ALERT MEMORANDUM

2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration

February 17, 2021

On February 15, 2021, the International Bar Association ("**IBA**") formally released its revised Rules on the Taking of Evidence in International Arbitration (the "**2020 IBA Rules**" or the "**Rules**"). The revised Rules will replace the previous iteration of the Rules, which have been in force since 2010 (the "**2010 IBA Rules**") and have found widespread application and discussion in international arbitration practice. The aim of the 2020 revision is to further streamline and clarify the Rules as well as to reflect established practices and address new, technology-driven challenges and developments in the taking of evidence in international arbitration.

Specifically, the newly released 2020 IBA Rules contain modest but potentially significant revisions addressing, *inter alia*:

- **Virtual/Remote Evidentiary Hearings** (introducing rules and protocols for Remote Hearings; *see Article 8*)
- **Cybersecurity, Data Protection and Confidentiality**
  - Addressing issues of cybersecurity and data protection during early consultations between the Parties and the Arbitral Tribunal (*see Article 2*)
  - Extending confidentiality over Documents to be produced to opposing Parties (*see Article 9*)
- **Tribunal Authority/Powers**
  - Expressly providing for the power to exclude evidence obtained illegally (*see Article 9*)
  - Clarifying the exclusive authority of the Arbitral Tribunal to decide on disagreements concerning Tribunal-Appointed Expert requests for information or access (*see Article 6*)
- **Document Translation** (*i.e.*, that Documents to be produced to another Party in response to a Request to Produce are not required to be translated while foreign-language Documents submitted to the Arbitral Tribunal are required to be translated; *see Article 3*);

This Alert Memorandum identifies and analyzes the most notable elements of the 2020 IBA Rules revision.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors.

FRANKFURT

Richard Kreindler
+49 69 97103 160
rkreindler@cgsh.com

Zachary S. O'Dell
+49 69 97103 128
zodell@cgsh.com

Till Hackstein
+49 69 97103 277
thackstein@cgsh.com

LONDON

Christopher P. Moore
+44 20 7614 2227
cmoore@cgsh.com

James Brady
+44 20 7614 2364
jbrady@cgsh.com

MILAN

Carlo Santoro
+39 02 7260 8280
csantoro@cgsh.com

NEW YORK

Ari D. MacKinnon
+1 212 225 2243
amackinnon@cgsh.com

PARIS

Jean-Yves Garaud
+33 1 40 74 68 00
jgaraud@cgsh.com

ROME

Ferdinando Emanuele
+39 06 6952 2604
femanuele@cgsh.com

1. Introduction

The IBA Rules on the Taking of Evidence in International Arbitration (the "**IBA Rules**" [1]) were promulgated in 1999 and represented the first broad attempt to combine aspects of both civil and common law practices for the taking of evidence in international commercial arbitration proceedings. Designed as supplementary evidentiary rules that parties or the arbitral tribunal could adopt irrespective of the substantive or procedural laws governing proceedings, the original Rules aimed to provide for efficient, economical and fair procedures when taking evidence in international arbitration.

Since the introduction of the IBA Rules in 1999, they have become increasingly important and frequently adopted as default guidelines in both international commercial and treaty-based arbitration proceedings. Indeed, based on the ubiquity of the IBA Rules in arbitral proceedings, it would not be hyperbole to say that the IBA Rules have achieved soft-law status.

At the same time, the proliferation and success of the IBA Rules has also led to competition, including most recently with the promulgation of the Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules) in 2019, which were promoted as an alternative to the IBA Rules. The Prague Rules avowedly eschew the perceived common law features of the IBA Rules and adopt an inquisitorial approach to the taking of evidence, more familiar to practitioners and users educated and trained in civil law jurisdictions.

Notwithstanding such intervening developments, experience still suggests that the IBA Rules remain the benchmark for evidentiary procedures in high-stakes, cross-border international arbitrations.

