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Revised IBA Rules on the Taking of Evidence in International Arbitration

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On 29 May 2010, the International Bar Association revised its Rules on the Taking of Evidence in International Arbitration, first published in 1999 ("IBA Rules"). The IBA Rules provide mechanisms for the gathering of evidence and the presentation of evidence in international arbitration proceedings and are often described as reflecting a compromise among the approaches from different legal systems. They are designed to provide procedures for the efficient, economical and fair taking of evidence in the course of an arbitration, and have been widely influential in practice since they were promulgated in 1999.[1]

The IBA Rules include specific mechanisms for the presentation of documents, fact and expert witnesses, as well as the physical inspection of evidence and the conduct of evidentiary hearings. They may be adopted by parties (in whole or in part or as guidelines) either in an arbitration agreement or after a dispute has arisen, and are intended to supplement the legal provisions and institutional or *ad hoc* rules that apply to the conduct of an international arbitration.

The Revised IBA Rules

The revised IBA Rules, which came into effect on 29 May 2010, introduce changes intended to reflect current practices and challenges in international arbitration. With that goal in mind, the revised rules have dropped the word "commercial" from the title, in recognition of the potential application of the rules to "non commercial" international arbitrations such as investment treaty-based disputes.

As discussed below, there are at least three noteworthy changes reflected in the revised rules.

First, the revised rules provide for a more prescriptive approach to the evidence gathering process in international arbitration. These changes have been introduced in an effort to promote efficiency and reduce unnecessary costs.

Second, the revised rules provide for specific guidance relating to the issue of legal privilege, with the express goal of maintaining fairness and equality, particularly if the parties are subject to

different legal or ethical rules.

Third, the revised rules provide for an express requirement of good faith in the taking of evidence, and expressly allow for the arbitral tribunal to consider lack of good faith in the awarding of costs.

It also is noteworthy that the language of one of the most fundamental aspects of the IBA Rules—the requirement in Article 3(3) that requested documents be "relevant and material to the outcome of the case"—has been revised, although the revised language appears to be intended to add clarity, rather than to change the test.

These changes are discussed in more detail below.

A More Prescriptive Approach to Evidence Gathering

The revised rules contain several updates which are intended to promote efficiency, and thereby reduce costs in the evidence gathering stage of an arbitration, by encouraging the tribunal to become more involved in procedural matters at an early stage of the proceedings, as well as providing the tribunal and parties with more specific guidelines on issues such as requests for the production of documents maintained in electronic form (often referred to as "e-disclosure") and the drafting of expert reports and witness statements.

Early Engagement with Issues of Evidence

The revised rules require the tribunal to engage with the parties at the earliest appropriate time in the proceedings to try and agree on an "efficient, economical and fair process for the taking of evidence."[2] The revised rules also encourage the tribunal to identify to the parties, as soon as it considers appropriate, any issues the tribunal regards as relevant to the case and material to its outcome.[3] Notably, the revised rules also encourage the tribunal to promptly identify issues for which a preliminary determination may be appropriate.[4]

The rules also expressly contemplate the organization of the proceedings, by issues or phases (e.g., jurisdiction, preliminary determinations, liability or damages). In this connection, the revised rules provide that the tribunal may schedule separately the submission of documents, production requests, witness statements and oral testimony for each specific issue or phase of the arbitration.[5]

Documents Maintained In Electronic Form

The scope and advisability of "e-disclosure"—the request for production of electronic communications and electronically stored information (such as e-mails, hyperlinked spreadsheets or information stored on mobile phones)—has become an issue of increasing contention in international arbitration and also can raise significant issues of costs and efficiency.[6] The revised rules introduce some specific language relating to requests for production of "Documents maintained in electronic form" (although it should be noted that that term is not fully defined in the

rules).[7]

In addition to the fundamental requirement that the party requesting the production of documents provided a statement as to why the requested documents are "relevant and material to the outcome of the case,"[8] the original IBA Rules required in Article 3(3) that any request for the production of documents should contain either (i) a description of each requested document sufficient to identify it[9] or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist.[10] The revised rules now expressly address "Documents maintained in electronic form" in the context of a request for a narrow and specific category of documents.

