



IBA REVISES RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

Earlier this year, the International Bar Association Council adopted a revised version of its Rules on the Taking of Evidence in International Arbitration (“IBA Rules”). The revised IBA Rules replace the 1999 version, which had become a widely accepted resource for administering document production and the presentation of evidence in international arbitration. The revised IBA Rules have dropped the word “commercial” from the title, recognizing their applicability to both commercial and noncommercial (investment treaty) arbitration.

The revised IBA Rules, like the 1999 version, are designed to be used in conjunction with institutional, *ad hoc* or other arbitration rules, which by themselves generally provide little guidance regarding document production and the presentation of evidence. The IBA Rules reflect procedures used in many different legal systems and are particularly useful when the parties are from different legal cultures.

For the IBA Rules to be binding in an international arbitration, the parties must expressly adopt them in whole or in part (usually in their arbitration agreement or at the commencement of the arbitration). In instances where the parties do not so agree, the IBA Rules may be used as “guidelines” when disputes regarding document production and the presentation of evidence arise.

Like the 1999 version, the revised IBA Rules recognize that expansive documentary discovery is generally inappropriate in international arbitration. They maintain the requirement that requests for documents must identify with sufficient particularity the description, relevance and materiality of each document or narrow category of documents. And, like the 1999 version, the revised IBA Rules preserve the arbitral tribunal’s power to determine the admissibility and weight of evidence and to make adverse inferences if a party fails without satisfactory explanation to produce documents of which the tribunal has ordered production.

While the revised IBA Rules maintain important aspects of the 1999 version, they introduced several changes intended to update and modernize practice in international arbitration. Key changes include:

- *Early consultation.* Article 2.1 requires that the arbitral tribunal consult with the parties at the earliest appropriate time in the proceedings and invite them to consult with each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.
- *Identifying key issues.* Article 2.3 encourages the arbitral tribunal to identify to the parties, as soon as it considers it to be appropriate, any issues that it may regard as relevant to the case and material to its outcome and/or for which a preliminary determination may be appropriate.
- *E-discovery.* Article 3.3(a) permits a party requesting documents maintained in electronic form to identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner.
- *E-production.* Article 3.12(b) provides that documents a party maintains in electronic form shall be submitted or produced in the form most convenient or economical to it that is reasonably usable by the recipients.
- *Confidentiality.* Article 3.13 expands confidentiality protections in relation to produced documents, documents submitted into evidence and documents introduced by third parties.
- *Scheduling production.* Article 3.14 allows an arbitral tribunal, after consultation with the parties, to schedule document production at different phases of the arbitration (interim relief, jurisdiction, liability, quantum, etc.).
- *Expert reports.* Article 5(2) gives greater clarity concerning the contents of expert reports including the requirement to describe the instructions given to the expert and a statement of his or her independence.
- *Oral testimony.* Article 8(1) provides for witnesses to appear to give oral testimony only if their appearance has been requested by a party or the tribunal. The use of modern technology, such as video conferencing, is also permitted.
- *Privilege.* Article 9.3 lists criteria that the arbitral tribunal may consider when deciding issues of legal privilege.

- *Good faith.* Article 9.7 allows the arbitral tribunal, when assigning the costs of the arbitration (including costs in connection with the taking of evidence), to take into account the failure of a party to act in good faith in the taking of evidence.

These revisions seek to ensure that the IBA Rules will continue to serve as a resource to parties and arbitral tribunals in providing an efficient and fair process for the taking of evidence in international arbitration and dispute resolution.

If you have questions about this article, or international arbitration or dispute resolution more generally, please contact the author, Stephen P. Anway (partner), or George M. von Mehren (partner and leader of the firm's international dispute resolution and non-US litigation practice), who have extensive experience in international arbitration and dispute resolution.

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