Kluwer Arbitration Blog

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

Duncan Gorst (Osborne Clarke) and Stephanie Tutt (Hogan Lovells) · Sunday, March 28th, 2021

Introduction

On 17 February 2021, the International Bar Association published its revised Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), replacing the former rules from 2010. The IBA Rules were first introduced in 1999 to codify an international best practice for the taking of evidence in international arbitration proceedings. Influenced by practices in both the civil law and common law jurisdictions, they have since become almost ubiquitous in their use by parties and arbitral tribunals. In practice, parties frequently agree on the application of the IBA Rules either through an arbitration clause or another procedural instrument. There is, however, a broad consensus that the arbitral tribunal may apply the IBA Rules as guidelines even where the parties have not explicitly agreed on their application.

The objective of the 2020 revisions is to reflect developments in arbitral best practice by bringing the rules in line with the prevailing consensus in international arbitration, and to address the increasing use of and reliance on technology brought about by the COVID-19 pandemic. Some issues, however, remain. This post will explore some of the revisions in more detail and discuss which points remain unresolved.

What has changed?

It is clear from the official redlined comparison between the 2010 and 2020 IBA Rules published by the IBA that the changes have been minor. A few of the more significant revisions are:

- **Cybersecurity and data protection (Article 2.2(e))**: The 2020 IBA Rules add cybersecurity and data protection to the list of evidentiary issues on which the tribunal may consult the parties. In practice, cybersecurity is a major concern for organizations due to the sensitivity and commercial value of the documents shared between the parties, the arbitral tribunal and the other participants in arbitration proceedings such as witnesses, experts and arbitral institutions. The reference to data protection is particularly current given the introduction of the European Union's General Data Protection Regulation ("GDPR"). The parties and arbitral tribunal are now encouraged to discuss in advance how these issues are to be treated, which are especially relevant in the context of document production and the presentation of evidence.

- **Responses to objections to document production requests (Article 3.5)**: Article 3.5 of the 2020 IBA Rules expressly foresees the right of the requesting party to respond to the opposing party's objections "[i]f so directed by the Arbitral Tribunal". This reflects a well-established practice of arbitral tribunals allowing parties to respond to the other party's objections to document production requests.
- **Translation of documents and evidence (Article 3.12)**: The 2010 IBA Rules already drew a distinction between documents produced to another party in a document request and documents that parties submit to the arbitral tribunal as evidence. The 2020 IBA Rules now reflect a broad consensus that documents produced in response to a document request do not form part of the evidentiary record and do not have to be translated into the language of the arbitration proceedings. This is of course different for any documents that are submitted to the evidentiary record, which in principle do have to be translated into the language of the arbitration. In practice, parties frequently reach agreements on how to handle translations, either in the arbitration clause or through a procedural order, stating that documents in a language familiar to both parties do not need to be translated.
- **Remote hearings (Article 8)**: The new Article 8.2 of the IBA Rules expressly provides that the arbitral tribunal may, at the request of a party, or on its own motion, order that the evidentiary hearing be conducted remotely. Whether the arbitral tribunal has the power to order a remote hearing against the will of a party is subject to ongoing debate. The answer to this question depends on factors outside of the scope of the IBA Rules, such as whether a right to a physical hearing exists under the applicable lex arbitri, or whether the agreed arbitration rules grant the arbitral tribunal discretion with regards to the format of the hearing, which is the case, for example, in Article 26(1) of the 2021 ICC Rules. Parties that want to exclude the possibility of remote hearings ordered against their will may want to consider agreeing in the arbitration clause that an arbitral tribunal needs their consent to order a remote hearing.

In the event of a remote hearing, the 2020 IBA Rules provide that the arbitral tribunal shall consult with the parties to establish a protocol for the hearing. 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"*.

In general, remote hearings have quickly developed from a reluctant compromise to a permanent fixture of arbitral practice and the suggested protocol will no doubt be a valuable starting point for parties and practitioners unaccustomed to conducting hearings remotely. There are otherwise several more detailed protocols out there for the structuring of remote hearings, including the CIArb Guidance Note on Remote Dispute Resolution Proceedings, the Hogan Lovells Protocol for the use of technology in virtual international arbitration hearings and the Seoul Protocol on Videoconferencing in International Arbitration.

The 2020 IBA Rules also provide further minor clarifications to already-established provisions:

- The arbitral tribunal does not have to consult with the parties when considering Requests to Produce (Article 3(7)) and parties are not obligated to produce multiple copies of documents that are essentially identical unless the tribunal decides otherwise (Article 3.12(c)). In practice, the term "essentially identical" can only mean "identical", not "similar", and the standard will have to be applied very narrowly. There may be a good reason why a party would want to see, e.g., different versions of the same document.
- Parties can submit second-round witness statements and expert reports to cover new factual

developments that could not have been addressed in a previous witness statement (Article 4.6(b)) or expert report (Article 5.3(b)). This is required in any event by the responding party's right to be heard, to be observed with care in order to ensure the enforceability of the award. In practice, the way to limit never-ending submissions and requests of this nature is to request the parties to frontload their factual submissions, so that the opportunity to bring new submissions of fact in later submissions is limited.

- A tribunal-appointed expert does not have the power to resolve any disputes between the parties over information or access to information (Article 6). This clarifies ambiguous language in the 2010 IBA Rules that suggested that a tribunal-appointed expert had the authority to decide on its own requests for information or access to information. It is now clear that only the arbitral tribunal has the authority to decide on these requests.
- The arbitral tribunal may, at the request of a party or on its own motion, exclude evidence that has been illegally obtained (Article 9.3). This issue has arisen most recently in connection with cybersecurity as there have been cases of documents being obtained via WikiLeaks being used as evidence in arbitration proceedings. There is, however, no consensus on what standard should be applied to determine whether evidence has been illegally obtained, or whether such evidence should be automatically deemed inadmissible. The admission and evaluation of illegally obtained evidence remain in the full discretion of the arbitral tribunal.

