

Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*

1999 IBA Working Party¹ & 2010 IBA Rules of Evidence Review Subcommittee²

In every arbitration, a key issue the parties and their counsel—as well as the arbitral tribunal—must face is the determination of the procedures for that arbitration. The principal institutional and *ad hoc* rules provide the framework for the arbitration and add detailed provisions concerning matters such as initial statements of the case, appointment of arbitrators and challenges, and the nature of the award and costs—but they are purposely silent about how evidence should be gathered and presented in any arbitration pursuant to those rules.

Quite properly, the principal institutional and *ad hoc* rules do not require that every arbitration be conducted in the same manner and so allow parties flexibility in devising the procedures best suited for each arbitration. Party autonomy and flexibility are among the significant advantages of international arbitration.

However, in many cases this intentional gap in the rules can 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. Problems can also occur when one or both of the parties are inexperienced in international arbitration.

Some three decades ago, the International Bar Association set out to assist parties by providing a mechanism to fill in the gap. The IBA is uniquely suited to provide such guidance, as its

* This article is a revised and expanded version of the commentary to the previous text of the IBA Rules, "Commentary on the New IBA Rules of Evidence in International Commercial Arbitration", published in 2 B.L.I., pp. 16-36 (2000).

¹ The *IBA Rules on the Taking of Evidence in International Commercial Arbitration* were drafted by a Working Party appointed by the Committee on Arbitration and ADR of the International Bar Association (Committee D). The Working Party was led by Giovanni Ughi of Italy, and its members were Hans Bagner, Sweden; John Beechey, England; Jacques Buhart, France; Peter Caldwell, Hong Kong; Bernardo M. Cremades, Spain; Otto De Witt Wijnen, The Netherlands; Emmanuel Gaillard, France; Paul A. Gelinas, France; Pierre A. Karrer, Switzerland; Wolfgang Kühn, Germany (former Chair of Committee D); Jan Paulsson, France; Hilmar Raeschke-Kessler, Germany; David W. Rivkin, United States (Chairman of Committee D); Hans van Houtte, Belgium; and Johnny Veeder, England.

² On 29 May 2010, the IBA Council approved the revised version of the IBA Rules on the Taking of Evidence in International Arbitration. In 2008, the Arbitration Committee of the International Bar Association tasked the IBA Rules of Evidence Review Subcommittee with the review of the 1999 IBA Rules. The Subcommittee was led by Richard Kreindler of United States/Germany, and its members were David Arias, Spain; C. Mark Baker, United States; Pierre Bienvenu, Canada (former co-chair of the Arbitration Committee); Antonias Dimolitsa, Greece; Paul Friedland, United States; Nicolás Gamboa, Colombia; Judith Gill, Q.C., United Kingdom (co-chair of the Arbitration Committee); Peter Heckel, Germany; Stephen Jagusch, New Zealand; Xiang Ji, China; Kap-You (Kevin) Kim, Korea; Amy Cohen Kläsener, Review Subcommittee Secretary, United States/Germany; Toby T. Landau, Q.C., United Kingdom; Alexis Mourre, France; Hilmar Raeschke-Kessler, Germany; David W. Rivkin, (former chair of the Arbitration Committee and of the Legal Practice Division), United States; Georg von Segesser, Switzerland; Essam al Tamimi, United Arab Emirates; Guido S. Tawil, Argentina (co-chair of the Arbitration Committee); Hiroyuki Tezuka, Japan; Ariel Ye, China.

Arbitration Committee now has more than 2,500 arbitration practitioners from 90 countries around the world.

In 1983, the IBA adopted the *Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration* (the "1983 Rules"). The 1983 Rules were generally well received and were frequently discussed at arbitration conferences as an example of the harmonisation procedures that can occur in international arbitrations.

By 1999, the nature of international arbitration had changed significantly. New procedures had developed; different norms as to appropriate procedures had taken root; and the scope of international arbitration had grown considerably, as many regions of the world formerly inhospitable to international arbitration embraced it.