The IBA Rules were last revised in 2010 whereby most of the revisions made at that time reflected already established evidentiary best practices.[2] In addition, the *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration* was published as an accompanying guide.[3]

As outlined below, the comparatively modest 2020 revisions maintain this legacy and do not by any means seek to overhaul the Rules. Rather, the 2020 revisions aim to modernize the Rules by codifying various more recent developments and practices while also addressing new challenges brought about by recent technological advancements. At the same time, the previous commentary has also been updated together with the Rules to reflect the latest revisions (the "**Commentary**").[4]

2. Preamble and Scope of Application (Article 1)

The 2020 revision of the Rules has aligned the Scope of Application in Article 1 with the (lesser known and heeded) Preamble and refined the provision to address potential conflicts of the Rules with any other applicable rules.

Pursuant to the Preamble of the Rules, Parties[5] and Arbitral Tribunals[6] may adopt the Rules in whole or in part to govern arbitration proceedings.[7] However, in the 2010 IBA Rules, Article 1 addressing the Scope of Application was silent concerning partial adoption of the Rules. In the 2020 revisions, Article 1 is now aligned with the Preamble, expressly clarifying that

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1 The revised 2020 IBA Rules were adopted by a resolution of the IBA Council on December 17, 2020, and were made available to the public on February 15, 2021, on the IBA website. Unless otherwise stated, capitalized terms used but not defined herein shall have the meaning given to them in the "Definitions" section of the 2020 IBA Rules.

2 The IBA Working Group responsible for the 2010 revision was chaired by Richard Kreindler while the Working Group responsible for the 2020 revision was co-chaired by Joseph Neuhaus and Nathalie Voser.

3 *See* Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

4 The Commentary on the Revised Text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration is available here.

5 *See* Definitions, 2020 IBA Rules ("*'Party' means a party to the arbitration*").

6 *See* Definitions, 2020 IBA Rules ("*'Arbitral Tribunal' means a sole arbitrator or a panel of arbitrators*").

7 *See* Preamble ¶ 2, 2010 IBA Rules ("*Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures.*") This language has been maintained in the 2020 IBA Rules.

the Parties can adopt the IBA Rules either in whole or in part.[8] As in the 2010 IBA Rules, if the Parties have agreed on the applicability on the Rules, the version of the Rules in force at the time of the agreement shall apply unless indicated otherwise.[9]

While the IBA Rules are intended to serve as a supplementary and complimentary set of procedural rules governing the taking of evidence, conflicts may still arise with other rules applicable to arbitration proceedings in a given case (so-called General Rules[10]). The 2020 revisions to Article 1 (Scope of Application) therefore address the extent to which the Arbitral Tribunal should accommodate such conflicts when applying the IBA Rules.

This potential problem was already partially addressed in the 2010 IBA Rules, taking due consideration of the primacy of party autonomy: Pursuant to Article 1.3 of the 2010 IBA Rules, in the event of a conflict the Arbitral Tribunal is to "*apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish the purposes of both the General Rules and the IBA Rules of Evidence*."[11] In the 2020 revisions, this language has been slightly modified to clarify that such an alignment of the IBA Rules with the General Rules should be undertaken only "*to the extent possible.*"[12] This approach generally aligns with the Commentary.

The Commentary, which it is fair to say since 2010 has not appeared to attract as much attention as intended as an accompanying guide to use of the 2010 IBA Rules, focused on the principle of party autonomy in resolving such conflicts and emphasizes that the Arbitral Tribunal should harmonize the applicable rules to the greatest extent possible.[13] Helpfully, the approach reflected in the previous Commentary has largely been codified in the 2020 revisions and updated Commentary.

3. Consultation on Evidentiary Issues (Article 2)

Article 2 of the Rules, which was implemented with the 2010 revisions, provides a framework for consideration of evidentiary issues in the context of an early consultation between the Parties and the Arbitral Tribunal. Such early consultation is intended in particular to ensure discussion, alignment and implementation of an efficient, economical and fair procedure for the taking of evidence.[14]

Article 2.2 of the Rules contains a non-exhaustive list of issues that may be addressed during such an early consultation. These include, *inter alia*, the preparation and submission of Witness Statements[15] and Expert Reports[16] and the taking of oral testimony at any

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[8] *See* Art. 1.2, 2020 IBA Rules ("*Where the Parties have agreed to apply the IBA Rules of Evidence, in whole or in part, they shall be deemed to have agreed, in the absence of a contrary indication, to the version as current on the date of such agreement.*") (revisions emphasized).

