

The IBA Rules are Revised

June 2010

The IBA Rules on the Taking of Evidence in International Commercial Arbitration ("the Rules") are one of the few safe havens in international arbitration. Most parties, counsel and tribunals adopt the Rules either expressly in the Terms of Reference or first procedural order, or are otherwise guided by them.

The original 1983 Rules were updated in 1999. On 29 May 2010 the 1999 Rules have been further modified by a committee under the joint chairmanship of Judith Gill QC of Allen & Overy and Guido Tawil of M&M Bomchil of Buenos Aires.

The key changes include:

- Deletion of the word "commercial" from the title, in recognition of the potential equal application to "non-commercial" arbitrations such as investment treaty-based disputes. The revised rules will apply to all arbitrations in which the parties agree to apply the IBA Rules after May 29, 2010, whether as part of new arbitration agreements or in determining the rules of procedure in a pending or future arbitration.
- Incorporation of an express requirement of good faith in taking evidence coupled with an empowerment of the tribunal to consider any lack of good faith in the awarding of costs.
- 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

- 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.
- Expansion of 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.
- 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.
- 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; the revised IBA Rules also provide for the use of video conference or similar technology.

- More specific guidance respecting issues of legal impediment or privilege, including the need to maintain fairness and equality particularly if the parties are subject to different legal or ethical rules.

Several of the changes merit slightly closer scrutiny:

Firstly, Article 3 has retained the general format of parties being obliged to produce documents upon which they rely and the other party has the right to request that party to produce additional documents. The 1999 Rules provided that the Request to Produce must either identify a document sufficient for it to be identified or identify a category of documents sufficient for them to be identified. In practice tribunals applied a fairly strict view of identifying a category and many requests were denied for lack of specificity. The 2010 Rules make an additional provision for identifying a category of electronic documents

–these must be identified by specific search files, search terms, individuals or otherwise enabling searching in an efficient and economical manner. It is this amendment that appears to create a difference in approach between documents held in paper and those held electronically. For example a requesting party may want the minutes of a meeting or series of meetings at which decisions were taken. If suitable search terms can be identified the drafting of the rule appears to indicate that the request might be sympathetically received but experience shows that requests for paper documents in such circumstances are often refused for lack of specificity. Tribunals will have to exercise caution not to be carried away by the new Rules and construe the ambit of e-disclosure as any wider than that for paper disclosure. The two limbs of Article 3(3)(a)(ii) should be construed ejusdem generis.

Secondly, Article 4(8) codifies the long-standing practice of the status of a witness statement where the maker is not required to be cross-examined. The practice has been that parties do not cross-examine every witness if the need to do so is merely to put the opponent's case to him. The limited time available makes this time indulgent and unnecessary. The new rule confirms that by not cross-examining a witness there is no deemed agreement to the correctness of the statement.

Finally, the independence of expert witnesses is addressed in Article 5(2)(c). The 1999 Rules obliged the expert to state his relationship (if any) with any of the parties. The 2010 Rules provide that the expert's report shall contain a statement of independence from the parties, their legal advisors and the tribunal. This raises many issues. At a purely practical level an expert might be engaged before the tribunal is appointed and hence independence might be affected by matters outside the control of the expert. The IBA Guidelines on Conflicts of Interest in International Arbitration ("the Guidelines") have at their heart the obligation that an arbitrator is impartial and independent of the parties at the time of the appointment and throughout the proceedings. It is to be assumed that the Rules and the Guidelines have a common view of independence. It is generally assumed that independence is a situation of fact and impartiality is a state of mind. It follows from this that those aspects of the Guidelines that cover factual situations might also cover experts, for example, the Orange List covers matters where justifiable doubts as to independence might be raised. One of the practical examples given for the Orange List in the Guidelines is paragraph 3.1.3: the situation where an arbitrator has been appointed on two or more occasions in the past three years by one of the parties. If that test were applied to an expert it would cover not only a party but also a party's legal advisor. This addresses the possibility of

the "hired gun" who regularly gives expert testimony for a party or on the instructions of a particular lawyer. Experts, parties and counsel need to be ready to address these issues at an early stage so as to ensure that time and costs are not wasted by challenges to expert testimony.

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