As a result, the 1983 Rules needed to be updated and revised, and in 1997 Committee D of the IBA (now called the "Arbitration Committee") formed a new Working Party, chaired by Giovanni Ughi of Italy, to do this. The Working Party consisted of 16 members (*see* fn 1). It held many meetings and discussed the Rules at public meetings of the IBA in Delhi in November 1997 and in Vancouver in September 1998. Drafts were also circulated for public comment to Committee D members and others, and were discussed at numerous arbitration conferences. The Working Party considered comments received throughout this process in drafting the final IBA Rules on the Taking of Evidence in International Commercial Arbitration, which were adopted by the IBA Council on 1 June 1999 (also referred to herein as the "previous text of the IBA Rules").

The IBA Rules on the Taking of Evidence in International Commercial Arbitration were well received as a useful harmonisation of the procedures commonly used in international arbitration and were widely used in international arbitrations. In 2008, the IBA's Arbitration Committee (formerly called "Committee D") established the IBA Rules of Evidence Review Subcommittee and tasked it to review and, as needed, update the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration. It held many meetings and discussed the Rules at open fora of the IBA in Buenos Aires in October 2008, in Dubai in February 2009, and in Madrid in October 2009. It conducted an online survey of Arbitration Committee members and others in 2008. In early 2010, the Arbitration Committee circulated a draft for public comment. The contemplated revisions were discussed at numerous arbitration conferences, and the comments received were duly considered throughout this process. The revised IBA Rules on the Taking of Evidence in International Arbitration were adopted by the IBA Council on 29 May 2010 (referred to herein as the "IBA Rules of Evidence" or the "revised IBA Rules of Evidence").

The resulting text of the 2010 revised IBA Rules of Evidence reflects the Arbitration Committee's wish to change and update only as necessary to reflect new developments and best practices in international arbitration since 1999. Users of the IBA Rules of Evidence will recognise the same structure, mechanisms and successful balance in the 2010 revised text of the IBA Rules of Evidence. The word "commercial" was deleted from the title of the Rules to acknowledge the fact that the IBA Rules of Evidence may be and are used both in commercial and investment arbitration.

The IBA Rules of Evidence contain procedures initially developed in civil law systems, in common law systems and even in international arbitration processes themselves. Designed to assist parties in determining what procedures to use in their particular case, they present some (but not all) of the methods for conducting international arbitration proceedings. Parties and arbitral tribunals may adopt the IBA Rules of Evidence in whole or in part—at the time of drafting the arbitration clause in a contract or once an arbitration commences—or they may use them as guidelines. Parties are free to adapt them to the particular circumstances of each matter.

This article describes the essential provisions of the IBA Rules, as revised in 2010, and provides some background on their drafting and the revision process. The Working Party and IBA Rules of Evidence Subcommittee hope this commentary will be helpful to parties in determining whether or not to use the IBA Rules of Evidence and how best to apply them in their particular arbitration. The IBA Rules of Evidence and translations of the Rules into various languages are available for download at www.ibanet.org.

Preamble

It was considered important to identify certain general principles which governed the IBA Rules of Evidence, so that parties and arbitral tribunals could best understand how to apply them. The Preamble is also important in illustrating both what the IBA Rules of Evidence hope to accomplish and what they do not intend to do.

- i. The Preamble notes that the IBA Rules of Evidence are "designed to supplement the legal provisions and the institutional, *ad hoc* or other rules that apply to the conduct of the arbitration". The IBA Rules of Evidence are not intended to provide a complete mechanism for the conduct of an international arbitration (whether commercial or investment). Parties must still select a set of institutional or *ad hoc* rules, such as those of the ICC, AAA, LCIA, UNCITRAL or ICSID, or design their own rules, to establish the overall procedural framework for their arbitration. The IBA Rules of Evidence fill in gaps intentionally left in those procedural framework rules with respect to the taking of evidence.
- ii. As the very first sentence of the Preamble notes, the IBA Rules of Evidence are intended to provide an "efficient, economical and fair process" for the taking of evidence in international arbitration. This principle informs all of the IBA Rules of Evidence. The Working Party considered that as international arbitration grows more complex and the size of cases increases, it is important for parties and arbitral tribunals to find methods to resolve their disputes in the most effective and least costly manner. The Review Subcommittee revised this sentence to include expressly the principle of fairness. This change goes hand in hand with the revision to paragraph 3 of the Preamble, which now includes a requirement that each Party shall act "in good faith" in the taking of evidence pursuant to the IBA Rules. At the discretion of the arbitral tribunal, violation of the good faith requirement can result in the consequences set forth in Articles 9.5, 9.6 and 9.7.
- iii. It was recognised that there is not a single best way to conduct all international arbitrations, and that the flexibility inherent in international arbitration procedures is an advantage. Therefore, it was considered important to note specifically, in paragraph 2 of

the Preamble, that the IBA Rules of Evidence are not intended to limit this flexibility. Indeed, as noted in that paragraph, the IBA Rules of Evidence should be used by parties and arbitral tribunals in the manner that best suits them.

