

RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION

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The very basic rules of evidence are those principles providing the definition of due process generally in international arbitration, which includes a party's right to equal treatment and an opportunity to be heard¹. These rules have a direct connection to the administration of evidence. It is clear that a party who is not afforded a fair opportunity to present its evidence will not have been afforded due process.

Arbitration is increasingly the preferred dispute resolution route in international commercial contracts. Amongst other benefits, arbitration provides the privacy that commercial parties often seek when resolving disputes and, whereas difficulties may be encountered when attempting to enforce national court judgments in other jurisdictions.

Subject to the principle that arbitrations should be conducted in orderly and efficient manner that ensures equal treatment of the parties, the parties to an international arbitration are generally free to submit any evidence they wish in order to prove the facts necessary to establish their respective cases. However, it is at the discretion of the Arbitral Tribunal as to the evaluation of the evidence submitted and the weight to be attached to it.²

The purpose of evidence in proceedings before international tribunal is to assist the tribunal in determining the truth as to the disputed issues of fact. The framework for the arbitral process is provided by three basic rules: -

- The agreement to arbitrate between the parties;
- The institutional rules, if any, selected by the parties;
- The arbitration laws of the jurisdiction in which the arbitration is seated

¹ Nathan O'Malley; Rules of Evidence in International Arbitration: An Annotated Guide, Informa Law 2012, pg 5

² *Asian Agricultural Products Ltd v The Republic of Sri Lanka*, ICSID Case No. ARB/87/3 Final Award, in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration*, vol. XVII, pg 122 (1992): "International tribunals are not bound to adhere to strict judicial rules of evidence. As a general principle the probative force of the evidence presented is for the Tribunal to determine."

Both parties and the arbitral tribunal may, however, choose to supplement the above framework by enhancing the rules to provide greater detail, certainty and efficiency to the arbitral process. This may be particularly beneficial where the parties come from different legal traditions.

THE INTERNATIONAL BAR ASSOCIATION (the “IBA”)

This was established in 1947 and is one of the most respected providers of rules relating to evidence in international arbitration. One major difficulty encountered in international arbitration, is when one party comes from a civil law jurisdiction and the other from a common law jurisdiction. Each party will expect their own procedure to be mirrored in the arbitral process but civil and common law procedures differ significantly.

THE PURPOSE OF THE IBA RULES

In the absence of agreement between the parties, the extent to which the parties must produce evidence during the arbitration proceedings will be left to the discretion of the arbitral tribunal. In exercising such discretion, arbitrators may be heavily influenced by the background from which they originate. Arbitrators from civil law backgrounds often favor more limited documentary disclosure whilst those from common law backgrounds tend to be more comfortable with wider disclosure.

The main purpose of adopting the IBA Rules as an additional source of rules is to narrow the discretion of the tribunal and reduce the potential for uncertainty and debate. The IBA Rules offer a compromise between the common law and civil law principles, providing a common ground for parties from both opposing sides. It is meant to offer a flexible, hybrid system between civil and common law procedures.

KEY PROVISIONS OF THE IBA RULES ON DOCUMENTARY EVIDENCE

- Article 2(1) – The arbitral tribunal is obliged to consult the parties at the earliest appropriate time in proceedings with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

- Article 3(1) – The Parties must submit to the tribunal and to the other parties all documents available to it on which it relies, including public documents and those in the public domain.
- Article 3(2) and 3(3) – The parties may exchange requests for production containing a description of “narrow and “specific” categories of documents that are reasonably believed to exist and are relevant and material to the issues in dispute.
- Article 9(5) and 9(6) – Where a party has failed to produce evidence without adequate explanation for the failure, the tribunal may infer that such evidence would be averse to the interests of that party.

Documents are expected to be introduced with oral witness statements, and as such are given far less weight than the testimonies themselves, which are tested by an extensive process of cross-examination by the parties.

Several other jurisdictions have followed suit in application of similar rules for international arbitration procedures. The Arbitration Rules of the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), American Arbitration Association (AAA), Singapore International Arbitration Centre (SIAC), Kigali International Arbitration Centre (KIAC), Arbitration Rules under the Arbitration and Conciliation Act 2004 (ACA) and the LCIA Mauritius International Arbitration Centre (LCIA-MIAC), which is soon to commence operations independent from the LCIA on 27 July 2018. Rules of Arbitration in these jurisdictions have universally similar and applicable provisions in order to facilitate ease and fairness in proceedings for the parties, regardless of the jurisdiction or country in which the proceedings may hold.

