁵ They note further that there is no consensus internationally as to whether the issue of legal privilege should be treated as an issue of substantive law (mostly common law jurisdictions) or as a procedural issue (civil law jurisdictions).⁵⁶ When a certain substantial nature of the privilege is accepted, they argue that the tribunal is not free to determine the applicable rule, but should determine the appropriate substantive law according to a choice-of-law analysis.⁵⁷

50 According to Fabian von Schlabrendorff and Audley Sheppard, 'Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution' in Gerald Aksent, Karl-Heinz Böckstiegel, et al. (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Bringer*, 744 (ICC Publishing, 2005), it refers 'to the entitlement of a lawyer or party to litigation/arbitration to withhold a document or other evidence because of the special position of the lawyer'.

51 Although this will probably change with the amendment of the Swiss Civil Procedure Code, which is currently under revision (see draft Swiss Civil Procedure Code, revised Art. 160a; see Swiss Federal Gazette, BBl 2020, 2785, 2789).

52 Berger and Kellerhals, op.cit., at para. 1330, footnote 43; on this matter, see also Gabrielle Kaufmann-Kohler and Philippe Bärtsch, 'Discovery in international arbitration: How much is too much?' in Jörg Risse, Guenter Pickrahn, et al. (eds), *SchiedsVZ*, Vol. 2, Issue 1, 20 (Kluwer Law International/Verlag CH Beck OHG, 2004).

53 B F Meyer-Hauser and Philipp Sieber, 'Attorney Secrecy v Attorney–Client Privilege in International Commercial Arbitration' in Stavros Brekoulakis (ed), *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management (CI Arb)*, Vol. 73, Issue 2, 183 (Kluwer Law International, 2007); Khodykin, Mulcahy and Fletcher, op.cit., at para. 12.104.

54 Von Schlabrendorff and Sheppard, op.cit., at 763.

55 id.; Khodykin, Mulcahy and Fletcher, op.cit., at para. 12.145.

56 Zuberbühler, Hofmann, Oetiker and Rohner, op.cit., at Article 9 para. 29; von Schlabrendorff and Sheppard, op.cit., at 764.

57 Von Schlabrendorff and Sheppard, op.cit., at 765.

Authorities also consider that the tribunal should take the parties' legitimate expectations into account with respect to privileges, since they rely on them in their communication. The parties' expectations are most likely to be that the applicable law relating to the question of legal privileges is predictable for them.⁵⁸ In addition, the parties, by agreeing to an arbitration agreement, do not expect to have waived their legal privilege rights.⁵⁹

The parties also have a fundamental right to be treated equally (known as equality of arms).⁶⁰ Finally, the award rendered pursuant to the treatment of legal privilege should be enforceable. In some countries, aspects of legal privilege may be considered protected by public policy, which may prevent the enforcement of the award according to the New York Convention.⁶¹

In consideration of the above, scholars propose to first determine the applicable law for the question of privilege with a conflict-of-law approach and then to adjust the result considering the equality of arms principle.

To determine the applicable law, several approaches may come into question. There is no conflict-of-law rule that would pinpoint the applicable law to govern the issue in international arbitration.⁶² Tribunals could therefore turn to the procedural law at the seat of the arbitration, the substantive law applicable to the merits of the case, the law of the place of residence of an attorney or a party, or the law where the documents are stored, to name a few.⁶³

The applicable law is usually determined by applying a closest connection test.⁶⁴ The law that has the closest connection to the attorney–client relationship⁶⁵ would primarily mean the law of the country where the attorney–client relationship took place. If the attorney and the client live in different countries, it may be the law that corresponds to the client's expectations, which may be the law of its place of business.⁶⁶ Alternatively, the most reasonable applicable law may be the law of the attorney's domicile, so that the privilege applicable to the client is equivalent to that of the attorney.⁶⁷

In principle, the closest connection test could result in different legal privileges applying to different parties, such as when the party's attorneys are domiciled in different countries. Applying different degrees of legal privilege to different parties would violate their right to equal arms. The requesting party should be able to request a document from the opposing party only if it would be obliged itself to produce the same type of document.⁶⁸ To treat the parties fairly, and as a pragmatic solution, legal experts propose the most-favoured privilege

58 Von Schlabrendorff and Sheppard, *op.cit.*, at 766.

59 Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 20; von Schlabrendorff and Sheppard, *op.cit.*, at 765; Meyer–Hauser and Sieber, *op.cit.*, at 182.