- iv. The Preamble notes the overriding principle of the IBA Rules of Evidence that the taking of evidence shall be conducted on the principle that each party shall be "entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely". This principle infuses all of the provisions of the IBA Rules of Evidence. Accordingly, the provisions for the exchange of documentary evidence, witness statements, and expert reports, among others, provide each party and the arbitral tribunal with significant information about each side's evidence.

Definitions

The Definitions section of the IBA Rules of Evidence (no longer a numbered Article) sets forth basic definitions to be applied in the IBA Rules of Evidence. The definitions are generally straightforward, with commonly understood meanings. The definitions themselves do not provide any substantive rules of conduct or evidence.

One definition that is not so commonly used is that for "General Rules". This term refers in the IBA Rules of Evidence to the institutional or *ad hoc* rules according to which the parties are conducting their arbitration, such as those of the ICC, AAA, LCIA, UNCITRAL and ICSID. The term is used in Articles 1.3 and 1.5, which discuss among other things conflicts between the IBA Rules of Evidence and other rules that govern the arbitration proceeding.

The definition of "Document" in the previous text of the IBA Rules was broad enough to include most forms of electronic evidence. The Review Subcommittee introduced minor changes intended to ensure that all forms of evidence, including electronic evidence, are subject to the IBA Rules and may be requested, subject to (i) the requirements of Article 3.3, including satisfaction of the relevance and materiality standard, and (ii) the reasons for objection set forth in Article 9.

Article 1 —Scope of Application

International arbitrations are subject to general rules establishing the procedural framework for the arbitration and to mandatory law relating to arbitration procedure at the seat of the arbitration. Therefore, while the IBA Rules of Evidence have been drafted to conform with the principal institutional and *ad hoc* rules generally used by parties, conflicts may nevertheless arise with the other set of rules chosen by the parties (the "General Rules" in the parlance of the IBA Rules of Evidence) or any mandatory legal provisions. Article 1 (formerly Article 2) sets forth several basic principles as to how arbitral tribunals should apply the IBA Rules of Evidence in the event of a conflict with any of these other provisions:

1. In a conflict between the IBA Rules of Evidence and mandatory legal provisions, the mandatory legal provisions shall govern.

2. In a conflict between the IBA Rules of Evidence and the General Rules (*i.e.*, the institutional or *ad hoc* rules chosen by the parties), the parties have a right, in keeping with the principle of party autonomy which is central to any international arbitration, to resolve this conflict in the manner they choose, as long as both parties agree. In the absence of such agreement, the arbitral tribunal shall try to harmonise the two sets of rules to the greatest extent possible.

3. If a conflict exists regarding the meaning of the IBA Rules of Evidence, or if both the IBA Rules of Evidence and the General Rules are silent on a particular issue, then the IBA Rules of Evidence instruct the arbitral tribunal to apply the general principles of the IBA Rules of Evidence, such as those set forth in the Preamble, to the greatest extent possible.

As mentioned above, the IBA Rules may be used in commercial or investment arbitration. However, the IBA Rules do not contain any specialised rules for investment arbitrations such as rules pertaining to the participation of *amici curiae*.

Article 1.2 provides that parties who have agreed to the application of the IBA Rules prior to 29 May 2010, the date of adoption of the 2010 revisions, shall be deemed to have agreed to the previous version of the IBA Rules in the absence of a contrary indication. As the IBA Rules could be potentially subject to further updates, parties wishing to apply the version of the IBA Rules current at the time of the arbitration should consider including this in the arbitration clause (see suggested arbitration clause in the Foreword to the IBA Rules).