Could the Rules have gone further?

The IBA Rules still do not deal with several issues that frequently come up when using them in practice. This was certainly deliberate and reflects the ongoing lack of consensus on these developing issues:

- **The extent of legal privilege (Articles 9.2(b) and 9.4)**: The rule on issues of legal impediment or privilege remain unchanged in the 2020 IBA Rules, which still only speak of the parties' "expectations" of privilege. In practice, parties frequently assert that they have a certain expectation of privilege as a defence to the production of certain documents. As different jurisdictions provide for different levels of legal privilege, this inevitably leads to laborious debates about the scope and applicability of different national concepts of privilege, for which there is no internationally recognised compromise. The popular "most favoured nation" approach, when applicable, is required by procedural fairness and favoured by the IBA Rules, but different approaches are used by arbitral tribunals on a case-by-case basis. The IBA Rules are, in any event, not an appropriate vehicle to impose a standard where there is not yet an international consensus.

- **The scope of "documents maintained in electronic form" (Article 3.3(a)(ii))**: Given the universal significance of electronically processed and stored information, the extent to which data contained in electronic form falls under the scope of the rules on document production under the IBA Rules is a frequent point of discussion. The 2020 IBA Rules do not provide clearer guidance on what electronic information may be requested. Under the current language, the IBA Rules only permit requests for "documents maintained in electronic form" and allow these documents to be identified or specified by means of "specific files, search terms, individuals or other means of searching". This arguably implies that the IBA Rules cover only electronically

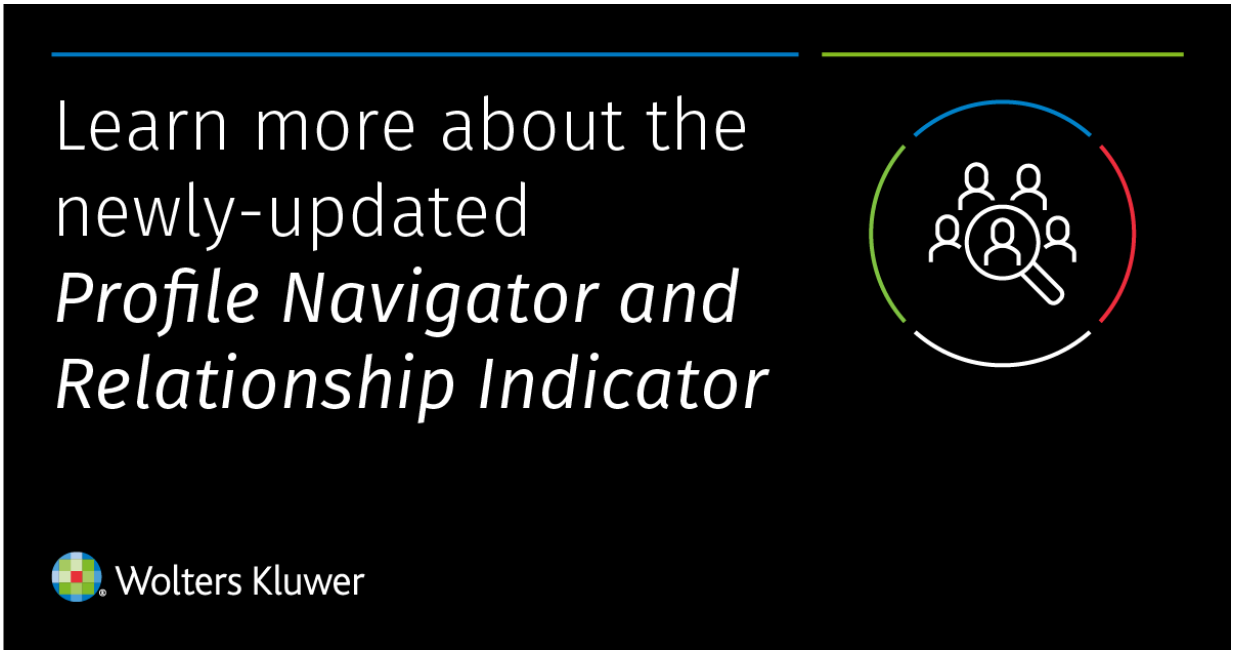
stored information embodied in some form of document.

This does not reflect the commercial reality that most organisations store and process information in electronic databases. This information may not be contained in “documents”, but in databases from which information can easily be retrieved by searching for criteria such as names or time periods. It is still unclear whether information retrieved in this way can also be understood as “electronic documents” under the IBA Rules and therefore requested for production.

In practice, many arbitral tribunals tend to take the view that data that can be retrieved electronically must be disclosed if it can be accessed by means of clear search criteria. In contrast, data that would have to be specifically created, e.g. by combining information from different databases, do not have to be produced. The wording of the IBA Rules, however, does not clearly cover this view, which reflects the fact that there is not yet an international consensus on how this issue should be handled.

Conclusion

Most arbitral tribunals and parties choose to employ the IBA Rules as guidelines, while retaining the flexibility to improvise and adapt the procedure for the taking of evidence to the expectations of all those involved and the requirements of the particular case. Against that background, the revised IBA Rules simply incorporate what the task force considered to have become so ingrained in the fabric of arbitral practice that it deserved to be confirmed as best practice – for example, the revisions concerning responses to objections and translations – as well as providing guidance on the relatively novel but nevertheless significant impact of cybersecurity, data protection and remote hearings. The unresolved questions relating to electronically stored information and legal privilege reflect the fact that so far no international standard or consensus of best practice on these points has been reached.



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