60 IBA Rules, Article 9(4)(e); von Schlabrendorff and Sheppard, *op.cit.*, at 766.

61 Von Schlabrendorff and Sheppard, *op.cit.*, at 767.

62 Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 19.

63 Meyer–Hauser and Sieber, *op.cit.*, at 182; Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 28.

64 Meyer–Hauser and Sieber, *op.cit.*, at 180, 184 et seq.

65 Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 29.

66 *id.*

67 Von Schlabrendorff and Sheppard, *op.cit.*, at 771.

68 Raesche–Kessler, *op.cit.*, at 429.

rule, which means that the rule by which the legal privilege is the strongest will be the rule applied to all parties.⁶⁹ The solution is thus to ‘give the parties what they demand and even out inequalities’.⁷⁰ This approach is sometimes criticised as hindering the search for evidence and perhaps even leading to a ‘super privilege’.⁷¹

Commercial or technical confidentiality

A company’s internal documents may be subject to document production in international arbitration. However, in some cases, the need to preserve commercial and technical confidentiality may allow the exclusion of certain documents from production.⁷² If a party shows compelling grounds of commercial or technical confidentiality, the arbitral tribunal may exclude or limit the scope of a document production request (IBA Rules, Article 9(2)(e)). Data privacy laws may also necessitate such confidentiality.⁷³

Confidentiality concerns may arise, for example, in connection with business secrets, know-how, intellectual property rights or internal records,⁷⁴ especially when the parties are competitors or if a party has indicated by its previous behaviour that it might disclose confidential information to third parties.⁷⁵

The documents in question may also be subject to a third-party confidentiality agreement. Generally, the arbitral tribunal will be reluctant to require a party to breach an agreement with a third party if it can be avoided. An exception, however, concerns situations in which the respective confidentiality agreement was concluded in bad faith.⁷⁶ In practice, the arbitral tribunal may encourage the parties to ask the third party for consent to produce the document in the arbitration.⁷⁷

The IBA Rules make no reference to national laws in connection with technical and commercial confidentiality, leaving it to the discretion of the tribunal to determine whether the threat to confidentiality is sufficiently severe that it determines it to be ‘compelling’ enough to exclude evidence.⁷⁸

The complete exclusion of evidence is the exception rather than the rule, and may be justified if the confidential information has a high economic value and its production is likely to cause significant damage to the party holding the document.⁷⁹ More often than not, the tribunal may also take confidentiality issues into account by ordering protective measures in accordance with Article 9(5) of the IBA Rules, such that – for example – only an excerpt will have to be produced, or the parties have to sign confidentiality

69 See von Schlabrendorff and Sheppard, *op.cit.*, at 771 to 774; Veit, *op.cit.*, at para. 16; Meyer-Hauser and Sieber, *op.cit.*, at 182, 186; Klaus Peter Berger, ‘Evidentiary Privileges: Best Practice Standards versus/and Arbitral Discretion’ in Markus Wirth (ed), *ASA Special Series No. 26*, 36 to 37 (Association Suisse de l’Arbitrage, 2006).

70 Meyer-Hauser and Sieber, *op.cit.*, at 188.

71 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.119.