Article 2 — Consultation on Evidentiary Issues

The 2010 revisions include the addition of a new Article 2. The Subcommittee carefully considered whether and how the IBA Rules should be adapted or expanded in response to the increased size and complexity of arbitrations and the evidentiary issues associated with them. After review of various sets of domestic and international arbitration rules and procedures, the Subcommittee agreed on a "meet and consult" approach.

Article 2.1 provides for a mandatory consultation between the arbitral tribunal and the parties "at the earliest appropriate time in the proceedings". Under normal circumstances, this consultation would coincide with a procedural conference or exchange of views early in the proceedings. Early timing allows the participants to organise the taking of evidence in an efficient, economical and fair manner. Where the evidentiary issues are not considered to be sufficiently clear at an early stage in the arbitration, the arbitral tribunal might postpone such conference or exchange.

The issues which may be appropriate for discussion at the Article 2.1 consultation include, but are not limited to, those enumerated in Article 2.2. While Article 2 provides a framework for discussing evidentiary issues, it is not intended to prescribe how evidence should be taken in any particular arbitration. For example, in any given arbitration the arbitral tribunal and the parties may determine not to require disclosure of electronic evidence. On the other hand, if they determine that taking evidence in electronic form would be conducive to the efficient, economical and fair taking of evidence, it may be advisable to discuss the related details at an early stage, such as the form of production (Article 3.12(b)) and the formulating of requests to

produce by identifying specific files, search terms, individuals or other means for searching for documents in an efficient and economical manner (Article 3.3(a)(ii)).

Article 2.2(e) encourages discussion of means to save time and costs in the arbitration. It also refers to the conservation of resources in connection of the taking of evidence, which could include, by way of example, the economic and environmental costs of travel or document reproduction (including by submitting documents using web-based platforms such as NetCase, the platform of the ICC).

Article 2.3 (formerly paragraph 3 of the Preamble) encourages arbitral tribunals to identify to the parties, as early as possible, the issues that they may regard as relevant to the case and material to its outcome. That paragraph also notes that a preliminary determination of certain issues may be appropriate. While the Working Party did not want to encourage litigation-style motion practice, the Working Party recognised that in some cases certain issues may resolve all or part of a case. In such circumstances, the IBA Rules of Evidence make clear that the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work.

Article 3 —Production of Documents

Article 3 deals with documents that the parties wish to introduce as evidence into the arbitral proceedings.

Article 3 refers to three groups of documents: (1) documents that are at the party's own disposal; (2) documents that the party wants to use as evidence for its submissions but cannot produce on its own, because they are either in the possession of the other party in the arbitral proceedings or in the possession of a third party outside of the arbitration; and (3) documents that neither party has introduced or wants to introduce as evidence into the arbitral proceedings, but which are seen as relevant and material by the arbitral tribunal. In addition, Article 3 contains several general principles for the treatment of documents as evidence by the parties and by the arbitral tribunal.

Production of Documents Available to One Party

The IBA Rules of Evidence begin with the principle that each party shall introduce those documents available to it and on which it wants to rely as evidence.³ This provision reflects the principle, generally accepted in both civil law and common law countries, that parties have a burden to come forward with the evidence that supports their case.

Article 3.1 contains the phrase "within the time ordered by the arbitral tribunal". This phrase is repeated throughout the IBA Rules of Evidence when a submission is to be made or an action to be taken by the parties. The Working Party believed that the best course is to maintain maximum schedule flexibility for the parties and arbitral tribunals. Therefore, throughout the IBA Rules of Evidence, as here, time frames are left to be determined by the arbitral tribunal in each case, presumably in consultation with the parties. For example, with respect to the initial

³ See UNCITRAL Model Law, Article 23; HKIAC Rules, Article 23.2; ICC Rules, Article 20(2); ICDR Arbitration Rules, Article 19.2; ICSID Arbitration Rules, Rule 33; LCIA Rules, Article 15.6; SCC Arbitration Rules, Article 26(2); WIPO Arbitration Rules, Articles 35-36.

production of documents on which each party intends to rely, the specific time when such documents are to be submitted may vary depending upon how well framed are the issues in the initial pleadings. Time frames will also, of course, vary depending upon the complexity of the matter, the resources and locations of the parties and the particular circumstances of each case.