Specifically, the revised rules now provide in Article 3(3)(a) that a party seeking such a category of documents may identify "specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner." Notably, the revised rules also expressly provide that the tribunal may order that the party requesting documents maintained in electronic form be required to identify specific files and identify search terms and other means for searching for such documents efficiently and economically.[11]

Witness Statements and Expert Reports

The revised rules add additional requirements for the contents of both expert reports and witness statements.

In addition to the existing requirements, the revised rules stipulate that an expert report should contain a description of the instructions pursuant to which the expert is providing his or her opinions and conclusions,[12] a statement of his or her independence from the parties, their legal advisors and the tribunal,[13] a statement as to the language in which the expert report was prepared (if translated from the original),[14] and, in circumstances where an 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.[15]

The revised rules also require that a witness statement must contain a statement as to the language in which it was prepared if the submitted witness statement is in a different language from that in which it was originally prepared and also requires the witness to state the language in which the witness anticipates giving testimony at the evidentiary hearing.[16]

The revised rules only oblige a witness to appear for oral testimony at a hearing if their appearance has been requested by any party or the tribunal,[17] and they also now expressly refer to the possibility that a witness may appear at the evidentiary hearing by videoconference or similar technology.[18]

Specific Guidance on Legal Privilege

Claims of attorney-client privilege, legal secrecy or other impediments to communications with or work product from legal advisers often raise very difficult issues, particularly in the context of international transactions and disputes, where parties and their legal advisers may come from a number of different jurisdictions and the governing and procedural laws applicable to the arbitration may again be different. In these circumstances, the rules regarding whether and when evidence can be taken from external and internal legal advisers (and what constitutes a waiver of a protection against providing evidence) may vary greatly. Prior to the revision, the IBA Rules provided that "legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable" could be a basis for excluding from evidence documents and oral testimony.[19] However, beyond authorizing the tribunal to determine what legal or ethical rules were applicable, the rules did not provide any specific guidance on the issues that a tribunal might actually consider when determining whether evidence was subject to legal impediment or privilege.

The revised rules go further than the original rules in providing certain considerations that the tribunal (and parties) may take into account when considering a claim that a legal impediment or privilege should exclude evidence, and expressly refer to maintaining "fairness and equality" between the parties.

Specifically, the revised rules refer to the following considerations in new Article 9(3):

1. The need to protect the confidentiality of a document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice, or for the purpose of settlement negotiations.[20]

2. The expectation of the parties and their advisers at the time when legal impediment or privilege was said to have arisen.[21]

3. Any possible waiver of legal impediment or privilege by consent, earlier disclosure, affirmative use of the document, statement, oral communication or advice contained therein.[22]

4. The need to maintain fairness and equality as between the parties, particularly if they are subject to different legal or ethical rules.[23]

Express Good Faith Requirement

The revised rules now expressly incorporate the concept of good faith with regard to the process of taking of evidence in international arbitration. Notably, the revised rules also provide express authority for the tribunal to take into account lack of good faith at the costs stage of the proceedings.

Thus, the Preamble to the revised rules states that "the taking of evidence shall be conducted on the principles that each Party shall act in good faith ..."[24] Article 9(7) of the revised rules then provides expressly that the tribunal can consider a failure to act in good faith in the taking of evidence as a factor when awarding the costs of the arbitration, including the costs arising out of or in connection

with the taking of evidence.[25]

Revised Language Concerning The Requirements of Relevance and Materiality

As noted above, one of the most fundamental principles in the 1999 IBA Rules is the requirement in Article 3 that requested evidence be "relevant and material to the outcome of the case" and the related obligation in Article 9(2)(a) for the tribunal to exclude from evidence or production, at the request of a party or on its own motion, evidence that lacks "sufficient relevant or materiality." The revised rules have changed the language used in those articles so that Article 3(3)(b) now requires a statement from the requesting party that the requested documents are "relevant to the case and material to its outcome,"[26] while Article 9(2)(a) tracks the revised language and provides that the tribunal should exclude evidence or refuse a request for production for "lack of sufficient relevance to the case or materiality to its outcome." These changes clarify that both relevance and materiality are required, but do not appear to affect a change in the general understanding of the standards set out in Article 3 and Article 9.