72 Commentary on the 2020 IBA Rules, p. 29; Marghitola, *op.cit.*, at 92.

73 Commentary on the 2020 IBA Rules, p. 29.

74 Nater-Bass and Pfisterer, *op.cit.*, at para. 56.

75 Commentary on the 2020 IBA Rules, p. 29; Marghitola, *op.cit.*, at 91.

76 Khodykin, Mulcahy and Fletcher, *op.cit.*, at paras 12.285 et seqq.; Marghitola, *op.cit.*, at 94.

77 Marghitola, *op.cit.*, at 94.

78 Commentary on the 2020 IBA Rules, p. 30; Marghitola, *op.cit.*, at 91.

79 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.281; Marghitola, *op.cit.*, at 93.

agreements.⁸⁰ Further possible measures might be an order by the tribunal prohibiting any disclosure to a third party or allowing a party to make redactions,⁸¹ the appointment of an independent and impartial expert to review the documents in the context of Article 3(8) of the IBA Rules, or the documents being produced to the parties' counsel only, with the direction that the parties themselves may not review the documents.⁸²

Special political or institutional sensitivity

Although Article 9(2)(e) of the IBA Rules covers secrets of a contractual, commercial or technical nature, Article 9(2)(f) was introduced to allow the same privacy for politically sensitive evidence. The provision protects political interests of governments as well as sensitive information about international institutions such as the United Nations, the World Bank or the International Monetary Fund. Relevant documents may relate to new government policies, military strategies, encryption algorithms or information from national banks, to name a few.⁸³ This objection may be of particular relevance in the context of arbitrations under the International Centre for Settlement of Investment Disputes.⁸⁴

If the tribunal finds the grounds of special political or institutional sensitivity to be compelling, it can exclude the concerned documents from production – otherwise it may apply the same protective measures as in the case of Article 9(2)(e) of the IBA Rules.

Considerations of procedural economy, proportionality, fairness or equality

Article 9(2)(g) of the IBA Rules is a catch-all clause by which a tribunal has the ability to consider all further circumstances, which may lead to the exclusion of evidence in the light of procedural economy, proportionality, fairness and equality in the case.⁸⁵

The aim of the principles of procedural economy and proportionality is to ensure an efficient and economic procedure, taking into consideration the value and complexity of the matter at hand.⁸⁶

Without prejudice or settlement privilege

According to Article 9.4(b) of the IBA Rules, in considering issues of legal impediment or privilege under Article 9.2(b), and insofar as is permitted by any mandatory legal or ethical rules that are determined by it to be applicable, an arbitral tribunal may take into account any need to protect the confidentiality of a document created, or statement or oral communication made, in connection with settlement negotiations.

⁸⁰ Nater-Bass and Pfisterer, *op.cit.*, at para. 56.

⁸¹ For example, if minutes of a board meeting contain confidential material on different topics, whereby only one is relevant for the case at hand, material concerning other topics can be redacted; see Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.336.

⁸² Commentary on the 2020 IBA Rules, p. 30.

⁸³ Raeschke-Kessler, *op.cit.*, at 429; Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 46; Khodykin, Mulcahy and Fletcher, *op.cit.*, at paras. 12.295, 12.301, 12.303.

⁸⁴ Jessica O Ireton, 'The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence' in Meg Kinnear and Campbell McLachlan (eds), *ICSID Review – Foreign Investment Law Journal*, Vol. 30, Issue 1, 233 et seq. (Oxford University Press, 2015).

⁸⁵ Commentary on IBA Rules on the Taking of Evidence 2020, p. 30.

⁸⁶ Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.310; Marghitola, *op.cit.*, at 111.

This ‘settlement privilege’, also referred to as the ‘without prejudice’ privilege, affords protection to disputing parties in connection with their efforts to negotiate a settlement of their differences.⁸⁷ Furthermore, it is a frequent view that this type of privilege also extends to mediation.⁸⁸

In this context, admissions or implicit acknowledgements made by a party to reach an amicable resolution shall not be exploited by the opposing party or allowed to influence the tribunal’s view.⁸⁹ The broad wording of this is also meant to encompass internal communications in preparation for the negotiation.⁹⁰ Disputes might arise as to the distinction between settlement communications and regular business communication.⁹¹

When considering the need to protect confidentiality, the tribunal would need, *inter alia*, to take into account the parties’ expectations with regard to a privileged treatment of the concerned documents in the sense of Article 9.4(c) of the IBA Rules.⁹² However, against this background, a party may not abuse this privilege, such as by introducing a document into the settlement negotiations specifically for the purpose of profiting from the settlement privilege.⁹³