Following such an initial production of documents on which each party intends to rely, later submissions in the case, such as witness statements or expert reports, may make it necessary for parties to submit additional documents to rebut statements contained in such submissions. Article 3.11 (formerly Article 3.10) provides for such a second round of submission of documents within each party's possession. Again, the arbitral tribunal is to determine when such a second round of production may take place.

Documents in the Possession of an Opposing Party

The issue of whether and under what conditions one party should be able to request production of documents from another party occupied much of the Working Party's discussions in 1999. The vigour with which this issue was debated demonstrated that the question of document production was the key area in which practitioners from common law countries and civil law countries differ. The debate produced a balanced approach that became a central aspect of the IBA Rules of Evidence and has become widely accepted by both common law and civil law practitioners. The current revision of the IBA Rules of Evidence preserves this balance.

Principles

The Working Party was able to reach agreement on certain principles governing document production because practices in international arbitration can be, and have been, harmonised to a large extent. The Working Party was guided by several principles:

1. 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 and material to the determination of the case.

2. At the same time, however, it was believed that there is a general consensus, even among practitioners from civil law countries, that some level of document production is appropriate in international arbitration. According to some of the most frequently used general rules, arbitral tribunals are to establish the facts of the case "by all appropriate means".⁴ This includes the competence of the arbitral tribunal to order one party to introduce certain documents, including internal documents, into the arbitral proceedings upon request of the other party. Even in some civil law countries, a State court is entitled to order the production of internal documents, either upon request of one party or because it sees the need for these documents itself.

3. The revised text of the IBA Rules provides that requests to produce are to be directed both to the arbitral tribunal and to the other parties. In the first instance, a party is to produce all documents requested in its possession, custody or control as to

⁴ E.g., ICC Rules, Article 20(1); LCIA Rules, Article 22.1(c).

which it makes no objection (Article 3.4). However, the decision on the scope of document production—whether or not a party must introduce internal documents into the arbitral proceedings against its will—shall lie solely with the arbitral tribunal. Therefore, only the arbitral tribunal has the competence to make a decision on the request if the receiving party refuses to produce the requested documents voluntarily.

4. The scope of the permissible document request is also limited by certain objections described in Article 9.2 (see the discussion of these objections below) or the failure to satisfy the requirements set forth in Article 3.3. A party may raise any of the reasons for objection in opposing the document request. If it does so, the arbitral tribunal may first invite the relevant parties to consult with each other with a view to resolving the objection (Article 3.6).

5. If the objection is not resolved by means of such consultation, either party may request the arbitral tribunal to make a decision as to whether or not any of these objections apply as well as a decision on the propriety of the request for production itself (Article 3.7, formerly Article 3.6). The arbitral tribunal shall order the production if it is convinced, first, that the issues that the requesting party wishes to prove are relevant to the case and material to its outcome; second, that none of the reasons for objection set forth in Article 9.2 applies; and, third, that the requirements of Article 3.3 have been satisfied.

The rules set forth in Articles 3.2 – 3.8 follow from the principles described above. These rules concerning requests for production of documents from other parties represent a balanced compromise between the broader view generally taken in common law countries and the more narrow view generally held in civil law countries. The IBA Rules of Evidence may be particularly useful, therefore, when an arbitration involves parties coming from these different legal backgrounds. A Continental European party may, for example, find that these Rules are useful in seeking to restrict an overly broad request from a common law party, while a common lawyer may be able to use the IBA Rules of Evidence to obtain documents from a Continental European party that the latter may not otherwise wish to provide.

Procedures

Usually following the initial submission of documents on which each party intends to rely pursuant to Article 3.1, any party may submit a request to produce documents to the arbitral tribunal and the other parties. This request must be submitted within the time ordered by the arbitral tribunal, as provided in Article 3.2. Article 3.3 provides certain requirements regarding the content of a request to produce, which are generally designed to have the request specifically describe the documents being sought. Article 3.3 is designed to prevent a broad "fishing expedition", while at the same time permitting parties to request documents that can be identified with reasonable specificity and which can be shown to be relevant to the case and material to its outcome. This specificity of the information required by Article 3.3 is also designed to help the receiving party decide whether it wants to comply with the request voluntarily (as provided in Article 3.4), or if it wants to raise objections (Article 3.5). The specificity of the request is also designed to make it possible for the arbitral tribunal to decide, if there is an objection to the

request to produce, whether or not to grant the request pursuant to the standards set forth in Article 3.7.