Application of Revised IBA Rules

The revised rules will apply to all arbitrations in which the parties agree, on or after 29 May 2010, to apply the IBA Rules, whether as part of a new arbitration agreement or in determining the rules of procedure in a pending or future arbitration.

For more information on this or other international arbitration matters, contact Gary Born, Steven P. Finizio or Franz T. Schwarz in London; Rachael D. Kent or John A. Trenor in Washington DC; or John V.H. Pierce in New York.

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[1] For a more detailed analysis of the 1999 version of the IBA Rules and their influence on the practice of taking evidence in international commercial arbitration, *see* G. Born, *International Commercial Arbitration* (2009), pp. 1896-1917; *see also* F. Schwarz and C. Konrad, *The Vienna Rules: A Commentary on International Arbitration in Austria*, para. 20-011; W. Miles and F. Schwarz, "Taking of Evidence in International Commercial Arbitration" in *International Comparative Legal Guide to International Arbitration 2004* (London Legal Group, 2003).

[2] Revised IBA Rules of Evidence, at Article 2(1).

[3] Revised IBA Rules of Evidence, at Article 2(3)(a).

[4] Revised IBA Rules of Evidence, at Article 2(3)(b).

[5] Revised IBA Rules of Evidence, at Article 3(14), Article 4(4) and Article 8(3)(e).

[6] In addition to the IBA's efforts to provide some additional guidance with regard to electronically stored information, there have been several other recent efforts to address this issue, including: (i) the ICDR's Guidelines for Arbitrators Concerning Exchanges of Information, issued in May 2008; (ii)

the Chartered Institute of Arbitrators Protocol for E-Disclosure, issued in October 2008; (iii) the CPR's Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, issued in December 2008; and (iv) the current ongoing process of review of this issue by the ICC Task Force on Production of Electronic Documents in Arbitration.

[7] Both the 1999 version and the revised rules define "Document" in a similar but not identical way. The 1999 version defines "Document" as "a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information." The revised 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." The revised rules do not attempt to further define a "Document maintained in electronic form," as now referred to in revised Article 3(3)(a)(ii).

[8] Both the 1999 version and the revised rules define "Document" in a similar but not identical way. The 1999 version defines "Document" as "a writing of any kind, whether recorded on paper, electronic means, audio or visual recordings or any other mechanical or electronic means of storing or recording information." The revised 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." The revised rules do not attempt to further define a "Document maintained in electronic form," as now referred to in revised Article 3(3)(a)(ii).

[9] IBA Rules of Evidence (1999), at Article 3(3)(a)(i).

[10] IBA Rules of Evidence (1999), at Article 3(3)(a)(ii). The revised rules at Article 3(3)(c) also require that a document request include a statement (i) that the requested documents are not in the possession, custody or control of the requesting party or that it would be unreasonably burdensome for the requesting party to produce the documents and (ii) of the reasons why the requesting party assumes the requested documents are in the possession, custody or control of another party.

[11] Revised IBA Rules of Evidence, at Article 3(3)(a)(ii).

[12] Revised IBA Rules of Evidence, at Article 5(2)(b).

[13] Revised IBA Rules of Evidence, at Article 5(2)(c).

[14] Revised IBA Rules of Evidence, at Article 5(2)(f).

[15] Revised IBA Rules of Evidence, at Article 5(2)(i).

[16] Revised IBA Rules of Evidence, at Article 4(5)(c).

[17] Revised IBA Rules of Evidence, at Article 8(1).

[18] Revised IBA Rules of Evidence, at Article 8(1).

[19] IBA Rules of Evidence (1999), at Article 9(2)(b).

[20] Revised IBA Rules of Evidence, at Article 9(3)(a)-(b).

[21] Revised IBA Rules of Evidence, at Article 9(3)(c).

[22] Revised IBA Rules of Evidence, at Article 9(3)(d).

[23] Revised IBA Rules of Evidence, at Article 9(3)(e).

[24] Revised IBA Rules of Evidence, Preamble at para. 3.

[25] Revised IBA Rules of Evidence, at Article 9(7).

[26] Revised IBA Rules of Evidence, at *inter alia*, Article 3(3)(b), Article 3(7), Article 3(9), Article 3(11) and Article 9(2)(a).

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