Evidence obtained illegally

In general, there is no accepted prevailing practice or one-size-fits-all rule when evidence obtained illegally must be deemed inadmissible in arbitration.⁹⁴ Instead, it is accepted that arbitral tribunals have substantial discretion in their decision to admit evidence even when the evidence has been obtained illegally.⁹⁵ Article 9(3) of the IBA Rules, which deals with evidence obtained illegally, was introduced in 2020.⁹⁶ Previously, this objection was derived from the principle of good faith.⁹⁷

An arbitral tribunal might find that the interest in using this evidence to establish the truth outweighs the interest that has been violated in obtaining the evidence.⁹⁸ This might be the case, for example, if a conversation had been taped without the knowledge of one of

87 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.139.

88 Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 32.

89 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.175.

90 Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 32.

91 Pietrowski, *op.cit.*, at 404.

92 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.184.

93 Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, at Article 9, para. 32.

94 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.27; Commentary on the 2020 IBA Rules, p. 30.

95 Cherie Blair and Ema Vidak-Gojkovic, ‘WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence’ in Meg Kinnear and Campbell McLachlan (eds), *ICSID Review – Foreign Investment Law Journal*, Vol. 13, 235 (Oxford University Press, 2018).

96 Commentary on the 2020 IBA Rules, p. 30. The discretion of the arbitral tribunal is stressed by use of the word ‘may’ in Article 9.3 of the IBA Rules in contrast to Article 9.2, which states the tribunal ‘shall’ exclude evidence.

97 Veit, *op.cit.*, at para. 18; Berger and Kellerhals, *op.cit.*, at para. 1320.

98 Berger and Kellerhals, *op.cit.*, at para. 1320; Switzerland: DSC of 27 March 2014, 4A_448/2013 cons. 3.2.2, in which a challenge for a violation of *ordre public* (PILA, Article 190(2)(e)) was dismissed because of illegally obtained evidence; Michael E Schneider and Matthias Scherer, ‘Art. 184 IPRG’ in Pascal Grolimund, Leander Loacker and Anton Schnyder (eds), *Basler Kommentar Internationales Privatrecht*, paras. 15 to 16 (4th ed., Helbing Lichtenhahn Verlag, 2020).

the persons involved.⁹⁹ When exercising its discretion, the arbitral tribunal should account for the specific circumstances, such as whether one of the parties was involved in the criminal act surrounding the evidence, the degree of clarity and the severity of the illegal act, its nature and whether other corroborating evidence (obtained legally) is available.¹⁰⁰ If a third-party hack led to the information entering the public domain, a tribunal may be more inclined to allow the information since none of the parties was involved in the illegal act, although it may wish to consider whether this is unfair to the party from whom the documents were stolen.¹⁰¹

Tribunal decisions on the admissibility of evidence

A tribunal may decide on the admissibility of evidence when confronted with a request relating to evidence, such as a document production request, or when a party makes a request to strike out evidence that is already on the record.¹⁰² Decisions on the taking of evidence, such as requests for the disclosure of documents,¹⁰³ are qualified as procedural orders, against which – at least in most jurisdictions (including Switzerland) – it is not possible to file an appeal.¹⁰⁴ The reasoning for the decision of the arbitral tribunal on evidential objections is mostly kept concise.¹⁰⁵

If a party feels the tribunal violated its right to be heard by rejecting a document production request, or by any other decision on the taking of evidence, it is well advised to reserve its rights explicitly to challenge an ensuing award, to avoid being deemed to have waived its objection.¹⁰⁶

The assessment of evidence by a tribunal may be challenged with an appeal against the ensuing award on the basis of a violation of the right to be heard if the arbitral tribunal did not take into account or assess an aspect relevant to the decision, in particular if a party

99 In the underlying case of DSC of 27 March 2014, 4A_448/2013 cons. 3.2.2, the Arbitral Tribunal for Sport held that an audiotape was inadmissible evidence because of lack of consent in the recording of the tape. Another videotape was deemed admissible since the party who was not aware of being taped relied on this evidence in the proceedings.

100 Commentary on IBA Rules on the Taking of Evidence 2020, pp. 30 to 31; Blair and Vidak-Gojkovic, *op.cit.*, at 256.

101 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.28; Blair and Vidak-Gojkovic, *op.cit.*, at 256.

