IBA Revised Rules of Evidence and their effect on International Arbitration

A. Stephens Clay
Kilpatrick Townsend
Atlanta, GA

INDEX

A. CHRONOLOGY

1983: Enactment of "IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration"

1999: Enactment of "IBA Rules on the Taking of evidence in International Commercial Arbitration." (Hereinafter The 1999 IBA Rules)

2008: Review process was initiated and lasted two (2) years.

- Process included public consultation.
- The revised rules replaced the 1999 rules and were developed by members of the IBA Rules of Evidence Review Subcommittee.
- The Subcommittee consisted of the following members :
    - Richard H Kreindler, of Shearman & Sterling LLP in Frankfurt (Chair)
    - David Arias, of Pérez-Llorca in Madrid
    - C Mark Baker, of Fulbright & Jaworski LLP in Houston
    - Pierre Bienvenu, of Ogilvy Renault LLP in Montréal
    - Amy F Cohen, of Shearman & Sterling LLP in Frankfurt (Secretary)

- Antonias Dimolitsa, of Antonias Dimolitsa & Associates in Athens
- Paul D Friedland, of White & Case LLP in New York
- Nicolás Gamboa, of Gamboa & Chalela Abogados in Bogotá
- Judith Gill QC, of Allen & Overy LLP in London
- Peter Heckel, of Hengeler Mueller in Frankfurt
- Stephen Jagusch, of Allen & Overy in London
- Xiang Ji, of Fangda Partners in Beijing
- Kap-You (Kevin) Kim, of Bae Kim & Lee LLC in Seoul
- Toby Landau QC, of Essex Court Chambers in London
- Alexis Mourre, of Castaldi Mourre & Partners in Paris
- Hilmar Raeschke-Kessler, Rechtsanwalt beim Bundesgerichtshof in Karlsruhe
- David W Rivkin, of Debevoise & Plimpton LLP in New York
- Georg von Segesser, of Schellenberg Wittmer in Zurich
- Essam Al Tamimi, of Al Tamimi & Company in Dubai
- Guido S Tawil, of M&M Bomchil Abogados in Buenos Aires
- Hiroyuki Tezuka, of Nishimura & Asahi in Tokyo
- Ariel Ye, of King & Wood in Beijing

2010: The IBA Rules on the Taking of Evidence in International Arbitration were adopted by Resolution of the IBA Council on May 29, 2010.

B. RATIONALE TO AMENDMENTS

The revision of the IBA 1999 rules comes as part of recent efforts in the legal community to improve the arbitration process, particularly with respect to costs and efficiency. This was the driving force for reviewing the widely accepted evidence rules. Also, the review was a reaction against the "Americanization" of the international arbitration process. t

International arbitration typically will involve parties to the dispute and arbitrators who are from different cultures, legal systems and backgrounds. No one set of rules is able to address all the possible combinations that could arise in a given arbitration. The

Rules are intended to promote fairness, efficiency and reasonable costs while also recognizing the myriad of cultures, legal systems and backgrounds of the participants. The Rules promote flexibility over a preference for any one system. Therefore, the style used in a particular arbitration may vary depending on the parties' goals and the arbitrators' approach.

Time and costs are two factors that made arbitration a preferred alternative to litigation. There is substantial debate about the U. S. style of discovery being used in the process; some consider it is lengthy and ineffective. Hence, some parties criticize the experience is not necessarily more efficient or less costly than going to trial.

For instance, groups such as the "Corporate Counsel International Arbitration Group" work for the improvement of international commercial arbitration, demanding change and complaining to arbitral institutions about the abovementioned issues.[1] Other institutions have also addressed this subject. For example, the ICDR (International Centre for Dispute Resolution) – one of the most widely used international arbitration organizations – issued revised disclosure rules in May 2008, aiming to narrow the scope of discovery.[2] Further, the International Institute for Conflict Prevention & Resolution (CPR) issued its "Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration" in 2009, recommending ways to limit discovery and present witness testimony more efficiently. Likewise, the ICC (International Chamber of Commerce), UNCITRAL (United Nations Commission on International Trade Law) and AAA (American Arbitration Association) recently revised their rules. The new ICC rules came into force on January 1, 2012, while the UNCITRAL guidelines have been effective since August 15, 2010 and the AAA's Rules since June 1, 2009.

