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
September 2023

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 7

Evidentiary Objections

Cinzia Catelli and Romana Weinöhrl-Brüggemann[1]

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]

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

2 Robert F Pietrowski, 'Evidence in International Arbitration', *Arbitration International* (2006), Vol. 22, Issue 3, 373.

3 Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, paragraph 1319 (4th edition, Stämpfli Verlag, 2021).

4 See Nigel Blackaby, Constantine Partasides, et al., *Redfern and Hunter on International Arbitration*, paragraphs 6.149 and 6.132 to 6.133 (7th edition, Oxford University Press, 2023); see also Roman Mikhailovich Khodykin, Carol Mulcahy and Nicholas Fletcher, *A Guide to the IBA Rules on the Taking of Evidence in International Arbitration*, paragraph 12.65 (Oxford University Press, 2019); Berger and Kellerhals, op. cit., at paragraph 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

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

6 English Arbitration Act 1996, Section 34, paragraphs (1) and (2)(f) (see also Samir A Saleh, 'Reflections on Admissibility of Evidence: Interrelation between Domestic Law and International Arbitration', *Arbitration International* (1999), Vol. 15, Issue 2, 153); 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 PILA, Article 184 (Procedure: taking of evidence)', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, paragraph 14 (2nd edition, 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*, paragraph 19 (3rd edition, Schulthess Juristische Medien, 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 1996, An Annotated Guide*, 58 (Lloyd's Commercial Law Library, 1996)).

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.

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

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

10 English Arbitration Act 1996, Section 34, paragraphs (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*, paragraph 647 (2nd edition, Thomson/Schulthess Juristische Medien, 2007); Pietrowski, op. cit., at 377; Born, op. cit., at 2317, 2428; Swiss Rules 2021, Article 26(1); UNCITRAL Rules 2021, 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 German Arbitration Institute 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 and Besson, op. cit., at paragraph 647.

14 Prague Rules, Article 4.2.

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.

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

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]', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, paragraph 31 (2nd edition, Kluwer Law International, 2018); Berger and Kellerhals, op. cit., at paragraph 1321; see also Caron and Caplan, op. cit., at 572.

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, paragraph 166 (2nd edition, Schulthess Juristische Medien, 2022). 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', *Arbitration International* (2002), Vol. 18, Issue 4, 422; Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 3, paragraph 116; Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.62.

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 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

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

20 Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 3, paragraph 116.

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 paragraph 6.148; see also IBA Rules, Article 3(1).

24 Reto Marghitola, *Document Production in International Arbitration*, 66 (Kluwer Law International, 2015); Khodykin, Mulcahy and Fletcher, op. cit., at paragraphs 6.173, 6.186.

25 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 6.187.

26 Marghitola, op. cit., at 66; in this context, see also Blackaby, Partasides et al., op. cit., at paragraph 2.47 et seq. on the 'group of companies doctrine'; Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 6.190 et seq.

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]

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

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

29 Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 3, paragraph 101; Raeschke-Kessler, op. cit., at 418.

30 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 6.56.

31 Raeschke-Kessler, op. cit., at 418; Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 3, paragraph 104.

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 paragraphs 6.56 to 6.61.

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

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]

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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 paragraph 6.125; Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 3, paragraph 136.

36 Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 3, paragraph 123; Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 6.96.

37 Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 3, paragraph 128.

38 Yves Derains, 'Towards Greater Efficiency in Document Production before Arbitral Tribunals – A Continental Viewpoint', *ICC Bull 2006 Special Supplement*, p. 87; 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*, at Article 3, paragraph 138 et seq. (1st edition, Schulthess Juristische Medien, 2012). In the second edition of this Commentary the authors suggest that while a party does not necessarily need to carry the burden of proof for an issue to succeed with a corresponding request, there must at least be specific factual allegations by the requesting party that that party intends to prove with the requested documents (Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 3, paragraph 133).

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

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.[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]

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]

40 IBA Rules, Article 9(2)(c); Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 9, paragraph 39.

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

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

43 id., at paragraph 12.249.

44 id., at paragraph 12.270; Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 9, paragraph 43.

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, the 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]

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45 International Centre for Dispute Resolution 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 paragraphs 12.95 to 12.96.

48 id., at paragraphs 12.97 to 12.98.

49 id., at paragraphs 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 Switzerland[51]).[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

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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 Aksen, 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 note that this will change with the amendment of the Swiss Civil Procedure Code (see draft Swiss Civil Procedure Code, revised Article 167a; see Swiss Federal Gazette, BBl 2023 786).

52 Berger and Kellerhals, op. cit., at paragraph 1330, footnote 47; on this matter, see also Gabrielle Kaufmann-Kohler and Philippe Bärtsch, 'Discovery in international arbitration: How much is too much?' *SchiedsVZ* (2004), Vol. 2, Issue 1, 20.

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

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

55 ibid.; Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.145.

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]

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]

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

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

58 id., at 766.

59 Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 9, paragraph 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, paragraph 19.

63 Meyer-Hauser and Sieber, op. cit., at 182; Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 9, paragraph 28.

The applicable law is usually determined by applying a closest connection test.[64] The law that has the closest connection to the attorney–client relationship[65] 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 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

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

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

66 ibid.