BURDEN OF PROOF

In international arbitration, as with litigation, each party shall have the burden of proving fact relied on to support its claim³. This is unlike the burden of proof in litigation whereby only one party, the party alleging wrong-doing, carries the burden of proving their allegations. The position held by the arbitrator in the *Chevreau Claim* between United

³ Article 27(1) UNCITRAL Rules

Kingdom and France in 1930 was that the 'normal rules of evidence' should hold, since there was no provision for burden of proof in the agreement by both nations to submit to arbitration. The French agent interpreted the absence of provision for burden of proof to mean that there was no Claimant or Respondent in the matter and therefore no burden of proof⁴. The British argued that France was the Claimant as thus held the burden of proof. While the Tribunal agreed on this point, it stressed the fact that parties would still have procedural obligation to submit proof of their factual allegations, so even in rebutting a claim, a party must produce evidence to support its rebuttal. However, a Tribunal retains discretion as to how the burden of proof is allocated (Article 9.1 2010 IBA Rules) and is rarely challenged upon review except if found to be in error of law⁵.

In Nigerian proceedings, each party carries the burden of proving the facts relied upon to support his claim or defence. Also, the arbitral tribunal, if it deems necessary, may require a party to deliver to the tribunal and other party, a summary of the documents and other evidence which it will rely upon. The Tribunal may also require that the party produces said documents, evidence, or exhibits within such period of time as the tribunal may decide.⁶

PRODUCTION OF DOCUMENTS

As stated earlier, due process requires the documents to be submitted to both the tribunal and the other parties, as this allows the parties to react to the evidence presented by the opposing party, and possibly submit counter-evidence before the actual hearing. In its request to produce, the requesting party must include a description of how the requested documents are relevant to the case and material to its outcome. In other words, the requested documents must support either the party, or provide evidence for invalidating claims made by the opposing party.

Nigerian Arbitration Rules provide that all documents to be adduced are made available to the other parties⁷. In the United States documents are to be produced either upon request

⁴ Summary of *Chevreau Claim* (United Kingdom and France) P. Hamilton *et al.* (eds), *The Permanent Court of Arbitration: International Arbitration and Dispute Resolution*, (1999)

⁵ *Milan Nigeria Ltd v Angeliki B Maritime Co (2011) EWHC 892 (Comm)*

⁶ Article 24(1) of Arbitration Rules, First Schedule of Arbitration and Conciliation Act 2004

⁷ Article 15(3) of Arbitration Rules, First Schedule of Arbitration and Conciliation Act 2004

from a party or the initiative of the tribunal, the parties may be required to exchange documents in their possession, on which they choose to rely⁸. The rules in Singapore make provision for the submission by the parties of supporting documents to the tribunal and to each other, along with their Statement of Claim or Defence⁹. The LCIA¹⁰ and LCIA-MIAC¹¹ provides for the submission of supporting documents. The ICC, under article 3 and appendix 4 (Case Management Techniques), also provides that documents to be relied on be submitted along with pleadings in number of copies sufficient for each party to receive a copy, in order to save time in the event that the party is eventually requested to produce the said documents.

HEARINGS

Hearings in arbitration are usually held in private with only the parties and the arbitrators in attendance, except where there are witnesses, who in any case, may be required to stay outside the proceedings until required. In most international arbitrations, almost all of the evidence is already produced and exchanged before an evidentiary hearing will take place. This is because the hearing is where the record and all evidence before the Tribunal is challenged through questioning of witnesses¹² and so new or last minute evidence is usually discouraged. It is thought that all issues in contention and evidence available should be well known to the Arbitrators and Parties before the hearing. Parties shall inform the Tribunal of the witnesses whose appearance it requests. These could be witnesses of fact or expert witnesses, and shall appear for testimony at an evidentiary hearing¹³. Each witness shall appear in person unless the Tribunal allows for videoconferencing or other remote means through which to deliver their testimony. Hearings are not always required and so could be done without, if the Tribunal is able to determine the matter without it, however the parties have a right to be afforded one, when requested.¹⁴ This right is present in other laws,

⁸ Rule 22, Arbitration Rules of American Arbitration Association

⁹ Rules 19 and 20 of Arbitration Rules of Singapore International Arbitration Centre

¹⁰ Rule 15, Rules of London Court of International Arbitration

¹¹ Rule 30, LCIA Mauritius International Arbitration Centre

¹² Nathan O'Malley; Rules of Evidence in International Arbitration: An Annotated Guide, Informa Law 2012, pg 227

¹³ Article 8.1 2010 IBA Rules

¹⁴ Article 15 UNCITRAL Rules

including Article 19.1 of the LCIA, Article 20(2) of the ICC Arbitration Rules and Article 25 of the Arbitration Rules of the ACA 2004.