The request to produce must (i) identify the document or documents sought, described in sufficient detail; (ii) state *why* the documents requested are relevant to the case and material to its outcome; and (iii) state that the documents requested are not in the possession of the requesting party (with one exception) and the reasons *why* that party assumes the documents requested to be in the possession of the other party. In a compromise between the common law and civil law systems, the request to produce can identify documents either by describing an individual document (Article 3.3(a)(i)) or by describing "in sufficient detail (including subject-matter) ... a narrow and specific requested category of Documents that are reasonably believed to exist" (Article 3.3(a)(ii)). The description of an individual document is reasonably straightforward. The IBA Rules of Evidence simply require that the description be "sufficient to identify" the document.

Permitting parties to ask for documents by category, however, prompted more discussion. The Working Party and the Subcommittee did not want to open the door to "fishing expeditions". However, it was understood that some documents would be relevant and material and properly produced to the other side, but that they may not be capable of specific identification. Indeed, all members of the Working Party and of the Subcommittee, from common law and civil law countries alike, recognised that arbitrators would generally accept such requests if they were carefully tailored to produce relevant and material documents. For example, if an arbitration involves the termination by one party of a joint venture agreement, the other party may know that the notice of the termination was given on a certain date, that the Board of the other party must have made the decision to terminate at a meeting shortly before that notice, that certain documents must have been prepared for the Board's consideration of that decision and that minutes must have been taken concerning the decision. The requesting party cannot identify the dates or the authors of such documents, but nevertheless can identify with some particularity the nature of the documents sought and the general time frame in which they would have been prepared. Such a request may qualify as a "narrow and specific category of Documents", as permitted under Article 3.3(a)(ii).

As documents in electronic form have become more important in international commerce and hence in dispute resolution, and since their production may be burdensome to the requesting party, the Subcommittee introduced in Article 3.3(a)(ii) the means for parties to identify more precisely a narrow and specific requested category of documents maintained in electronic form. Either at a party's own behest or upon order of the arbitral tribunal, electronic documents may additionally be identified by file name, specified search terms, individuals (for example, specific custodians or authors) or other means of searching for such documents in an efficient and economic manner (Article 3.3(a)(ii)). The revised Rules are neutral regarding whether electronic documents should be produced in any given arbitration; they simply provide a framework for doing so where the parties agree or the arbitral tribunal orders production of such documents.

As noted above, the provisions of Articles 3.3(b) and (c) also serve as checks on the scope of any request to produce. The content of the requested document needs to relate to issues in the case, and the relationship between the documents and the issues must be set forth with sufficient specificity so that the arbitral tribunal can understand the purpose for which the requesting party

needs the requested documents. By requiring the requesting party to state that the documents sought are not in its own possession, the IBA Rules of Evidence seek to prevent unnecessary harassment of the opposing party by the requesting party. Article 3.3(c)(i) of the revised IBA Rules recognises one exception to this principle. In the age of electronic documents, it will become increasingly less likely that a particular document has been entirely deleted from a party's records, as it may continue to exist electronically, such as on back-up tapes or in electronic archives. Where a document is no longer easily accessible, for example because it is not in a server's active data, it may be less burdensome and costly for another party to produce it.

Under the previous text of the IBA Rules, documents produced pursuant to a request to produce were to be sent not only to the other parties in the arbitration but also to the arbitral tribunal. The rationale had been that because any documents produced would automatically become a part of the record, the self-interest of parties should cause them thereby to limit the scope of their request. This rule was revised in 2010 in light of the observation that it is often not efficient for arbitrators to review all of the documents at the stage of their production. Accordingly, the default has been changed such that documents are to be produced to the other parties and only to the arbitral tribunal if it so requests.

The specificity required in the request to produce makes it likely that such a request will be made only after the issues have become sufficiently clear in the case. The precise timing of such a request will be determined by the arbitral tribunal. It will naturally depend upon the specificity of the initial pleadings and any Terms of Reference or other documents identifying the issues.