All of these important institutions modified their rules to improve the document production process in international arbitration. In civil law countries, of course, the concept of "discovery" is either non-existent or very different. For most of Europe,

[1] ABA Journal April, 2010, 96 A.B.A.J. 50
[2] Id.

discovery as Americans understand it is considered intrusive, unnecessary, and unfair. To a very limited degree, international arbitral tribunals may order document production, but depositions, even of party witnesses, are rarely allowed.[3]

C. ISSUES

The Chair of the Rules Subcommittee, Richard Kreindler, explained some of the issues addressed by the revised Rules, including "electronic document disclosure, abuse of the evidentiary process, and competing standards of legal privilege."[4] These, he said, are considered new or increasing challenges. The rules have been updated to meet these new challenges.[5] Below are the main issues revised by the rules:

- Relevancy and broad requests for electronic stored information

(1) Traditionally, expansive U.S. style discovery is not permitted into international arbitration. Rather the parties have flexibility to agree to discovery that is more convenient and efficient for them.

(2) Scholar and Arbitrator Bernard Hanotiau has said that vague requests to obtain "all documents relating to" or "all the minutes of the board" or "all the correspondence exchanged between the parties", especially if covering a long period of time, will generally not be allowed in arbitration.[6] He further explained the European principles that require a party to justify each request and for specificity.

Arbitrators have different approaches to gathering evidence. Some allow the parties to decide the level of discovery to be allowed, regardless of efficiency and costs. Others are more strict and will deny broad requests and the exchange of extensive amounts of evidence. The Redfern Schedules, on which the new rules are based, is a neutral approach. It requires a party to complete information in a system of 'columns', where the justifications for each request is explained. The parties shall then present their own requests, list a reason for each and the opposition to the other parties' requests, and

[3] 18 Transnat'l Law. 371 2004-2005
[4] IBA E-News "Newly revised IBA Rules on the Taking of Evidence in International Arbitration"
[5] Id.
[6] ICC BOOK

the arbitrator makes a decision. This approach has been amplified in the new IBA rules, by introducing the concepts of *economy* and *proportionality* in the admission of evidence.

As some explain "while arbitrators in international arbitration may not compel broad discovery or discovery of certain types (e.g. depositions), or may even lack the legal power to do so under the law of the seat, nothing precludes arbitrators from receiving evidence procured by the parties in accordance with lawful means outside the arbitration itself."[7] It should be noted, that with regards to electronic stored information, the IBA Rules make no distinction and treats them as paper documents.[8] Therefore, the explained approach applies equally to requests for electronic documents and paper documents.

- Confidentiality

Confidentiality remains one significant concern in the new rules. Documents submitted or produced in an arbitration by a non-party are kept confidential by the tribunal and the other parties, and shall be used only in connection with the arbitration. The only exceptions are when disclosure may be required to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.[9]

- Privilege

To decide issues of privilege, arbitrators previously had to choose between a conflict-of-laws analysis(1) using the law of the forum where enforcement was sought, (2) or the law of the forum where the tribunal sits; or (3) the law of the parties' agreement, among other options. Tribunals may still be faced with the same questions, but the new rules do provide more specific guidance respecting issues of legal impediment or privilege, including the need to maintain fairness and equality, particularly

[7] Commentary by Joseph P. Zammit and Mary Ann C. Ball, Mealey's International Arbitration Report, Vol. 25 #3, March 2010.
[8] Int. A.L.R. 2010, 13(5), 158.
[9] Int. A.L.R. 2010, 13(5), 169.

if the parties are subject to different legal or ethical rules.[10] According to Kreindler, this progression relates to the existing debate in international arbitration, with respect to the increased invocation of "privilege" as grounds for objection to disclosure. This has created controversy as to what standard should apply for granting said objection. The new provision still leaves room for a flexible approach without interfering with domestic privilege and conflict of law issues, conforming to the soft-law nature of the IBA Rules.

