International Arbitration: documentary evidence and the revised IBA rules

Arbitration is increasingly the preferred dispute resolution mechanism in international commercial contracts. Amongst other benefits, arbitration provides the privacy that commercial parties often seek when resolving disputes and, whereas difficulties may be encountered when attempting to enforce national court judgments in other jurisdictions, arbitral awards may be enforced in any of the 144 signatory states of the New York Convention.1

Another benefit over national court litigation is the procedural flexibility of arbitration, arguably one of its most attractive qualities. The framework for the arbitral process is provided by three basic sources of rules: (i) the agreement to arbitrate between the parties; (ii) the institutional rules, if any, selected by the parties; and (iii) the arbitration laws of the jurisdiction in which the arbitration is seated. Parties and/or the arbitral tribunal may, however, choose to supplement this framework by adopting an additional source of rules to provide greater detail, certainty and efficiency to the arbitral process. This may be particularly beneficial when the proceedings are vigorously contested and/or the parties hail from different legal traditions.

The International Bar Association (the "IBA"), established in 1947, is one of the most respected providers of such rules and, in this newsletter, we consider the revised Rules on the Taking of Evidence in International Arbitration (the "IBA Rules")2 adopted by the IBA Council on 29 May 20103 and, in particular, its provisions relating to documentary evidence.

Differing legal traditions in respect of documentary evidence

The Foreword to the IBA Rules states that they "reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures." One cultural difference encountered in international arbitration is when one party comes from a civil law jurisdiction and the other from a common law jurisdiction. Each party will expect the procedure of its national courts to be mirrored in the arbitral process, but civil and common law procedure differs significantly. This difference is arguably most pronounced in relation to how documentary evidence should be dealt with.

In "civil law" jurisdictions, such as Germany and Japan, parties to national court litigation are, in principle, only required to produce documents that support their case. In Japanese litigation, for example, there is no provision for full pre-trial discovery of documents and, in practice, document discovery is very limited. A party can file a petition to order the other party or a third party to produce a certain document or documents, but the petition must be specific enough to enable the document holder to identify the requested document.4

Documentary disclosure in "common law" jurisdictions, such as England and the USA, is far more extensive, and has been criticised for being time-consuming and expensive. A party is usually required to disclose all relevant and admissible documents, whether or not they are helpful or harmful to its case. In English proceedings, for example, this obligation is set out in Rule 31.6 of the Civil Procedure Rules 1996.5

The Purpose of the IBA Rules

The agreement to arbitrate, the institutional rules and the relevant arbitration law rarely set out detailed rules governing documentary evidence. In the absence of agreement between the parties, the extent to which the parties must produce documentary evidence. In the absence of agreement between the parties, the extent to which the parties must produce documentary evidence is determined by the IBA Rules.

2 The IBA Rules are at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.
3 Jacques Buhart of Herbert Smith was amongst the members of the Working Party of the Arbitration Committee which prepared the 1999 IBA Rules. The revised IBA Rules were the result of a two-year review of the 1999 IBA Rules, which included a public consultation in which Herbert Smith participated.
4 Herbert Smith Guide to Dispute Resolution in Asia, Japan Chapter, Section 6 by Professor Hiroshi Oda of Herbert Smith. See also Section 5, Chapter IV, Part 2 of the Japanese Code of Civil Procedure, a translation of which can be found at www.cas.go.jp/jp/seisaku/hourei/data/ccp.pdf.
evidence during the arbitration proceedings will be left to the discretion of the arbitral tribunal. 6

In exercising their discretion, arbitrators may be heavily influenced by the background from which they originate. Arbitrators from civil law backgrounds often favour more limited documentary disclosure, whilst those from common law backgrounds tend to be more comfortable with wider disclosure. Although such factors will weigh on the parties' minds when nominating potential arbitrators for appointment, there is no guarantee that either the arbitrator or the tribunal will adopt a particular approach to the scope of documentary disclosure. Furthermore, in order to be seen to be exercising its discretion fairly, the tribunal may entertain extensive submissions from the parties on the appropriate scope before rendering its decision and issuing directions.

The main purpose of adopting the IBA Rules as an additional source of rules is to narrow the discretion of the tribunal and reduce the potential for uncertainty and debate. The IBA Rules offer a compromise between the common law and civil law traditions, providing a common ground for parties from opposing sides of the civil / common law divide. The IBA Rules may therefore save time and costs which would otherwise be spent by the parties and the arbitral tribunal debating matters such as documentary disclosure.

Key provisions of the IBA Rules on documentary evidence

The most important provisions in the IBA Rules relating to documentary evidence in arbitration proceedings are as follows.7

Article 2(1): The arbitral tribunal is obliged to consult the parties at the earliest appropriate time in proceedings with a view to agreeing on an efficient, economical and fair process for the taking of evidence.

Article 3(1): The parties must submit to the tribunal and to the other parties all documents available to it on which it relies, including public documents and those in the public domain.

Articles 3(2) and 3(3): The parties may exchange requests for production containing a description of "narrow and specific" categories of documents that are reasonably believed to exist and are relevant and material to the issues in dispute.

Articles 3(5) and 9(2): A party may object to the production of some or all of the documents requested on various grounds.

Article 9(3)(e): In considering whether to exclude any document from production or inspection, the tribunal may take into account "the need to maintain fairness and equality between the Parties, particularly if they are subject to different legal or ethical rules".

Articles 9(5) and (6): Where a party has failed to produce evidence without adequate explanation, the tribunal may infer that such evidence would be adverse to the interests of that party.

Conclusions & Recommendations

The IBA Rules provide additional detail to the framework of the arbitration beyond the arbitration agreement, any institutional rules selected by the parties and the applicable national laws of the seat of the arbitration. The certainty provided may lead to potential savings in terms of costs and time which would otherwise be spent by the arbitral tribunal and the parties debating procedural matters.

In certain circumstances, however, there may be benefit to a party to arbitration in not adopting the IBA Rules, and instead seeking to retain a greater degree of procedural flexibility throughout the proceedings. Alternatively, there may be benefit to a party to arbitration in requesting that the tribunal adopt a purely civil, or common, law approach to the procedure. We would therefore recommend that parties considering the adoption of the IBA Rules seek the advice of specialist arbitration counsel in relation to whether it is in their interests to do so.

---


7 It should not be forgotten that the IBA rules do not just deal with documentary evidence. They also provide a framework for the process and procedure for taking evidence, including procedures for dealing with witnesses of fact, expert witnesses and inspections, as well as the conduct of evidentiary hearings.