[9] *Id.*

[10] *See* Definitions, 2020 IBA Rules ("*'General Rules' mean the institutional, ad hoc or other rules that apply to the conduct of the arbitration*").

[11] Art. 1.3, 2010 IBA Rules.

[12] *See* Art. 1.3, 2020 IBA Rules ("*In case of conflict between any provisions of the IBA Rules of Evidence and the General Rules, the Arbitral Tribunal shall apply the IBA Rules of Evidence in the manner that it determines best in order to accomplish, to the extent possible, the purposes of both the General Rules and the IBA Rules of Evidence, unless the Parties agree to the contrary.*") (revisions emphasized).

[13] "Art. 1 – Scope of Application," in Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration: ("*In a conflict between the IBA Rules of Evidence and the General Rules* […]*, the parties have a right, in keeping with the principle of party autonomy which is central to any international arbitration, to resolve this conflict in the manner they choose, as long as both parties agree. In the absence of such agreement, the arbitral tribunal shall try to harmonise the two sets of rules to the greatest extent possible.*").

[14] *See* "Art. 2 – Consultation on Evidentiary Issues," in Commentary on the Revised Text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration.

[15] *See* Definitions, 2020 IBA Rules ("*'Witness Statement' means a written statement of testimony by a witness of fact*").

[16] *See* Definitions, 2020 IBA Rules ("*'Expert Report' means a written statement by a Tribunal-Appointed Expert or a Party-Appointed Expert*").

Evidentiary Hearing.[17] With the 2020 revisions, a new Article 2.2(e) has usefully been added to this non-exhaustive list providing that the Arbitral Tribunal may also address "*the treatment of any issues of cybersecurity and data protection*" during such an early consultation on evidentiary issues.[18] This new subparagraph highlights the importance of considering and addressing technology-driven issues at an early stage of proceedings to provide for efficient and cost-effective taking of evidence. Such technology-driven issues may concern, *inter alia*, (i) compliance with GDPR[19] or other applicable data protection regimes, and (ii) cybersecurity in virtual hearings, an issue which has risen to prominence in the context of the Coronavirus health crisis.

The revised Article 2.2 of the Rules now also further clarifies that the Arbitral Tribunal may address the evidentiary issues listed in sub-section 2 "*to the extent applicable*."[20] Arguably, this added clarity was already implicit in Article 2.2 of the 2010 IBA Rules. In any event, the 2020 revisions to Article 2.2 further emphasize the flexibility inherent in the intended "*meet and consult approach*."[21]

4. Documents (Article 3)

Some of the most important changes contained in the 2020 revisions concern the taking of evidence by way of Documents[22], including the procedure to be observed after a Request to Produce[23] is submitted (sub-section (a), below), and the form of production of requested Documents (sub-section (b), below).

a. Procedure

Article 3.2 of the IBA Rules provides that Parties may submit to the Arbitral Tribunal a Request to Produce Documents. The general procedure following a Request to Produce is outlined in the Rules in order to provide a guideline for the Arbitral Tribunal and the Parties, but at the same time to allow the greatest possible flexibility.

Following the submission of a Request to Produce, Article 3.5 of the Rules allows the Party to whom the Request to Produce is addressed to object.[24] However, the 2010 IBA Rules did not expressly permit the requesting Party to respond to such an objection, notwithstanding the fact that this was and is the prevailing practice, particularly in the context of the Redfern Schedule.

