WHAT'S NEW?

REVISIONS TO THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 2020

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On 17 December 2020, the International Bar Association (the IBA) adopted revisions to the IBA Rules on the Taking of Evidence in International Arbitration which were released on 15 February 2021 (the revised IBA Rules). The revised IBA Rules supersede the IBA Rules of 1999 and 2010 and, unless there is an indication to the contrary, will apply to all arbitrations in which the parties agree to apply the IBA Rules after 17 December 2020.

Although the revisions are limited in number, they continue to reflect best practice in the taking of evidence in international arbitration and address technology-driven developments precipitated by the global pandemic Covid-19. Among the key changes are the following:

1. Including cybersecurity and data protection in the list of issues for the initial consultation on evidentiary issues;
2. Introducing provisions on remote hearings including the definition of a Remote Hearing and establishing a Remote Hearing protocol; and
3. Setting out further powers of the Arbitral Tribunal in matters such as the treatment of evidence and document production.

The most notable revisions are discussed in more detail below.

Cybersecurity and data protection

Cyber-attack and data loss are the highest rated risks facing businesses according to the D&I Liability Survey Report of April 2021.[1] With the world having had to adjust to working remotely due to COVID-19, it is not surprising that cyber criminals have been seeking to exploit weaknesses in IT systems.[2] It was reported that 30bn data records were stolen in 2020 which is more than in the previous 15 years combined. [3]The Financial Times cited "our growing dependence on networked technologies, massively accelerated by the pandemic" and "the increased outsourcing of computer systems to cloud-based companies" as two big trends that contributed to it.[4]

International arbitration as a forum for resolving commercially sensitive, confidential, often high value and complex disputes involving multiple parties in various jurisdictions is of no exception.

Arbitral institutions and arbitration users including clients, their counsel team and arbitrators have become increasingly reliant on electronic and digital means for conducting arbitration proceedings. This involves not only handling large quantities of data which is being processed, managed and transmitted through electronic channels (which are not necessarily encrypted) across multiple jurisdictions but also participating in virtual hearings through online technology platforms from various locations. All of this has further accentuated concerns surrounding data protection, including data privacy and cybersecurity, in international

1 Global FINEX – Directors and Officers Insurance (D&O) Liability Survey 2021 (the D&I Liability Survey Report).
2 The D&I Liability Survey Report, page 9.
3 See Report on "Cybersecurity investment grows in 2020, but organizations face record data breaches", 29 March 2021, as referred to by the Financial Times article, "Pandemic accelerates growth in cybercrime", 28 April 2021.
4 The Financial Times article, "Pandemic accelerates growth in cybercrime", 28 April 2021.

arbitration.

To encourage addressing these concerns at an early stage of the arbitration proceedings, the revised IBA Rules have introduced Article 2.2(e) which places "the treatment of any issues of cybersecurity and data protection" in the list of evidentiary issues which may be addressed, "to the extent applicable", at the initial consultation between the parties and the Arbitral Tribunal.

In practical terms, this could involve an adoption of the data protection and cybersecurity protocol for the duration of the arbitration proceedings in compliance with the European Union's General Data Protection Regulation and applicable data protection regimes.

As an example of useful resources for the parties and Arbitral Tribunals to consult, the 2020 Review Task Force referred to the ICCA-IBA Roadmap to Data Protection in International Arbitration [5] and the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration [6] in its commentary on the revised IBA Rules (the revised IBA Commentary).[7]

Remote hearings

Although remote hearings are not a novel feature in international arbitration, the revised IBA Rules have expressly introduced provisions on conducting remote hearings in line with the realities brought out by the global COVID-19 pandemic which "caused national lockdowns, quarantines and restriction of free movement, and inevitably affected arbitration proceedings, in particular, the conduct of in-person evidentiary hearings".[8]

Firstly, the revised IBA Rules define a 'Remote Hearing' as "a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate".

This definition reflects the versatile nature of international arbitration contemplating the possibility of conducting virtual evidentiary hearings for the entirety of the arbitration proceedings as well as some part of it in case of mixed evidentiary hearings (e.g. both remote and in-person during the course of one arbitration).

Secondly, the revised IBA Rules outline the active role of the Arbitral Tribunal in managing the conduct of a Remote Hearing. In particular, Article 8.2 provides that "[a]t the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing" and, if a Remote Hearing is ordered, it shall "consult with the Parties with a view to establishing a Remote Hearing protocol to conduct the Remote Hearing efficiently, fairly and, to the extent possible, without unintended interruptions".

Adoption of protocols for remote hearings have become widespread in international arbitration in recent months and the revised IBA Rules go hand in hand with the tools and practices adopted by the users of arbitration to combat technological challenges and ensure smooth running of the arbitration.

