Philippi Prietocarrizosa Ferrero DU &Uría

URÍA MENÉNDEZ

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2020 IBA Rules on the Taking of Evidence in International Arbitration

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2020 IBA Rules on the Taking of Evidence

The new rules and commentary can be found *here*. The aim of the 2020 revision is to clarify the rules to reflect established practices that address new technology-driven challenges and developments in the taking of evidence in international arbitration. The most notable amendments in the 2020 revision of the IBA rules relate to cybersecurity, data protection, remote hearings and tribunal powers.

2020 IBA Rules on the Taking of Evidence
Background

The IBA Rules on the Taking of Evidence in International Arbitration are amongst the most influential soft law instruments within the international arbitration community*. The rules on evidence were developed in 1999 with the intention of guiding parties on how to properly conduct the taking of evidence in international arbitration. They were carefully drafted to bridge the gap between the civil law system, the common law tradition and the practice developed in international arbitration processes themselves and provide comprehensive guidelines that have become an indispensable tool for parties and arbitrators alike when conducting an arbitration procedure.

**See the Report on the reception of the IBA arbitration soft law products, September 2016 (paragraph 19).*

2020 IBA Rules on the Taking of Evidence

Uría Menéndez's role in the 2020 revision of the rules

Álvaro López de Argumedo
Partner

Jesús Saracho
Senior Associate

Santiago Rodríguez
Junior Associate

The rules were first amended in 2010, a decade after they were introduced. In 2016 the IBA Arbitration Guidelines and Rules Subcommittee issued the *Report on the reception of the IBA arbitration soft law products*, which identified several areas for improvement. Consequently, the IBA International Arbitration Committee initially appointed **Álvaro López de Argumedo** (Uría Menéndez) and Fernando Mantilla-Serrano as co-chairs of the task force in charge of reviewing the rules on evidence. **Jesús Saracho** and **Santiago Rodríguez** (Uría Menéndez) served as secretaries of that task force, together with Alice Williams and David Blackman.

The task force, created in early 2019, was made up of 4 teams consisting of 28 prominent members of the international arbitration community in order to ensure that the rules remain one of the most diverse and representative soft law instruments. Álvaro López de Argumedo and Fernando Mantilla-Serrano, who initially led the task force as co-chairs, were later succeeded by Nathalie Voser and Joseph E. Neuhaus.

2020 IBA Rules on the Taking of Evidence

Main amendments

Most of the modifications to the rules aim to clarify them. However, the task force did amend certain substantive parts of the rules on evidence to reflect evolving trends in the international arbitration community over the last decade. The following are some of the most important and substantive amendments:

1. Cybersecurity and data protection issues (article 2.2.e)
2. Witness and expert testimony (articles 4.6 and 5.3)
3. Remote hearings (article 8.2)
4. Direct testimony at hearings (article 8.5)
5. Illegally obtained evidence (article 9.3)

Main amendments:
Cybersecurity and data protection issues (article 2.2.e)

Article 2 — Consultation on Evidentiary Issues:
2. The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including**, to the extent applicable**:

[. . .]

(e) the treatment of any issues of cybersecurity and data protection; and
(f) the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.

Article 2 of the rules on evidence provides a framework for considering evidentiary issues in the context of an early consultation between the parties and the tribunal. It is intended to ensure efficiency and fairness in the taking of evidence. Article 2.2 of the rules comprises an open-ended list of issues that may be addressed in this early consultation.

The 2020 task force has included a new section in the list in connection with "the treatment of any issues of cybersecurity and data protection." This modification reflects the increasing importance that technology-driven issues like cybersecurity and data protection have taken on in recent years.

Addressing these issues at an early stage will no doubt avoid unexpected problems and therefore increase the efficiency of the proceedings. We are all aware today that cybersecurity threats are a growing concern in international arbitration, given the increase in virtual hearings as a consequence of the current health crisis, the electronic management of arbitration proceedings and the confidential nature of the information exchanged in arbitrations.

The above also applies to data protection issues, as parties and arbitral tribunals may be wary of sharing certain documents during the procedure as doing so may breach data protection laws —which vary by country— or expose confidential data to potential cybersecurity threats.

Main amendments:

Witness and expert testimony (articles 4.6 and 5.3)

Article 4 — Witnesses of Fact:

6. If Witness Statements are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Witness Statements, including statements from persons not previously named as witnesses, so long as any such revisions or additions respond only to:

(a) matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration; **or**

(b) new factual developments that could not have been addressed in a previous Witness Statement.

Article 5 — Party-Appointed Experts:

3. If Expert Reports are submitted, any Party may, within the time ordered by the Arbitral Tribunal, submit to the Arbitral Tribunal and to the other Parties revised or additional Expert Reports, including reports or statements from persons not previously identified as Party-Appointed Experts, so long as any such revisions or additions respond only to:

(a) matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration; **or**

(b) new developments that could not have been addressed in a previous Expert Report.

Main amendments:
Witness and expert testimony (articles 4.6 and 5.3)

It is common practice in arbitration to have two rounds of pleadings: (i) the statement of claim and statement of defence, and (ii) the reply to the statement of defence and rejoinder to the reply.

Generally, parties submit their factual and expert witness statements during the first round of pleadings, and allow a second round of factual and expert witness statements that are limited to responding to what the other factual or expert witness said about their own statement.

These amendments make clear that parties can submit a second round of witness statements and expert reports to cover new factual developments that could not have been addressed previously. This ensures that opportunities to give further evidence are still limited to replying to the counterparty's evidence, but, at the same time, recognizes that this possibility should also exist when new facts — which could not have been considered in the first round of briefs— have arisen.