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

68 Raeschke-Kessler, op. cit., at 429.

69 See von Schlabrendorff and Sheppard, op. cit., at 771 to 774; Veit, op. cit., at paragraph 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 paragraph 12.119.

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.[73] Data privacy laws may also necessitate such confidentiality.[74]

Confidentiality concerns may arise, for example, in connection with business secrets, know-how, intellectual property rights or internal records,[75] 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.[76]

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.[77] In practice, the arbitral tribunal may encourage the parties to ask the third party for consent to produce the document in the arbitration.[78]

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.[79]

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.[80] 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 agreements.[81] Further possible measures might be an order by the tribunal prohibiting any disclosure to a third party or

72 Commentary on the 2020 IBA Rules, p. 29; Marghitola, op. cit., at 92.
73 IBA Rules, Article 9(2)(e).
74 Commentary on the 2020 IBA Rules, p. 29.
75 Nater-Bass and Pfisterer, op. cit., at paragraph 56.
76 Commentary on the 2020 IBA Rules, p. 29; Marghitola, op. cit., at 91.
77 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.285 et seq.; Marghitola, op. cit., at 94.
78 Marghitola, op. cit., at 94.
79 Commentary on the 2020 IBA Rules, p. 30; Marghitola, op. cit., at 91.
80 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.281; Marghitola, op. cit., at 93.
81 Nater-Bass and Pfisterer, op. cit., at paragraph 56.

allowing a party to make redactions,[82] 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.[83]

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.[84] This objection may be of particular relevance in the context of arbitrations under the International Centre for Settlement of Investment Disputes.[85]

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.[86]

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82 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 paragraph 12.336.

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

84 Raeschke-Kessler, op. cit., at 429; Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 9, paragraph 48; Khodykin, Mulcahy and Fletcher, op. cit., at paragraphs 12.295, 12.301, 12.303.

85 Jessica O Ireton, 'The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence', *ICSID Review – Foreign Investment Law Journa*l (2015), Vol. 30, Issue 1, 233 et seq.

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

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.[87]

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.

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.[88] Furthermore, it is a frequent view that this type of privilege also extends to mediation.[89]

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.[90] The broad wording of this is also meant to encompass internal communications in preparation for the negotiation.[91] Disputes might arise as to the distinction between settlement communications and regular business communication.[92]

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.[93] 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.[94]

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87 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.310; Marghitola, op. cit., at 111.
88 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.139.
89 Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 9, paragraph 33.
90 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.175.
91 Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 9, paragraph 33.
92 Pietrowski, op. cit., at 404.
93 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.184.
94 Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., at Article 9, paragraph 33.

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.[95] Instead, it is accepted that arbitral tribunals have substantial discretion in their decision to admit evidence even when the evidence has been obtained illegally.[96] Article 9(3) of the IBA Rules, which deals with evidence obtained illegally, was introduced in 2020.[97] Previously, this objection was derived from the principle of good faith.[98]

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.[99] This might be the case, for example, if a conversation had been taped without the knowledge of one of the persons involved.[100] 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.[101] If a third-party hack led to the information entering the public domain, a tribunal may be

95 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.27; Commentary on the 2020 IBA Rules, p. 30.

96 Cherie Blair and Ema Vidak-Gojkovic, 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence', *ICSID Review – Foreign Investment Law Journal* (2018), Vol. 13, 235.

97 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.

98 Veit, op. cit., at paragraph 18; Berger and Kellerhals, op. cit., at paragraph 1320.

99 Berger and Kellerhals, op. cit., at paragraph 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*, paragraphs 15 to 16 (4th edition, Helbing Lichtenhahn Verlag, 2020).

100 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.

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

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.[102]

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.[103] Decisions on the taking of evidence, such as requests for the disclosure of documents,[104] are qualified as procedural orders, against which – at least in most jurisdictions (including Switzerland) – it is not possible to file an appeal.[105] The reasoning for the decision of the arbitral tribunal on evidential objections is mostly kept concise.[106]

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.[107]

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

102 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.28; Blair and Vidak-Gojkovic, op. cit., at 256.

103 Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.70 et seq.

104 Raeschke-Kessler, op. cit., at 423; see Zuberbühler, Hofmann, Oetiker and Rohner, op. cit., Article 3, paragraph 181.

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

106 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.

107 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.

the decision, in particular if a party can show that this violated the procedural rules agreed by the parties.[108] 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*.[109]

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.[110]

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 Article 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.[111]

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

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108 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), paragraphs (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)).

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

110 Born, op. cit., at 2485; Blackaby, Partasides et al., op. cit., at paragraph 6.80; Khodykin, Mulcahy and Fletcher, op. cit., at paragraph 12.22. Nater-Bass and Pfisterer, op. cit., at paragraphs 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.

111 Poudret and Besson, op. cit., at paragraph 647.

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[112] 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.

112 See Article 4.5.

Released to coincide with the new IBA rules on evidence, *The Guide to Evidence in International Arbitration* steers a course through what can otherwise be one of the most divisive topics in international arbitration.

The Guide to Evidence in International Arbitration fills a gap in the literature by bringing together law and practice and providing a holistic view of the issues surrounding evidence in international arbitration, from strategic, cultural and ethical questions to what to do in certain settings. Along the way it offers various proposals for improvements to the received approach.

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