- Experts and Witnesses

The new rules reflect a compromise on the use of expert witnesses. Under the U.S. system, parties retain and present expert witnesses. The witness prepares a report and is made available for either pre-hearing deposition, cross-examination, or both. Civil countries allow the Tribunal, and not the parties, to retain and present expert witness testimony. The new IBA Rules provide the arbitrators with the authority and discretion to allow either or both approaches. The outcome would be resolved on an *ad hoc* basis based on the parties' and arbitrators' preferences for how expert witness testimony is to be presented. Regardless, the Rules encourage no more than one expert. ""

D. CHANGES OR DIFFERENCES (ARTICLES AMENDED)

The revised IBA Rules are broader and emphasize the efficiency, economy and fairness of the process. By introducing these principles, the rules move to a process where time and cost are priorities. The new approach improves international arbitrations, but some worry that it could result in grounds for excluding evidence.[11] This could mean that by prioritizing economy and speed, case management would be affected. The opinions are split, but overall the new Rules are well received and represent a undeniably useful reference for the legal community. Some of the key additions or modifications are the following:

[10] IBA Newsletter
[11] Int. A.L.R. 2010, 13 (5), 165.

- Title and Scope

The title changed from "International Commercial Arbitration" to "Taking of Evidence in International Arbitration".[12] The word 'commercial' was deleted, in recognition of the potential equal application to 'non-commercial' arbitrations such as investment treaty-based disputes.[13]

- Preamble

The new preamble establishes that the parties "shall act in good faith".[14] This might be invoked in cases in which bad-faith acts *delay the production of evidence, seek to conceal evidence*, and/or give rise to inefficiencies which increase the costs of arbitration.[15] (Emphasis added). The IBA itself explained this addition as the incorporation of an express requirement of good faith in taking evidence coupled with an empowerment of the tribunal to consider lack of good faith in the awarding of costs.[16]

Such empowerment is granted by Art. 9.7, which discusses that arbitrators may take into account the parties' failure to conduct itself in good faith in the assignment of costs.[17] Although many agree the duty is implicit, the 1999 rules did not contain an express requirement of good faith. This addition may cause an increase on the frequency with which parties request costs on this basis.

- Early Consultation

The new rules impose an obligation on the tribunal to consult the parties at the earliest appropriate time with a view to agreeing on an efficient, economical and fair process for taking evidence. It also includes a non-exhaustive list of matters which such 'consultation' may address.[18] This should increase the efficiency of the process.

[12] Newsletter International Disputes Quarterly, Max Shterngel, Summer 2010.
[13] IBA Newsletter.
[14] IBA Rules, Preamble 3.
[15] Int. A.L.R. 2010, 13(5), 158.
[16] IBA Newsletter.
[17] Int. A.L.R. 2010, 13(5), 160.
[18] Id.

The following are some of the evidentiary issues dealt with:

- Art. 2(2)(a) referring to the preparation and submission of witness statements and expert reports.
- Art. 2(2)(b) regarding the taking of oral evidence.
- Art. 2(2)(c) concerning the requirements procedure and format applicable to the production of documents.
- Art. 2(2)(d) referring to the level of confidentiality protection to be afforded to evidence.
- Art. 2(2)(e) brings the conservation of resources into the picture, probably referring to conservation in terms of ecology.
- Art 2(3) advocates proactivity by the tribunal, encouraging the arbitrators to tell the parties, (probably) at an early stage, what they consider to be important in the case.

- Witnesses and Experts Testimony

The rules provide greater clarity respecting the contents of expert reports and in particular the requirement to describe the instructions given to the expert and a statement of his or her independence from the parties, legal advisers and tribunal; the revised IBA Rules also foresee the provision of evidence in reply to expert reports.[19] They further create an obligation on witnesses to appear for oral testimony at a hearing *only* if their appearance has been requested by any party or the tribunal; they also provide for the use of videoconference or similar technology.

- Confidentiality

The rules expand confidentiality protections respecting both documents produced pursuant to document requests and documents submitted by a party in support of its own case and documents introduced by third parties.[20]

[19] Id.
[20] Id.