Indeed, it has become customary for most Arbitral Tribunals to issue schedules that contemplate responses to such objections notwithstanding this omission. This practice may be seen as supportive of the Parties' fundamental right to be heard and it has proven to be an effective tool, as the further responses to objections may lead to further clarification or narrowing of the issues in dispute for which evidence is being sought. Consequently, the 2020 revisions to

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17 *See* Definitions, 2020 IBA Rules ("*'Evidentiary Hearing' means any hearing, whether or not held on consecutive days, at which the Arbitral Tribunal, whether in person, by teleconference, videoconference or other method, receives oral or other evidence*").

18 *See* Art. 2.2(e), 2020 IBA Rules ("*The consultation on evidentiary issues may address the scope, timing and manner of the taking of evidence, including, to the extent applicable:* […] *the treatment of any issues of cyber-security and data protection*") (revisions emphasized).

19 The General Data Protection Regulation (EU) 2016/679 (GDPR).

20 *See* Art. 2.2(e), 2020 IBA Rules.

21 *Cf.* "Art. 2 – Consultation on Evidentiary Issues," in Commentary on the Revised Text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration.

22 *See* Definitions, 2020 IBA Rules ("*'Document' means 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*").

23 *See* Definitions, 2020 IBA Rules ("*'Request to Produce' means a written request by a Party that another Party produce Documents*").

24 *See* Art. 3.5, 2020 IBA Rules ("*If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal and the other Parties within the time ordered by the Arbitral Tribunal. The reasons for such objection shall be any of those set forth in Article 9.2 or 9.3, or a failure to satisfy any of the requirements of Article 3.3.*").

Articles 3.5 and 3.6 of the Rules now explicitly foresee the possibility of a response to such an objection if the Arbitral Tribunal so permits.[25]

In the event that an objection to a Request to Produce is raised, Article 3.7 of the Rules sets out the procedure for the Arbitral Tribunal to rule on the objection. In this context, the 2010 IBA Rules required the Arbitral Tribunal to consider the Request to Produce and the objection in a timely fashion and "*in consultation with the Parties*."[26]

Helpfully, the 2020 revisions to the Rules now expressly reflect that the Arbitral Tribunal is to consider not only the Request to Produce and the objection, but also the responses thereto.[27]

Furthermore, the 2020 revisions no longer contain the requirement in Article 3.7 that the Arbitral Tribunal should consider the Request to Produce and the objection in consultation with the Parties. This revision of Article 3.7 legitimately reflects (i) common practice of Arbitral Tribunals to rule on objections to Requests to Produce solely based on the Request, the objection and response thereto and thus without further consultation, and (ii) the apparent concern of the Working Group charged with the 2020 revisions that the previous language might erroneously suggest that consideration of a second round of comments from the Parties was a requirement.

Additionally, according to the revised Article 3.10 of the Rules, "*any Party*" may now object to a Request to Produce for any of the reasons set forth in Articles 9.2 or 9.3 of the Rules, *inter alia*, legal impediment or privilege.[28] Such an objection was previously contemplated only for the Party to whom a Request to Produce was addressed. Usefully, the 2020 revisions now formally recognize that any Party may have legitimate claims of privilege or confidentially concerning Documents subject to Requests to Produce addressed to other Parties and thus may have an interest in stating an objection to the disclosure of such Documents.

b. Form

Another important question that regularly arises in document production phases of international arbitration concerns translation of Documents produced in response to a tribunal-ordered Request to Produce. In this context, two issues are of particular concern, namely (i) whether and when translations are to be submitted and (ii) whether such requirement applies solely to Documents submitted into the evidentiary record or also to Documents produced only to the opposing Party, but not (yet) introduced into the record.

As to (i), the 2010 IBA Rules generally provide in Article 3.12(d) how translations are to be submitted, but do not specifically address at what stage this submission should be made.[29] The Commentary on the 2010

[25] *See* Art. 3.5, 2020 IBA Rules ("*If so directed by the Arbitral Tribunal, and within the time so ordered, the requesting party may respond to the objection.*"); Art. 3.6, 2020 IBA Rules ("*Upon receipt of any such objection and response, the Arbitral Tribunal may invite the relevant Parties to consult with each other with a view to resolving the objection.*") (revisions emphasized).