Article 8.2 of the revised IBA Rules specifies that the protocol may address the following:

(a) the technology to be used;

(b) advance testing of the technology or training in use of the technology;

(c) the starting and ending times considering, in particular, the time zones in which participants will be located;

(d) how Documents may be placed before a witness or the Arbitral Tribunal; and

(e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

The above issues are indicative of potential difficulties and technological challenges when conducting remote hearings which are best addressed in a Remote Hearing protocol.

As regards witness testimony, the revised IBA commentary suggests different means to ensure that "witnesses are not improperly assisted by other persons or make improper reference to documents when giving oral testimony".[9] These include:

(a) questioning the witness at the outset of the examination about the room in which the testimony is being given, the persons present and documents available;

(b) installation of mirrors behind the witness;

(c) use of fish-eye lenses; or

(d) the physical presence with the witness of a representative of opposing counsel.[10]

Treatment of evidence and document production

The remaining revisions reflect established international arbitration practices, clarify the framework for the taking of evidence established by the IBA Rules and provide for a more active role of the Arbitral Tribunal. Among such revisions are:

1. **Treatment of evidence:** Article 9.3 of the revised IBA Rules expressly recognises that "[t]he Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally". Unlike Article 9.2 where grounds for exclusion from evidence are listed, Article 9.3 was deliberately drafted in broad terms without specifying circumstances in which such evidence is to be excluded and using "may" instead of "shall". This was done to preserve divergence in national law approaches regarding the exclusion of such evidence and to contemplate potentially differing views of Arbitral Tribunals on the issue "depending on, among other things, whether the party offering the evidence was involved in the illegality, considerations of proportionality and whether the evidence is material and outcome determinative, whether the evidence has entered the public domain through public "leaks," and the clarity and severity of the illegality".[11]

5 The ICCA Reports No. 7: The ICCA-IBA Roadmap to Data Protection in International Arbitration 2020.
6 ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration 2020.
7 Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration, January 2021 (the revised IBA Commentary), pages 6-7.
8 The revised IBA Commentary, page 25.
9 The revised IBA Commentary, page 25.
10 Ibid.
11 The revised IBA Commentary, pages 30-31.

2. Document production requests:

(a) Article 3.5 provides for the right of the requesting party to respond to the opposing party's objection "[i]f so directed by the Arbitral Tribunal". This revision is in line with the prevailing practice in international arbitration in the context of requests for the production of documents in the form of a Redfern Schedule where a party's response to an objection may lead to a useful clarification or further narrowing down of the issues in dispute for which evidence is being sought;

(b) consistently with Article 3.5, Article 3.7 of the revised IBA Rules adds that the Arbitral Tribunal shall consider a party's objection and "any response thereto" and eliminates the perceived requirement for the Arbitral Tribunal to consult with the parties when considering, "in timely fashion", the Request to Produce, the objection and any response to the objection;

(c) Article 9.5 of the revised IBA Rules clarifies that the Arbitral Tribunal's discretionary power to afford suitable confidentiality protection extends to documents to be produced in response to a Request to Produce in addition to the introduction of documents as evidence in the proceeding. Such protection measures may include orders to produce documents in a redacted form, order "attorneys-eyes only" production, appoint an independent and impartial expert to review the document in question in order to report to the Arbitral Tribunal and the parties about the non-confidential content under Article 3.8 of the IBA Rules.[12]

3. Document translations and copies:

(a) Articles 3.12(d)-(e) of the revised IBA Rules clarify that, unlike documents submitted in the evidentiary record on which a party intends to rely, documents produced in response to document requests do not need to be translated into the language of the arbitration unless the parties agree otherwise or unless the Arbitral Tribunal decides otherwise in the absence of such agreement. This clarification is potentially cost-saving in voluminous document production requests and reinforces the burden to provide translations for the party relying on and submitting foreign-language documents into the record;

(b) Article 3.12(c) expressly says a party is not obligated to produce multiple copies of "essentially identical" documents unless the parties agree otherwise or unless the Arbitral Tribunal decides otherwise in the absence of such agreement. The Arbitral Tribunal may decide otherwise if, for example, various versions of a particular document may be material to the outcome of the case.

4. New developments:

The revised IBA Rules allow for "revised or additional" witness statements and expert reports to be submitted to respond only to "new factual developments that could not have been addressed in a previous Witness Statement" and "new developments that could not have been addressed in a previous Expert Report" in Articles 4.6(b) and 5(3)(b) of the revised IBA Rules respectively. This provides greater flexibility for witness and expert evidence and clarifies the scope of that evidence.

Conclusion

The latest revisions demonstrate the adaptability of the IBA Rules to the realities of the modern age of technology at the time of the global pandemic. The revised IBA Rules continue to harmonise procedures in international arbitration reconciling common law and civil law differences and reflect best practice in the taking of evidence in transnational disputes. Nonetheless, there is scope for further developments in certain areas such as refining the framework for drawing adverse inferences by the Arbitral Tribunal which have the potential to significantly impact the outcome of proceedings. It will be interesting to see how the IBA Rules evolve in line with the international arbitration practice in the years to come.

12 **The revised IBA Commentary, page 30.**