102 Khodykin, Mulcahy and Fletcher, *op.cit.*, at para. 12.70 et seq.

103 Raeschke-Kessler, *op.cit.*, at 423; see Zuberbühler, Hofmann, Oetiker and Rohner, *op.cit.*, Article 3, para. 183.

104 DSC of 15 April 2013, 4A_596/2012 cons. 3.3 and 3.5.

105 If the parties used a Redfern schedule for the document production requests, the arbitral tribunal will provide its reasoning in the appropriate column of the table.

106 In Switzerland, see PILA, Article 182(4); see also DSC of 15 March 2021, 4A_438/2020 cons. 4.2, in which a tribunal rejected broad document production requests on the grounds that they amounted to a fishing expedition. When the president of an arbitral tribunal sitting in Switzerland asks at the end of the hearing whether the parties have any objections to the manner in which the proceedings were conducted, a party is well advised to state that it upholds any evidentiary objection already on record.

can show that this violated the procedural rules agreed by the parties.¹⁰⁷ However, a mere incorrect assessment of evidence is generally not deemed to be a violation of the right to be heard, or of *ordre public*.¹⁰⁸

To minimise the risk of the award being challenged for a violation of the right to be heard, arbitral tribunals tend to consider defects of the evidence in a pragmatic way when determining the credibility and value of the evidence, rather than declaring evidence inadmissible according to technical rules.¹⁰⁹

If a tribunal has violated a party's right to be heard, or procedural rules determined by the parties in taking decisions on the admissibility of evidence, the award may be denied recognition and enforcement based on Articles V(1)(b) and (d) of the New York Convention. According to legal doctrine, under Article V(1)(d) of the Convention, the enforcement of the award may be refused if the application of the IBA Rules or another set of procedural rules was not merely adopted as 'guiding principles' by the tribunal, but explicitly agreed by the parties and the tribunal has disregarded them.¹¹⁰

Summary

In the absence of an agreement between the parties, the rules governing the taking of evidence are determined, under most *lex arbitri*, by the arbitral tribunal itself. The discretion of the arbitral tribunal in dealing with evidentiary objections to documentary evidence is limited by the parties' right to equal treatment and their right to be heard.

The IBA Rules and the Prague Rules provide predefined guidelines that may be useful to the arbitral tribunal when dealing with issues concerning document production and the admissibility of evidence. They are binding only when expressly agreed by the parties. In practice, the party resisting a document request will frequently try to argue that the document does not meet the materiality and relevance requirement or that the request is too broad and amounts to a fishing expedition, although there are a number of other possible evidentiary objections. The requirement of specificity of the request is stricter under the Prague Rules, as they only allow requests for production of a specific document (see Article 4.5) rather than for specific documents and narrow, specific categories of documents.

Generally, when faced with objections pertaining to the admissibility of evidence, arbitral tribunals favour a pragmatic approach, rather than declaring evidence inadmissible according to technical rules.

107 In Switzerland, only a violation of public policy, the right to be heard or the right to equal treatment would constitute a ground to challenge the award (PILA, Article 190(2), paras. (d) and (e)). However, this is different under other arbitration laws. Under English arbitration law, for example, the failure of the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties may already make the award open for challenge (English Arbitration Act 1996, Section 68(2)(c)).

108 Oetiker, op.cit., at para. 26; Laurence W Craig, William W Park and Jan Paulsson, *International Chamber of Commerce Arbitration*, 421 (3rd ed., Oxford University Press, 2000).

109 Born, op.cit., at 2485; Blackaby, Partasides et al., op.cit., at para. 6.81; Khodykin, Mulcahy and Fletcher, op.cit., at para. 12.22. Nater-Bass and Pfisterer, op.cit., at paras. 32 and 34; see also Caron and Caplan, op.cit., at 573.

Also called admitting evidence 'for whatever it may be worth', see Craig, Park and Paulsson, op.cit., at 417.

110 Poudret and Besson, op.cit., at para. 647.

Appendix 1

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