[26] *See* Art. 3.7, 2010 IBA Rules ("*Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce and the objection.*").

[27] *See* Art. 3.7, 2020 IBA Rules ("*Either Party may, within the time ordered by the Arbitral Tribunal, request the Arbitral Tribunal to rule on the objection. The Arbitral Tribunal shall then, in consultation with the Parties and in timely fashion, consider the Request to Produce, the objection and any response thereto.*" (revisions emphasized).

[28] Art. 3.10, 2020 IBA Rules ("*Any Party may object to the request for any of the reasons set forth in Article 9.2. In such cases, Article 3.4 to Article 3.8 shall apply correspondingly.*") (revisions emphasized).

Art. 9.2(b), 2020 IBA Rules ("*The Arbitral 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, in whole or in part, for any of the following reasons: legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable (see Article 9.4 below*").

[29] *See* Art. 3.12(d), 2010 IBA Rules ("*With respect to the form of submission or production of Documents:*[…] *(d) translations of Documents shall be submitted together with the originals and marked as translations with the original language identified.*").

IBA Rules, for its part, suggested that not all Documents need be translated.[30]

With the 2020 revisions, the revised Article 3.12(e) is now fully aligned with the Commentary and states that (only) "*Documents in a language other than the language of the arbitration that are submitted to the Arbitral Tribunal shall be accompanied by translations marked as such.*"

As to (ii), the 2010 IBA Rules already distinguish between Documents that are submitted as evidence and Documents that are produced solely in response to a Request to Produce. Both Article 3.12(d) of the 2010 IBA Rules[31] and the relevant Commentary[32] indicate that if translations are required to be submitted, this requirement should apply to Documents formally submitted as evidence. However, it is left unstated whether this requirement also applies to Documents produced to opposing Parties in response to a Request to Produce.

The revised 2020 IBA Rules address this issue, providing in revised Article 3.12(d) that "*Documents to be produced in response to a Request to Produce need not be translated.*" This wording is a welcome clarification, which is particularly important in the case of extensive and voluminous Requests to Produce where time and cost efficiencies are serious concerns. This revision now formally places the burden of translation on the Party relying on and submitting the Document into the record.

5. Witnesses of Fact and Party-Appointed Experts (Articles 4 and 5)

Articles 4 and 5 of the IBA Rules address the taking of evidence via witnesses of fact and Party-Appointed Experts.[33]

Importantly, under the 2010 IBA Rules, the submission of "*revised or additional*" Witness Statements or Expert Reports is permitted only when the revisions or additions respond to "*matters contained in another Party's Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.*"[34]

Experience suggests that, in practice, this rule has been interpreted broadly and enforced loosely. Indeed Parties frequently contend, sometimes legitimately, that issues that could have been addressed but were not included in prior Witness Statements or Expert Reports subsequently became relevant only owing to subsequent submissions or arguments advanced by the other Party. Additionally, Parties have also invoked due process concerns to justify the need for submission of "*revised or additional*" Witness Statements or Expert Reports.

This lack of alignment between the express language of the 2010 IBA Rules and actual practice has now helpfully been reconciled by means of the 2020 revisions. Revised Articles 4.6(b) and 5.3(b) provide that "*revised or additional*" Witness Statements or Expert Reports may also be permissibly submitted if they are based on new "*developments that could not have been addressed in a previous Witness Statement* [respectively "*Expert Report*"]."

In addition, revised Article 4.10 of the Rules aligns with Article 3.7 reflecting that "*any Party may object for any of the reasons set forth in Articles 9.2 or 9.3*."

6. Tribunal-Appointed Experts (Article 6)

The 2020 revisions to the IBA Rules leave Article 6 concerning Tribunal-Appointed Experts[35] largely untouched. One small but important change, however, concerns the scope of authority of the Tribunal-Appointed Expert to request information relevant to the

[30] *See* "Art. 3 – Production of Documents," in Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration: ("*if translations of documents are to be submitted* […].") (emphasis added).