A party seeking to oppose entirely or to limit a request to produce must raise its objections in writing within the time ordered by the arbitral tribunal. As noted, the reasons for objection shall be those set forth in Article 9.2 of the IBA Rules of Evidence (discussed below) or a failure to satisfy any of the requirements of Article 3.3. If a party raises such objections, the arbitral tribunal must decide on the propriety of the request to produce. The revised text of the IBA Rules provides that the arbitral tribunal may, before making such decision, give the parties an opportunity to consult with each other with a view to resolving the objection themselves (Article 3.6). Party-to party consultation may in some circumstances be the more effective means of resolving objections, including those based on insufficient descriptions and other deficiencies in the form of the request to produce.

If the arbitral tribunal deems such consultation to be unnecessary or if it takes place but objections remain following it, the arbitral tribunal shall consult the parties regarding the request to produce and the objections, and shall "in timely fashion" decide whether to accept some or all of the objections. The arbitral tribunal may order production of the documents sought in the request to produce only if it is convinced that (i) "the issues that the requesting party wishes to prove are relevant to the case and material to its outcome", (ii) "none of the reasons for objection set forth in Article 9.2 applies" and (iii) "the requirements of Article 3.3 have been satisfied". This third requirement was added in the 2010 revision.

Occasionally, an objection—such as on the grounds of privilege, commercial confidentiality or special political or institutional sensitivity (*see* Article 9.2(b), (e) and (f))—may require the arbitral tribunal first to review the document itself without review by the requesting party. It is generally preferable that the arbitral tribunal not review any such documents itself because (i) if

after reviewing the document the arbitral tribunal upholds the objection, it could not eliminate its knowledge of the document once it had been reviewed, or (ii) there may be confidentiality concerns. For such cases, Article 3.8 (formerly Article 3.7) provides that in such "exceptional circumstances", when the arbitral tribunal determines that it should not review the document, it may appoint an independent and impartial expert, who is bound to confidentiality, to review any such document and report on the objection. In other circumstances, such as where time and cost factors are considered to be compelling, the arbitral tribunal may, nonetheless, decide to review the document itself.

The expert, who need not necessarily be appointed pursuant to the terms of Article 6 of the IBA Rules of Evidence, would provide a report on the objection, but the arbitral tribunal is to make the final ruling as to its validity. If the objection is upheld, then the document is to be returned by the expert to the producing party, and it does not become a part of the arbitral proceedings. If, on the other hand, the objection is denied, then the requested party should produce the document to the other parties pursuant to the request to produce. In either event, the expert would, of course, also keep confidential the information learned in reviewing the document.

Requests to Produce by the Arbitral Tribunal

The IBA Rules of Evidence also permit the arbitral tribunal to seek certain documents that it considers to be relevant to the case and material to its outcome or to allow or request parties to use their best efforts to obtain them.

First, a party may request production of documents from a person or organisation that is not a party to the arbitration. Some arbitration laws permit arbitral tribunals to take or to apply for certain steps, such as a subpoena, to obtain documents from non-parties. Therefore, Article 3.9 (formerly Article 3.8) permits parties to ask an arbitral tribunal "to take whatever steps are legally available to obtain the requested Documents, or seek leave from the arbitral tribunal to take such steps itself", as long as the arbitral tribunal determines that such documents would be "relevant to the case and material to its outcome", the requirements of Article 3.3 have been satisfied and none of the reasons for objection set forth in Article 9.2 applies.

In addition, since the arbitral tribunal may be required under certain arbitral rules to establish the facts of the case by all appropriate means,⁵ it should be entitled to order a party to produce documents so far not introduced as evidence into the proceedings (*see* Article 3.10, formerly Article 3.9) or to request any party to use its best efforts to take, or itself take, any step that it considers appropriate to obtain documents from any person or organisation. Ultimate oversight and control over this process should remain with the arbitral tribunal. However, there may be circumstances under which a party is better positioned to undertake such steps, including, for example, due to presence in the country in question. A party receiving such a request from an arbitral tribunal, however, has the same right to raise objections, pursuant to Article 9.2, as if the documents had been sought in a request to produce by another party. If such objections are raised, the arbitral tribunal makes a decision based upon the considerations described above.

⁵ ICC Rules, Article 20(1); LCIA Rules, Article 22.1(c).

General Issues Regarding Documents

Copies

The IBA Rules of Evidence permit the production and submission into evidence of copies of documents, rather than originals. Of course, the copies must fully conform to the originals (Article 3.12 (a), formerly Article 3.11). The arbitral tribunal may request the production of an original document at any time, so that if a party believes that the copy does not fully conform to the original document, it may ask the arbitral tribunal to require the production of that original.