Though this right exists, the Tribunal has the power to set notice and time limits which if party fails to comply with, could lead to them waiving such rights. In *Whole Farmers Trading Inc. v The Islamic Republic of Iran*¹⁵, the Claimant waited eleven months after the deadline for filing a request for hearing and so their request was seen as unreasonable at the stage. The issues were determined on the basis of documents having been submitted, without holding a hearing. The tribunal may also choose not to hear certain witnesses as part of its authority, but this must not infringe on the rights of a party. It is generally the adverse party who would call for a witness to appear at the hearing for cross-examination as it is deemed that written statement itself should serve as the direct testimony of the witness. In the hearing, witness testimony, as mentioned earlier, can be taken by video evidence but the Tribunal would have to be satisfied with the integrity of the testimony, given the circumstances, and that the witness is not being coached. Once witness testimony is allowed and taken, by videoconference, the evidence is given full weight as if the witness had given it in person.

The Tribunal has control over how the hearing will be conducted by limiting or excluding any question to a witness or answer by them.¹⁶ They also have control over the manner of questioning and when it shall question the witness itself. That said, the Tribunal must use their authority in a way that will align with the rights of the parties and facilitate a fair hearing. The order in which evidence is presented at a hearing is provided for under Article 8.3 of the 2010 IBA rules; it is traditional in the sense that it begins with the Claimant presenting the testimony of their witnesses, followed by the Respondent. Any other party may then question the witness in any order determined by the Tribunal, who may also ask questions to the witness at any time. It is common in practice for there to be a hearing schedule agreed upon by the parties, subject to the approval of the Tribunal. This would help avoid accusations of bias when it comes to the scheduling of the hearing. Each party will be allowed to allot time to their witnesses as they may wish. Once a party's time is depleted,

¹⁵ *Whole Farmers Trading Inc. v The Islamic Republic of Iran*

¹⁶ Article 8.2 2010 IBA Rules

they will be expected to end their presentation. There may be instances where a party requires more time, for legitimate reason, and the Tribunal must decide whether this would require both parties being allotted the same additional time. Before a witness give their evidence, they shall provide affirmation that they commit to telling the truth or in the case of an expert witness, their genuine belief in their findings. The parties may agree, or the Tribunal may order, if the witness has submitted a written statement or expert report, that it shall serve as their direct testimony once confirmed.¹⁷ The provisions for hearing in arbitration are also generally accepted nationally, evident under article 19 of the LCIA and LCIA-MAIC rules, rule 24, of the SIAC Rules, rules 22-32 of the AAA rules.

WITNESSES OF FACT

Though documentary evidence is more preferred in the international arbitration, oral evidence of witnesses is also admissible. Article 4.1 of the 2010 IBA Rules provides that each party shall identify the witnesses on whose testimony they wish to rely and what the subject matter of their testimony will be. Also, any person may be called as a witness including the Party, their employer or other representatives. Written statements of witnesses must be presented and signed by them before any oral evidence will be taken [Article 27(2) UNCITRAL 2010 Rules]. Restrictions on witnesses with close relations to a Party do not apply in international arbitration. Once a testimony has probative value, the tribunals shall admit it regardless of the connections or interest the witnesses may have in the outcome of the case, as Article 4.2 of the 2010 IBA Rules states that “any person” may tender a witness statement in an international tribunal. However, it is usual practice for the testimony of witnesses of fact with an interest to be submitted as part of a Party’s case as statement, but not as a witness. In addition, by virtue of Article 4.2, expert witnesses can also be called to testify on certain issues of fact.

Consequentially, as codified in Article 4.5(d), a witness must provide corroborating evidence along with their statement. Any omission of evidence alluded to in the statement may affect its admissibility later in the hearing. Any witness statement must also include an affirmation that the facts reported therein are true, and a signature by the witness [Article 4.5(e)]. Article

¹⁷ Article 8.4 2010 IBA Rules

4.8 provides that if the appearance of a witness is not requested, none of the Parties will be deemed to have agreed to the correctness of the content of the witness statement. This means that the statement of a witness does not lose its probative value merely because they were not called to give oral evidence, instead, it is considered as part of the record. The Arbitral Tribunal may also assist parties in obtaining the evidence of witnesses who would not voluntarily appear upon request [Article 4.9 2010 IBA Rules], once the Party wishing to call the witness provides the identity of the witness in question, a description of the subject on which the testimony is sought and why such subjects are relevant to the case. The Tribunal may also order a Party to provide for the appearance for testimony of a witness whose testimony has not been offered to be adduced [Article 4.10 2010 IBA Rules], though the Party asked to produce such witness may object to it.