- E-disclosure

Several provisions regarding e-disclosure were added.[21] According to the IBA, a key revision is the addition of greater guidance to the tribunal on how to address requests for documents or information maintained in electronic form – so-called 'e-disclosure'. Similarly, the revisions give greater guidance as to requests for documents in the possession of third parties. These inclusions are directly related and in some cases overlap with the subjects covered in the next topic.

- Documents

The Rules define *document* as "a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means".[22]

Once defined, it is crucial to note that documents requests experienced significant changes in the 2010 revision. See the following example:

> **Revised**: Article 3(3)(a)(ii), outlines the requirements for a Request to Produce, allowing the party making the request for production of electronic documents, to "identify *specific* files, search terms, individuals or other means of searching for such documents in an *efficient and economical* manner." (Emphasis added)
>
> **New**: Article 3 (12)(b) provides that electronic documents "shall be submitted or produced in the form most convenient or *economical* to the [producing] party that is reasonably usable by the recipients."

In addition, and although overlapping with some of the topics already touched, the following revisions regarding the 'discovery' process are among the most interesting, according to the IBA itself:

- Article 3.3 sets out the contents of a "Request to Produce". One such requirement, set out in Article 3.3(b), is that a "Request to Produce" must include a statement of the requested documents' *relevance and materiality*.

[21] Newsletter IDQ.
[22] IBA Rules, Definitions.

The requirements set out in Article 3.3 have been incorporated into other articles of the Revised IBA Rules, including the grounds for objecting to document requests (Article 3(5)), rulings on document production by the tribunal (Article 3(7)) and document requests addressed to non-parties (Article 3(9)).

- Article 3(6) permits the tribunal to "*invite* the relevant parties to consult with each other" to resolve discovery disputes.
- Article 3(10) allows an arbitral tribunal to proffer its own document requests to parties or to request that a party coordinate non-party production.
- Article 3(14) allows a tribunal, after consultation with the parties, to schedule the document requests and productions separately for each issue or phase of the arbitration (e.g., jurisdiction, liability or damages).
- Translations of documents must be identified as such, with an indication of the original language, and must be submitted together with the originals, pursuant to Article 3(12)(d).
- Article 3(13) provides an exception to the obligation for parties and the tribunal to keep documents confidential: "Disclosure may be required of a Party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."
- Any documents relied upon by fact or expert witnesses (whether party-appointed or tribunal-appointed) that have not otherwise been submitted are to be produced with witness statements or expert reports according to Articles 4(5)(b), 5(2)(e), and 6(4)(c) of the Revised IBA Rules.

IBA Newsletter. (Emphasis added). In terms of the admissibility and exclusion of evidence, article 9(2)(g) provides that the tribunal may exclude from production a document, statement, oral testimony or inspection because of, "considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral

Tribunal determines to be compelling."[23] The exclusion of evidence takes us to the topic of privilege.

- Privilege

Article 9(2)(b) provides that a 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 due to a legal impediment or privilege under the legal or ethical rules determined by the arbitral tribunal to be applicable. It is the most basic rule related to privilege and has remained unchanged in the revised rules.

Furthermore, the modifications or additions made do not interfere with domestic laws and/or conflict of laws issues with regards to privilege. They merely provide a basis for arbitrators to take into account when making the determination. The new Rules contain a list of five specific issues for the tribunal to consider. The checklist is as follows:

- Art. 9(3)(a), attorney-client privilege.
- Art. 9(3)(b), settlement privilege.
- Art. 9(3)(c), expectations of parties and advisors at the time the legal impediment or privilege is said to have arisen.
- Art. 9(3)(d), waiver by consent, disclosure, affirmative use of the document or advice, or otherwise.
- Art. 9 (3)(e), fairness and equality between the parties, particularly if subject to different legal or ethical rules.

