La Kanzlei

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

Schiedsverfahren



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On 15 February 2021, the International Bar Association (IBA) published its revised rules on the taking of evidence in international arbitration, which were adopted on 17 December 2020[1].

Purpose of the IBA Rules

The major advantage arbitration offers to the parties is an increased flexibility in the conduct of the proceedings and the taking of evidence. However, this flexibility leaves the parties with the difficult choice which rules to apply to their arbitral proceedings.

In order to provide parties from different legal cultures with a common set of rules, the IBA introduced its Rules on the Taking of Evidence in International Arbitration (IBA Rules) in 1999. It was especially important to reconcile the very different approaches to the taking of evidence in civil and common law jurisdictions. In this context, the IBA intends to provide a basis for an efficient, economical and fair process in the taking of evidence in international arbitrations[2]. The IBA Rules contain, for example, guidelines for document production and the examination of witnesses and experts.

The IBA Rules are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration. In international arbitration practice, the application of the IBA Rules is considered standard so that the Rules have gained a great practical significance.

Major Modifications

The revised rules clarify certain points:

- Article 1.2 of the IBA Rules now expressly provides that the parties may agree to apply the IBA Rules **in whole or in part**.
- Another important clarification concerns the **translation of documents**: according to the new Article 3.12 (e) of the IBA Rules, documents in a language other than the language of the arbitration shall only be accompanied by translations if they are formally submitted to the arbitral tribunal as evidence. However, documents provided in response to a request for document production do not need to be translated. Thus, the Rules now clearly state that the translation of a document is always incumbent on the party submitting the document as evidence.
- In addition, the new Article 9 of the IBA Rules extends the possibility of **confidentiality protection** to documents produced in response to a request for document production.

Other amendments formalize established practices:

- Article 3.2 of the IBA Rules provides that any party may submit to the arbitral tribunal a request for documents to be produced by an opposing party.
  - The revised Article 3 of the IBA Rules now provides that **any party** may object to the request for any of the reasons set forth in Articles 9.2 or 9.3 (e.g. legal impediment or privilege, lack of sufficient relevance to the case) of the Rules. According to the previous version of the Rules, only the requested party was entitled to object.
  - In addition, Article 3.5 of the IBA Rules now explicitly provides that the requesting party may **respond** to such an objection. This approach has been standard practice for a long time.
- Another revision concerns the provisions on witness statements and expert reports. Until now, Articles 4 and 5 of the Rules provided that **revised or additional** witness statements or expert reports could only be filed "so long as any they only responded to matters contained in another party's witness statements, expert reports or written submission previously filed in the arbitration". However, this approach was not in line with standard arbitral practice and the fact that the relevance of certain statements and expert reports only becomes apparent in the course of the proceedings. Therefore, Articles 4 and 5 of the Rules now provide that revised or additional witness statements or expert reports are also admissible "if they relate to new factual developments that could not have been addressed in a previous witness statement or expert report".

Further revisions concern the evidence presented to the arbitral tribunal by the parties:

- According to the new Article 8.5 of the IBA Rules, the parties may still agree, or the arbitral tribunal may still order that the witness statement or expert report shall serve as that witness's direct testimony. However, the new Article 8.5 of the IBA Rules explicitly provides that the arbitral tribunal may nevertheless permit **further oral direct testimony**.
- Also, the revised Article 9.3 of the Rules now explicitly provides that "the arbitral tribunal may, at the request of a party or on its own motion, exclude **evidence obtained illegally**".

In addition, the revised IBA rules contain new passages reflecting technical developments:

- The most important innovation in this context is provided by the new Article 8.2 of the Rules, which enables the arbitral tribunal to order, at the request of a party or on its own motion, a **remote evidentiary hearing**. In this case, the arbitral tribunal shall consult with the parties to establish a remote hearing protocol, "allowing to conduct the remote hearing efficiently, fairly and, to the extent possible, without unintended interruptions. "

Article 8.2 of the Rules provides a non-exhaustive list of issues the protocol may address, including "the technology to be used, advance testing of the technology or training in use of the technology, the starting and ending times considering, in particular, the time zones in which participants will be located, how documents may be placed before a witness or the arbitral tribunal, and measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted."

- Similarly, **cybersecurity and data protection** were added to the list of issues in Article 2 of the Rules that should be discussed with the parties as early as possible during a consultation on evidentiary issues.

Conclusion

The revision of the IBA Rules primarily constitutes an adaptation to already established practices, which should lead to further simplification of arbitration proceedings, more clarity and increased time and cost savings. Therefore, the changes are welcome.

The introduction of the possibility to conduct a remote hearing, which will have the main impact in the arbitral practice, has recently also been provided for by other sets of rules regarding arbitration proceedings. For example, the new ICC Rules, which came into force on 1 January 2021, also provide for the possibility of an oral hearing via means of communication (cf. our publication in german and in french)

[1] Cf. a comparative version of the IBA Rules 2010 and 2020 here.

[2] Cf. the Foreword of the IBA Rules 2010, here.