Under Arbitration Rules of the Arbitration and Conciliation Act 2004, in Nigerian arbitral proceedings, where witnesses are to be heard, each party shall communicate to the arbitral tribunal and to the other party, the name and address of each witness he chooses to rely on, the subject upon which he will give evidence, and the language in which he will give it. This information must be provided at least 15 days before the oral hearing. Where necessary, arrangements shall be made, by the arbitral tribunal for the translation of the oral statement made. Also, unless the parties have agreed otherwise, the evidence will be heard on camera. The arbitral tribunal has the power to require the retirement of any witness during the testimony of another.

Rules of the London Court of International Arbitration provide for oral hearings under Article 19. Any party has the right to a hearing at any appropriate stage of the proceedings unless the parties had previously agreed to a 'documents-only' arbitration. Under the LCIA, the Arbitral Tribunal has complete authority as to the conduct of the hearing and it can be done by video conference, telephone conference or in person. Much like the Arbitration Rules in Nigeria, the LCIA, under Article 20, provide that the party willing to call a witness may be required to provide particulars of the witness to be relied on and the subject matter on which they will testify and this is uniform throughout other jurisdictions; (Article 20 of the LCIA-MIAC, Article 35 of KIAC; Article 24-25 of SIAC and Articles 34-35 of the AAA). The testimony may be presented in the form of a signed document, in which case, the Tribunal

may order (also, usually upon request of a party) that a witness relied on by the other party attend for oral questioning before the Tribunal.

EXPERT EVIDENCE

As mentioned above, expert evidence is also admissible in international Arbitral Tribunals. Article 5.1 of the 2010 IBA Rules provides that parties may appoint experts on whose evidence they wish to rely for specific issues. The Party-Appointed expert shall then submit an Expert Report. Contents of the Expert Report;¹⁸

- a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
- b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
- c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
- d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
- e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
- f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;
- g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

¹⁸ Article 5.2 IBA Rules

- h) the signature of the Party-Appointed Expert and its date and place; and
- i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.

When an expert is appointed by a Party, there is always an issue of their independence and non-bias, raising questions as to the reliability of their reports and the weight to be attached to such evidence, hence the requirement that a Party-Appointed Expert provides a statement of independence, because lack of independence could be a ground for termination of his appointment¹⁹. Once expert reports have been submitted, subsequent expert reports may be submitted, even from persons not previously identified as party-appointed experts, in order to rebut or respond to matters contained in another party's witness statement or expert report.²⁰ If both Parties have appointed experts, the Tribunal may order the Experts to meet, confer on the issues and reach an agreement on their findings, after which the agreement shall be put in writing, detailing any issues yet to be agreed upon.²¹ Party-Appointed experts are also often required to testify jointly, in an effort to streamline their findings. If a Party-Appointed Expert fails to appear for hearing without valid reason, the Expert Report submitted by that Expert will be disregarded by the Tribunal.²² Though there are added complications to this rule because there may be instances where a party is unable to afford the costs of bringing their expert to a hearing. In *Aguas del Tunari SA v Republic of Bolivia*²³, the Tribunal maintained that it is customary that such witnesses be made available for cross examination if so requested, as it is in line with procedural fairness, and the opposing party's right to challenge evidence against it. However, there may be cases where this rule is not enforced, based on the discretion of the Tribunal. Moreover, failure to call an expert witness to an evidentiary hearing for cross-examination is not to be deemed as acceptance of the expert's evidence.²⁴ A Tribunal should consider the entire context of the report to determine its weight in the circumstances of the case.

¹⁹ Nathan O'Malley; Rules of Evidence in International Arbitration: An Annotated Guide, Informa Law 2012, pg 144

²⁰ Article 5.3 2010 IBA Rules

²¹ Article 5.4 2010 IBA Rules

²² Article 5.5 2010 IBA Rules

²³ *Aguas del Tunari v Republic of Bolivia*, ICSID Case No. ARB/02/3 paras. 40,41 (2005)