[31] *See* Art. 3.12(d), 2010 IBA Rules.

[32] *Cf.* "Art. 3 – Production of Documents, General Issues Regarding Documents, Translations," in Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

[33] *See* Definitions, 2020 IBA Rules ("*'Party-Appointed Expert' means a person or organisation appointed by a Party in order to report on specific issues determined by the Party*").

[34] *See* Arts. 4.6 and 5.3, 2010 IBA Rules.

[35] *See* Definitions, 2020 IBA Rules ("*'Tribunal-Appointed Expert' means a person or organization appointed by the Arbitral Tribunal in order to report to it on specific issues determined by the Arbitral Tribunal*").

case from the Parties. Such authority is bestowed on the Tribunal-Appointed Expert under Article 6.3 of the 2010 IBA Rules.[36]

Pursuant to Article 6.3 of the 2010 IBA Rules, "*the authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal.*" However, Article 6.3 also (potentially confusingly) provides in parallel that any disagreements between a Tribunal-Appointed Expert and a Party should be decided solely by the Arbitral Tribunal.[37]

With the 2020 revisions, Article 6.3 of the Rules has been amended to remove the language suggesting equivalence of authority between the Tribunal-Appointed Expert and the Arbitral Tribunal ("*the authority of a Tribunal-Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal*").

This change is in fact consistent with the previous version of the Commentary, which already clearly enunciated that a Tribunal-Appointed Expert does not share the same authority as the Arbitral Tribunal.[38] Consequently, under Article 6.3 of the 2020 IBA Rules, only the Arbitral Tribunal has the authority to decide on disagreements between a Party and the Tribunal-Appointed Expert concerning the Expert's requests for information or access, for instance when a party addressed relies on privilege.

7. Evidentiary Hearing (Article 8)

The timeliness of the revised 2020 IBA Rules is reflected in the revised Article 8, which addresses Evidentiary Hearings, and now in subsection 8.2 expressly provides a framework for Remote Hearings for the first time.[39]

As a direct consequence of the COVID-19 pandemic, many users of international arbitration (and of the IBA Rules) have been grappling with the possibility and peculiarities of Remote Hearings. New Article 8.2 now provides that the Arbitral Tribunal, at the request of a Party or on its own motion, and after consultation with the Parties, may order that the Evidentiary Hearing be conducted remotely.[40]

In such case, the Arbitral Tribunal shall consult with the Parties to establish a protocol for the remote Evidentiary Hearing in order to conduct such hearing "*efficiently, fairly, and, to the extent possible, without unintended interruptions*."[41]

The new Rules provide that the protocol "*may address (a) the technology to be used; (b) advanced testing of technology* […]; *(c) the starting and ending times* […] *(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*."[42]

While the description of the protocol may be seen as spare, there are an abundance of resources available concerning remote Evidentiary Hearings, much of

[36] *See* Art. 6.3, 2020 IBA Rules ("*Subject to the provisions of Articles 9.2 and 9.3, the Tribunal-Appointed Expert may request a Party to provide any information or to provide access to any Documents, goods, samples, property, machinery, systems, processes or site for inspection, to the extent relevant to the case and material to its outcome.*").

[37] *See* Art. 6.3, 2010 IBA Rules ("*Any disagreement between a Tribunal-Appointed Expert and a Party as to the relevance, materiality or appropriateness of such a request shall be decided by the Arbitral Tribunal, in the manner provided in Articles 3.5 through 3.8.*"). This language has been maintained in the 2020 IBA Rules.

[38] *See* "Art. 6 – Tribunal-Appointed Experts," in Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

[39] *See* Definitions, 2020 IBA Rules ("*'Remote Hearing' means 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*").