It must not be forgotten that there are differences to note in the way these privileges are viewed and treated internationally. For example, the attorney-client privilege in common law countries seeks to protect the client from discovery intrusion. In civil law countries, however, the focus is on the legal profession, protecting not the client from disclosure, but the attorney from criminal sanctions for violating his duty of confidentiality. Similarly, the privilege does not apply to in-house counsel everywhere as

[23] Int. A.L.R. 2010, 13(5), 168.

it does in the United States and England.[24] In addition, article 9(3)(c) leaves room for debate as it gives the tribunal discretion to determine what are reasonable expectations. It is of particular interest the weight that the parties' own national procedures will be given, especially in finding where internal communications fall under the "expectations" privilege.

Despite the ambiguity of some of the considerations and the ultimate discretion of the arbitrators with regards to this issue, the new IBA rules are a useful reference. By providing the above cited checklist, and without interfering with domestic law, they create a source to which other institutions can turn to when deciding privilege situations in international arbitrations.

Commentators have said that the only way to treat the parties equally and give credit to their prior expectations is to apply the 'most-favoured' nation rule. In other words, the most expansive privilege is applied to all parties.[25]

E. EXPECTED COVERAGE

Most of the previous cited additions and/or modification were self explanatory in their intended coverage. There are, however, issues that may need more clarification, including:

- Duty of Good Faith

This duty requires good faith compliance with the taking of evidence and should not be interpreted to expand the substantive scope of article 3 of the IBA Rules.[26] In other words, it does not impose affirmative duties beyond those expressed in the rules. For example, it does not create a duty voluntarily to submit documents adverse to the party, or to preserve evidence in anticipation to litigation. The following list provides examples of situations in which a party can be in violation of the good faith duty with regards to article 3 of the IBA Rules:

[24] Int. A.L.R. 2010, 13(5) 172.
[25] Int. A.L.R. 2010, 13 (5) 179.
[26] Int. A.L.R. 2010, 13(5), 161.

- Article 3.1: Failing to produce all documents on which a party relies with the intent to sand-bag or surprise parties or witnesses with documents in violation of the second principle enshrined in preamble 3 to the IBA Rules.

- Article 3.3: Submitting requests to produce that are intentionally burdensome, over-broad, irrelevant or immaterial. Although such requests may be objected to on formal or substantive grounds pursuant to arts 3.3 and 9.2 of the IBA Rules, the duty of good faith could also be relevant, for example, if the decision making process triggered by bad faith requests itself amounted to a bad faith attempt to burden the other parties or delay the proceedings.

- Article 3.4: Producing documents in a manner intended to burden the receiving party unduly, e.g. by "burying" responsive documents under reams of unimportant, duplicative or unresponsive documents.

- Article 3.5: Raising objections to requests to produce without a reasonable and good-faith basis or with the intention of delaying or disrupting the taking of evidence.

- Article 3.12(a): Any kind of tampering with documents submitted or produced, including by manipulating electronic versions of documents (cutting or pasting), abridging or excerpting from documents, with the intent of misleading the arbitral tribunal or the other parties.

- Article 3.12(b): Submitting data in a form other than the agreed or default form with the intent to hide information, prevent electronic searching or otherwise burden the other party.

- Article 3.12(d): Submitting translations that are substantively misleading or disguising the fact that a document has been translated at all (i.e. by failing to mark it as a translation or failing to submit the original) with the intent of hiding information or misleading the arbitral tribunal or the other parties.

- Article 3.13: Disclosing otherwise confidential materials with the intent of pressuring or harming another participant in the arbitration, including by causing negative publicity; invoking an exception to confidentiality contained in art.3.13 without a reasonable or good-faith basis.

Int. A.L.R. 2010, 13(5), 162. The duty of good faith can also be interpreted to cover the violations of Articles 4 and 5 regarding "Witnesses of Fact" and "Party-Appointed Experts" respectively. For instance, by failing to identify all witnesses or experts on whose testimony or report a party intends to rely with the intent to surprise the other party may be considered a violation of the duty of good faith.

- <u>E-Discovery</u>

The revisions regarding the electronic production of documents provide guiding principles rather than set rules. For instance, they basically leave it to the arbitrators to decide, on a case by case basis, what format would be *economical* and *fair*.[27] The rules limit the scope of production to documents "reasonably believed to exist" and "relevant and material to the outcome," but there is no indication of what "reasonable" or "relevant"includes.

