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NewsLetter

No 23 October 2000

New IBA Rules of Evidence in International Commercial Arbitration

The new IBA Rules of Evidence in International Commercial Arbitration (hereafter the "Rules") adopted last year by the International Bar Association Council contain procedures initially developed in different legal systems and in international arbitration processes. They are a blend of different legal traditions and are intended to govern the taking of evidence "in an efficient and economical manner". As international arbitration grows more complex and the size of cases increases, it is important for parties to find methods to resolve the disputes in the most effective and least costly manner. The following is based on a Commentary on the New IBA Rules of Evidence in International Commercial Arbitration by the IBA Working Party (see Business Law International, January 2000, published by Sweet & Maxwell/West Group).

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Procedure and flexibility

The first issue in an arbitration the parties and their counsel must face is the determination of the procedures. The principal institutional and ad hoc arbitration rules provide the framework for the arbitration but they are generally silent about the gathering and presentation of evidence. Quite properly, these rules do not request that every arbitration be conducted in the same manner and so allow the parties flexibility. However, in many cases this gap may cause problems if the parties have conflicting views as to how the case should proceed. This is particularly so when the parties come from different legal backgrounds and cultures.

Parties and arbitral tribunals may adopt the IBA Rules in whole or in part – at the time of drafting the arbitration clause in a contract or once arbitration commences – or they may use them as guidelines. Thus, the Rules are not intended to limit the flexibility inherent in international arbitration procedures. Because the Rules do not provide a complete framework for the conduct of international arbitration, parties must still select another set of rules, institutional or ad hoc, to govern their proceedings. In addition, international arbitrations are subject to mandatory law relating to the arbitration procedures at the seat of arbitration.

Production of documents

Art. 3 of the Rules deals with documents that the parties wish to introduce as evidence into the arbitral proceedings. Issues around whether and in what conditions one party should be able to request production of documents from another party (document discovery) is the key area in which practitioners and parties from common and civil law countries differ. The Rules reflect that expansive American- or English-style discovery is generally inappropriate in international arbitration. Rather, requests for documents to be produced should be carefully tailored to issues that are relevant to the determination of the merits of the case. At the same time, however, there is a general consensus that arbitral tribunals are to establish the facts of the case "by all appropriate means". This includes the competence of the arbitral tribunal to order one party to introduce certain internal documents into the arbitral proceedings upon request of the other party. The decision on the scope of document discovery shall lie solely with the arbitral tribunal. The Rules therefore provide that any request of one party for documents in the possession of another party is to be directed towards the arbitral tribunal, not towards the other party. The arbitral tribunal shall order the production if it is convinced *inter alia* that the requested documents are relevant and material to the outcome of the arbitral proceedings. The scope of the permissible document request is also limited by certain objections discussed below.

Witnesses of fact

Arbitration proceedings under both legal traditions very often rely on witnesses. In the common law tradition, the party questions witnesses. In the civil law

tradition, the court questions them. Art. 8 of the Rules spells out how witnesses are to be examined at the hearing. Art. 4 organizes the stages before this hearing. Art. 4.1 requires each party to identify the witnesses on whose testimony it wants to rely, as well as the subject-matter of this testimony. Through this requirement the opposing party can select its own evidence in response well in advance of the hearing. Differences exist among legal systems as to whether an executive employee, agent or other person affiliated with one of the parties in dispute can be heard as a witness. Art. 4.2 of the Rules considers the parties' officers, employees and other representatives to be witnesses for the purpose of the Rules. The arbitral tribunal may also consider the affiliation of any party as one of many factors that may or may not affect the weight to be given to such evidence.

In the common law tradition, parties may discuss with their own witnesses the facts on which they will submit testimony. Contrarily, in European civil law countries it is often against ethical rules of the national bar for a lawyer to "prepare witnesses" or to discuss the case with a witness prior to his testimony being heard by the court. However, in transnational arbitration a party and its counsel are, as a general rule, permitted to contact a potential witness. Art. 4.3 of the Rules now confirms that it is not "improper" for a party or its lawyers to interview its own witnesses.

Admissibility and assessment of the evidence

Art. 9.1 states the general principle that the arbitral tribunal shall determine the admissibility, relevance, materiality and the weight of evidence. Art. 9.2 provides general limitations as to admissibility. With a view to handle the taking of evidence "in an efficient and economical manner", Art. 9.2(a) states the simple proposition that the arbitral tribunal shall exclude evidence that is not sufficiently relevant or material to the outcome of the case. Art. 9.2(b) provides protection for documents and other evidence that may be covered by certain privileges, such as the attorney-client privilege or professional secrecy. Art. 9.2 (c) permits the arbitral tribunal to exclude from production or from evidence any evidence which would be an unreasonable burden to produce.

Articles 9.2(e) and (f) reflect the belief that some internal documents are properly producible in an international arbitration, even documents that may not be producible in a state court in certain nations. However, the Rules also recognize that some documents may be subject to such commercial or technical confidentiality concerns that they should not be required to be introduced into evidence. The arbitral tribunal retains the discretion to determine whether the considerations of confidentiality or sensitivity are sufficient to warrant the exclusion from evidence or production of this evidence. Art. 9.3 also makes clear that the arbitral tribunal may make certain arrangements to permit evidence to be considered subject to suitable confidentiality protection.

Over all, the Rules seem to be a successful blend of different legal traditions and will provide an effective mechanism to assist parties in the conduct of international arbitrations. From this perspective they recognize the importance of means of efficient and fair dispute resolution for the international business community.

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