[40] *See* Art. 8.2, 2020 IBA Rules ("*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.*")

[41] *Id.*

[42] Art. 8.2(a) – (e), 2020 IBA Rules.

which has been developed with the contributions of practitioners and leading arbitral institutions.[43]

In addition, the revised Article 8.5 now foresees that the Arbitral Tribunal may permit oral direct testimony at an Evidentiary Hearing, even in instances where the Parties have agreed, or the Arbitral Tribunal has ordered, that Witness Statements or Expert Reports shall serve as the direct testimony of a given witness.[44] The provision simply articulates expressly the discretionary power already held by the Arbitral Tribunal to allow oral direct testimony to proceed even when a Party has previously submitted written testimony in lieu of such oral direct testimony, and to allow such oral direct testimony to exceed the scope or content of that prior written direct testimony.

8. Admissibility and Assessment of Evidence (Article 9)

As a crucial component of the IBA Rules, Article 9 governs the Admissibility and Assessment of Evidence. Pursuant to Article 9.1, the Arbitral Tribunal continues to enjoy broad discretion in this respect.[45] Thus, Article 9 is intended only to provide a rough framework of guidance for Arbitral Tribunals. At the same time, the 2020 revisions in this section helpfully contain more specific formulations which are likely to be relevant to almost all arbitration proceedings, in particular by addressing illegally obtained evidence (sub-section (a), below) and confidentiality (sub-section (b), below). On the other hand, despite proposals for certain revisions addressing adverse inferences, no substantive changes were ultimately adopted (sub-section (c), below).

a. Illegally Obtained Evidence

Notably, in what may be regarded as a reaction to recent case law and commentary respecting evidence considered to be "fruit of the poisonous tree," new sub-section Article 9.3 of the 2020 IBA Rules now expressly recognizes that the Arbitral Tribunal "*may, at the request of a Party or on its own motion, exclude evidence obtained illegally.*" However, the Rules do not specify what constitutes "*evidence obtained illegally*." The Rules hence imply, correctly, that there is no uniform or even general criminal or civil standard for the determination of whether illegality has occurred.

Such determination will therefore depend significantly on the law deemed applicable to the dispute and specifically to the issue of evidentiary illegality, as well as hinging on the Arbitral Tribunal's background, experience and overall assessment. Needless to say, while this express provision usefully shines a brighter light on this increasingly thorny issue, it may well also spawn a rise in related due process disputes before both the Arbitral Tribunal and the courts of appropriate jurisdiction.

b. Confidentiality

Separate and apart from the ongoing debate as to the extent to which an implied cloak of confidentiality protects from the outside world the taking of evidence in arbitrations to which no express confidentiality attaches, the extent of confidentiality *between the parties* to the arbitration also continues to roil many an arbitration.

Pursuant to Article 9.4 of the 2010 IBA Rules, Arbitral Tribunals are empowered to provide for suitable confidentiality protection for "*evidence to be presented or considered*" (*e.g.*, by means of an "Attorney's Eyes Only" order). While the Rules distinguish between Documents to be proactively submitted as evidence and Documents produced to the opposing Party solely in response to a Request to Produce,[46] Article 9.4 of the 2010 IBA Rules is otherwise silent as to whether such confidentiality protection would also apply to the Documents produced in response to a Request to Produce. Usefully, the revised provision

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[43] *See*, *e.g.*, "International Arbitration in the Time of COVID-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions," Cleary Gottlieb Alert Memo, July 10, 2020. The appended "Resource List" is particularly relevant and helpful in this respect.

[44] *See* Art. 8.5, 2020 IBA Rules ("*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.*")

[45] *See* Art. 9.1, 2020 IBA Rules ("*The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.*"). This provision has been maintained from previous versions of the IBA Rules.

[46] *Cf.* Art. 3.12, 2020 IBA Rules.