This flexibility in the determination of scope is not coincidence. The IBA did not intend to provide strict rules but only direction to the arbitral tribunal.

F. OBSERVATIONS

Needless to say, the IBA Rules are limited in their effect by the so-called "General Rules" or any mandatory applicable law.[28] Therefore, the parties will ultimately determine the governing procedures. Also, because of the wide room left for interpretation with regards to the good faith duty, it is important that the parties request the tribunal to make clear what will be considered a breach of the good faith principles, to avoid incurring costs for behaving in a particular way. For example, it is not clear

[27] Int. A.L.R. 2010, 13(5), 181.
[28] IBA Rules, Art 1.1.

whether a very extensive document request could be considered excessive by the tribunal and amount to bad faith. [29]

"""""""""""

[29] Int. A.L.R. 2010, 13(5) 166

BIBLIOGRAPHY

1. Rules
    a. IBA Rules on the Taking of Evidence in International Arbitration, 2010.
    b. IBA Rules on the Taking of evidence in International Commercial Arbitration, 1999.
    c. ICC Dispute Resolution Rules, 2012.
    d. UNCITRAL Arbitration Rules, 2010.
    e. AAA's Commercial Arbitration Rules and Mediation Procedures, 2009.
2. IBA E-Newsletter, undated.
3. Richard Kreindler, The 2010 Revision to the IBA Rules on the Taking of Evidence in International Commercial Arbitration: A Study in Both Consistency and Progress
4. Amy Cohen Klasener, The Duty of Good Faith in the 2010 IBA Rules on the Taking of Evidence in International Arbitration
5. Christopher Newmark, "Efficient, Economical And Fair" — The Mantra of the New IBA Rules
6. Nicholas Craig, Arbitration Confidentiality and the IBA Rules on the Taking Evidence in International Arbitration
7. Klaus Peter Berger, Evidentiary Privileges Under the Revised IBA Rules on the Taking of Evidence in International Arbitration
8. James H. Carter, Privilege Gets A New Framework
9. Amal Bouchenaki, The IBA Rules Lay the Ground for Solutions to Address Electronic-Document-Production Disputes
10. Nathan D. O'Malley, Document Production Under Article 3 of the 2010 IBA Rules of Evidence
11. Matthias Scherer, The Limits of the IBA Rules on the Taking of Evidence in International Arbitration: Document Production Based on Contractual or Statutory Rights
12. Robert H. Smit, E-Disclosure Under the Revised IBA Rules on the Taking of Evidence in International Arbitration
13. Markus Wirth, Fact Witnesses
14. Christopher Harris, Expert Evidence: The 2010 Revisions to the IBA Rules on the Taking of Evidence in International Arbitration
15. Klaus Sachs & Nils Schmidt-Ahrendts, Expert Evidence Under the 2010 IBA Rules
16. Document Discovery in International Arbitration – Getting the Documents you need, Nathan D. O' Malley and Shawn C. Conway, 18 Transnat'l Law. 371, 2004-2005.

17. Newsletter: International Disputes Quarterly, Max Shterngel, Summer 2010.
18. Commentary on the revised text of the 2010 IBa Rules on the Taking of Evidence in International Arbitration, 1999 IBA Working Party and 2010 IBA Rules of Evidence Review Subcomittee.
19. ABA publication, The 2010 IBA Rules of Evidence: Selected Issues.
20. Document Production in Arbitration: A Civil Law Viewpoint, Pierre Tercier and Tetiana Bersheda.
21. Americanization of Discovery, Jenna M. Godfrey, 60 Am. U.L. Rev. 475 2010-2011.
22. Discovery from Non-Parties (Third-Party Discovery) in International Arbitration, Charles Owen Verrill Jr.
23. Understanding Discovery in International Commercial Arbitration through behavioral law and economics: A Journey inside the minds of parties and arbitrators, Giacomo Rojas Elgueta. 16 Harv. Negot. L. Rev. 165 2011.
24. ABA Journal April, 2010.
26. ICC Publication No. 698, Dossiers, 2009.
25. EPC Contract between The Consortium and AES.