Main amendments:
Remote hearings (article 8.2)

Article 8 — Evidentiary Hearing:

[. . .]

2. At 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. In that event, the Arbitral Tribunal 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. The protocol may address:
(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
(d) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

This amendment is probably the most substantial change to the 2010 version of the rules. As a consequence of the COVID-19 pandemic, remote hearings have become the "new normal" while restrictions on travelling and gatherings remain in place. Conducting in-person hearings has become impossible or impractical, so parties have been forced to resort to remote hearings in order to continue proceedings.

The new rules confirm that an arbitral tribunal may order that the evidentiary hearing be conducted as a "Remote Hearing", either at the request of a party or on its own motion. The task force has defined a remote hearing, in the "Definitions" section of the rules, 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."

Main amendments:
Remote hearings (article 8.2)

Remote hearings have demonstrated that hearings, or parts of hearings, can be conducted remotely without too much trouble. Their appropriateness must be analysed on a case-by-case basis, but in many cases remote hearings present significant advantages over in-person hearings, such as alleviating some of the costs that are innate to in-person hearings. It is expected that remote hearings will stay with us in a post-COVID-19 world.

This subsection to article 8 reflects a new trend in the international arbitration community. In addition, the subsection mentions that the arbitral tribunal should consult with the parties with a view to establishing a remote hearing protocol in order to conduct the remote hearing “efficiently, fairly and, to the extent possible, without unintended interruptions.” The new rules also give some examples of issues that may be addressed in the protocol. The updated commentary on the rules states that the question of who bears the responsibility for preparing such a protocol was left open for the sake of flexibility.

Main amendments:
Direct testimony at hearings (article 8.5)

Article 8 — Evidentiary Hearing:

[. . .]

5. A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth or, in the case of an expert witness, his or her genuine belief in the opinions to be expressed at the Evidentiary Hearing. If the witness has submitted a Witness Statement or an Expert Report, the witness shall confirm it. The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony, **in which event the Arbitral Tribunal may nevertheless permit further oral direct testimony**.

It is common practice in international arbitration for a witness to only appear at the hearing if they are called for cross-examination. Witnesses who are not called for cross-examination generally do not give oral testimony at the hearing, given that their witness statement is taken as their direct testimony. This practice is reflected in article 8.5 of the rules on evidence: "The Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness's direct testimony."

There was some uncertainty in the international arbitration community as to whether, when a party waives its right to cross-examine a witness, the party that presented the witness may nevertheless call that witness to give testimony.

The task force has expressly clarified that the tribunal, as part of its discretionary powers, may allow a witness to give direct oral testimony at the hearing despite the fact that the counterparty has waived its right to cross-examine that witness.

Main amendments:
Illegally obtained evidence (article 9.3)

Article 9 — Admissibility and Assessment of Evidence:

[. . .]

3. The Arbitral Tribunal may, at the request of a Party or on its own motion, exclude evidence obtained illegally.

The issue of whether or not to admit illegally obtained evidence is an ongoing debate within the international arbitration community. Therefore, the question arises as to whether or not illegally obtained evidence should be accepted in an arbitration procedure and considered by the tribunal when deliberating. The answer seems like it should be clear, however this is not always the case given that evidence may be illegal under the law of one country but not so under the law of another country, which may also apply to the dispute.

Given that there is no general standard as to what exactly constitutes illegally obtained evidence, the task force has decided to add wording that grants the tribunal a certain degree of flexibility to accept or reject the admissibility of evidence on these grounds. The tribunal may act at the request of a party or of its own accord to decide on the admissibility of illegally obtained evidence.

This provision must be read in connection with article 9.2 of the rules, which also provides other grounds to exclude evidence, or its production, from the arbitration. It must be noted, nevertheless, that the lack of a common standard on what constitutes “evidence obtained illegally” is the reason why the rules state only that the tribunal “may” exclude such evidence (in contrast with article 9.2, according to which the tribunal “shall” exclude evidence in certain circumstances).

2020 IBA Rules on the Taking of Evidence
General overview

In sum, the 2020 IBA Rules on the Taking of Evidence are a welcome development, given that they:

1. clarify specific points of interpretation in line with current practice, while keeping to their core principles;
2. reinforce the idea that the rules provide the right balance between civil and common law traditions; and
3. address in a flexible way the technology-driven challenges that the international arbitration community is facing today.

International Arbitration
Contact information

Jesús Remón
Spain
jesus.remon@uria.com

Gabriel Bottini
Spain
gabriel.bottini@uria.com

Álvaro López de Argumedo
Spain
alvaro.argumedo@uria.com

Cristian Gual
Spain
cristian.gual@uria.com

Tito Arantes Fontes
Portugal
tito.fontes@uria.com

Fernando Aguilar de Carvalho
Portugal
fernando.aguilar@uria.com

Philippi Prietocarrizosa Ferrero DU & Uría

Heidi López
Spain
heidi.lopez@uria.com

Jorge Vial
Chile
jorge.vial@ppulegal.com

Ramiro Portocarrero
Peru
ramiro.portocarrero@ppulegal.com

Héctor Hernández
Colombia
hector.hernandez@ppulegal.com

Gillian Cahill
Spain
gillian.cahill@uria.com

Philippi
Prietocarrizosa
Ferrero DU
&Uría

URÍA
MENÉNDEZ

www.uria.com
www.ppulegal.com