(now Article 9.5 of the 2020 IBA Rules) has been extended in scope so as also to expressly apply to Documents to be produced.[47]

c. Adverse Inferences

Articles 9.6 and 9.7 of the 2020 IBA Rules generally describe at which point an Arbitral Tribunal might consider whether adverse inferences are warranted.[48] However, proposals by the 2020 Working Group to include language expressly providing that adverse inferences could be drawn by the Arbitral Tribunal "*at the request of a Party*" or "*on its own motion*" were ultimately abandoned. These provisions therefore remain broadly formulated, as they were in the 2010 IBA Rules, leaving the modalities and procedures for the drawing of adverse inferences within the sole discretion of the Arbitral Tribunal.[49]

Against this background, one might consider whether (minor) clarifications would have been appropriate to highlight including: (i) what should at a minimum be included in a Party's request, *i.e.*, a requirement of specificity for the specific adverse inference requested to be drawn, (ii) when or how the Arbitral Tribunal would inform the Parties that it was considering an adverse inference on its own motion, (iii) what specific adverse inference the Arbitral Tribunal was considering, and (iv) whether the Parties would be accorded a due process opportunity to comment on the Arbitral Tribunal's contemplated inference.

It is to be expected that these issues would almost certainly be considered and addressed by a conscientious Arbitral Tribunal, taking into account the fundamental due process rights of the Parties and the particularities of a given case. At the same time, the requesting, granting and denying of adverse inferences have the potential to significantly impact the outcome of proceedings.

While on the one hand it is fully correct that the Arbitral Tribunal should enjoy flexibility in this context, on the other hand the broad language of the Rules may not adequately reflect the consequences which may result from the drawing of such inferences.

9. Summary and Conclusion

Considering the soft-law status enjoyed by the IBA Rules, users and practitioners alike should carefully consider the recent revisions to the IBA Rules. Such consideration is all the more important as the revised IBA Rules will not only apply to arbitration agreements concluded after the 2020 Rules entered into force (*i.e.*, December 17, 2020), but also where Parties agree to apply the Rules in force at the time of the commencement of the arbitration proceedings.

With the revised Rules, practitioners and users will be amply equipped to navigate difficulties arising in the taking of evidence in international arbitration. It is particularly commendable that the Rules now also provide a framework for Remote Hearings, which have become prevalent during the COVID-19 pandemic and are likely to continue to be utilized going forward, including for reasons of efficiency and cost.

On the other hand, an opportunity may have been missed to further hone the Rules concerning Admissibility and Assessment of Evidence in the context of legal impediment or privilege as well as the drawing of adverse inferences.

First, concerning issues of privilege, it has become apparent in practice that certain Parties and their advisors, including some hailing from jurisdictions whose rules and practice do not provide a basis for a legitimate expectation of legal impediment or privilege, nonetheless believe or in any event assert that they have such an expectation of legal impediment or privilege. This tendency often leads to unnecessary and time-consuming discussions in the proceedings

[47] *See* Art. 9.5, 2020 IBA Rules ("*The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit Documents to be produced, and evidence to be presented or considered, subject to suitable confidentiality protection.*") (revisions emphasized).

[48] *See*, *e.g.*, Art. 9.5, 2010 IBA Rules ("*If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.*").

[49] *Cf.* Preamble ¶ 2, in Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration.

that might have been prevented by means of a clarification of the Rules in this respect.[50]

Second, it might have been desirable for the Rules to outline a narrow framework concerning when adverse inferences may permissibly be drawn, including details for the procedures for doing so. Since 2010, few evidentiary issues in international arbitration have attracted as much debate, attempts at practical application, but also misunderstanding and even abuse as the so-called adverse inference.

Finally, it is also commendable that the IBA Working Group seized the opportunity of the Rules revision to shed better light on the Commentary, including by updating the Commentary and by means of more express references thereto. Experience suggests to date that, notwithstanding the efforts of the Committee at the time of the 2010 IBA Rules revision and since that time, the existence and content of the Commentary as an integral tool for understanding and applying the Rules have not quite achieved the recognition that they deserve. With greater emphasis in the 2020 IBA Rules, the Commentary will surely aid readers, especially first-time users of the Rules, to properly understand their purpose, content and intended limitations.

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[50] For example, by amending Article 9.4(c) to require "legitimate" expectations on the part of Parties and their advisors who seek to invoke legal impediment or privilege.