²⁴ Article 5.6 2010 IBA Rules

An Arbitral Tribunal may also appoint an expert to produce evidence on an issue to be determined.²⁵ The tribunal-appointed expert, before appointment, shall submit a description of his or her qualifications to Tribunal and Parties, and a statement declaring his independence from the Parties, their legal advisors and the Tribunal itself. Though the decision of the Tribunal to appoint an expert is generally discretionary, where a Tribunal would need to decide on an issue in order to deliver the final award but lack the expertise in that area, appointment of an expert is mandatory. It is common that even when on the Tribunal itself there is an expert on the issue of the dispute, an expert separate from one on the Tribunal may however need to be appointed. This is because the arbitrator is limited to determining the evidence or information brought before him, while an expert witness is not limited in such a way and is able to go beyond what is in the file before the arbitrator.²⁶ The article also provides for the Parties to object to appointment of the expert, after which the Tribunal shall decide whether or not to accept such objections. Objections can also be made after appointment but only for reasons which the objecting Party became aware after appointment. An expert being appointed by the Tribunal will do away with the issue of independence of the expert and as such, the issue of probative value of the expert's evidence is avoided.

Expert evidence is also provided for and applicable in other jurisdictions; Article 21 of LCIA, 35 of AAA, 25-26 of the SIAC, 21 of the LCIA-MIAC and 35 of the KIAC. In Nigeria, the Arbitration Rules of the ACA provide for it under Article 27 and, under the same Article, as is generally applied in other jurisdictions, the expert may be required to appear, upon the request of the other party, for hearing where they can be questioned based on their report.²⁷

ADVERSE INFERENCES IN INTERNATIONAL ARBITRATION

Article 9.6 of the 2010 IBA Rules Adverse inferences may be drawn by an arbitral tribunal if a party fails to produce relevant evidence or testimony which they were requested to make available.²⁸ The inference to be made is that such evidence would be adverse to the interests

²⁵ Article 6.2 IBA Rules; Article 26(1)(a) UNCITRAL Model Law

²⁶ Nathan O'Malley; Rules of Evidence in International Arbitration: An Annotated Guide, Informa Law 2012, pg 166

²⁷ Article 27(4) Arbitration Rules of ACA 2004

²⁸ Article 9 2010 IBA Rules

of that party. Such an inference will also be drawn where a party fails to object to the request in due time. The same inference could to be drawn where party fails to make available, documentary evidence. The authority of a Tribunal to draw adverse inferences in arbitration was cemented in the *Parker Case*²⁹ in 1926, where it was held by the Mexico-US Claims Commission that where evidence which would probably influence the decision of the Commission in particular, is within knowledge of the parties, failure to produce it may be taken into account in reaching a decision.

What this means is that the tribunal will adopt a position on the evidence which is contrary to the argument of the party which fails to produce it, however such inference must be consistent and in line with all the evidence available as a whole. Any inference will be drawn at the end, once all evidence is before the Tribunal, in the process of weighing the evidence before the Arbitral Tribunal. A Tribunal may warn a party of the consequences of failure to comply with a procedural order and the possibility of adverse inference being drawn against them. In *Double K Oil Products 1996 Ltd v Neste Oil*³⁰ [2009] EWHC 3380, the Tribunal notified Double K of the possible inference to be drawn but refrained from giving an order to produce when Double K argued that the document in question was covered by privilege.

Before an adverse inference is to be drawn, the party requesting must also bring evidence to corroborate the adverse inference it has sought to be drawn and must provide prima facie evidence of its claim. It must also be shown that the evidence in question was accessible to the party who failed to produce it. More obvious is the fact that adverse inference cannot be drawn against a party who had no prior knowledge of its duty to produce the evidence. The rule on adverse inferences are not provided in all arbitration rules but are present under the AAA rules³¹, the tribunal has enforcement powers under rule 23 to draw adverse inferences where a party has willfully refused to comply with rules 22 requiring production and exchange of documents to be relied on in the proceedings.

²⁹ *William A. Parker (USA) v United Mexican States*, 31 March 1926, 4RIAA, p 39

³⁰ [2009] EWHC 3380

³¹ Article 23 AAA Arbitration Rules

CONCLUSION

International Arbitration is widely used globally, by major organizations for various reasons, ranging from privacy to swift disposal of disputes. However, as mentioned above, the major concern with International Arbitration is the question of how to harmonize the various rules and procedures observed in several countries from civil and common law jurisdictions, and adapt them to the international scene. The International Bar Association has covered a lot of ground with the introduction of the IBA Rules, making provisions for evidence in International Arbitration and facilitating universal practice. Other jurisdictions, the United Kingdom, Rwanda, Singapore, the United States have applied similar rules of their own and the provisions allow parties in arbitration access to various practices covering witnesses of fact to documentary evidence, giving them the full benefits and opportunities to be heard, as litigation would provide, while retaining the advantages that come along with opting for alternate dispute resolutions.