As electronic transmission and storage of documents often leads to the existence of multiple copies of the same document, the revised text of the IBA Rules of Evidence provides that a party is not obligated to produce multiple copies of documents that are "essentially identical" unless the arbitral tribunal decides otherwise (Article 3.12 (c)). In some cases, multiple copies may be individually relevant to the dispute. In other cases, the production of multiple copies of the same document may unduly increase the cost of reviewing the documents for the other party and even be at odds with the parties' obligation to conduct themselves in good faith in the taking of evidence (Preamble 3).

Form of production for electronic documents

The cost of the taking of evidence in electronic form can vary widely depending on the form in which documents are to be submitted. Thus, absent agreement by the parties or determination by the arbitral tribunal to another form, the revised text of the IBA Rules of Evidence provides that the default form of production for electronic documents shall be the form most convenient or economical to the producing party that is reasonably usable by the recipient (Article 3.12(b)). This format will generally not be the native format with full metadata, as submission in this format can be unduly expensive and inconvenient. Where electronic disclosure is likely to play a role in an arbitration, the question of the form of production should be addressed early in the Article 2.1 consultation (*see* Article 2.2(c)).

Translations

Article 3.12(d) requires that if translations of documents are to be submitted, they are to be submitted together with the originals, marked as translations and identify the original language. The IBA Rules do not govern whether translations are required in particular arbitral proceedings, whether particular documents may be translated in part only, the resolution of disputes regarding translations or the timing of submission of translations.

Confidentiality

Both the Working Party and the Subcommittee discussed at length what confidentiality ought to be accorded to documents produced pursuant to the IBA Rules of Evidence. The issue of the extent of confidentiality that should attach to arbitration proceedings continues to be a controversial topic, in particular with respect to intellectual property and investment treaty-based arbitrations. The Working Party decided in 1999 that the IBA Rules of Evidence should not seek to change the evolving standards with respect to confidentiality and distinguished between

documents submitted by a party in support of its own case and documents produced pursuant to a request to produce or other procedural order of the arbitral tribunal. When reconsidering the issue, the Subcommittee decided to expand Article 3.13 (formerly Article 3.12) to cover the former category as well as documents submitted by non-parties.

Article 3.13 now provides that any document submitted or produced by either parties or non-parties in the arbitration is to be kept confidential by the arbitral tribunal and by the other parties. Such a document may be used only in connection with the arbitration. This requirement does not apply to documents that are already in the public domain or are made public by the parties prior to production in the arbitration. Of course, parties remain free to make their own documents public at any time.

The IBA Rules of Evidence take no position with respect to the confidentiality of non-documentary evidence such as oral testimony (although a transcript recording oral testimony would be subject to confidentiality protection as a document submitted or produced by a non-party). Furthermore, the "General Rules" applicable to the arbitration may also impose requirements relevant to confidentiality, or the parties or the arbitral tribunal may agree or determine additional rules relating to confidentiality (*see* Article 9.4, which applies to all types of evidence). For this reason, the IBA Rules state simply, "this requirement shall be without prejudice to all other obligations of confidentiality in the arbitration". Therefore, parties must look to the institutional or *ad hoc* rules pursuant to which they are conducting the arbitration, or to the parties' agreement or the legal regime governing the arbitration, to determine what level of confidentiality would apply to such documents.

Finally, the revised IBA Rules of Evidence also include certain exceptions to this obligation, namely where disclosure is required of a party to fulfil a legal duty, protect or pursue a legal right or enforce or challenge an award in *bona fide* legal proceedings before a state court or other judicial authority. To prevent inadvertent disclosure of documents, tribunals and parties are well-advised to discuss procedures for consideration of confidentiality in any consultation under Article 2.1 (*e.g.*, proper retention or deletion of evidence following conclusion of arbitral proceedings and any challenge or enforcement proceedings).

Inferences

Article 9.5 (formerly Article 9.4) of the IBA Rules of Evidence provides that if a party fails to comply with a procedural order of an arbitral tribunal concerning the production of documents, then the arbitral tribunal may infer from this failure to comply that the content of the document would be adverse to the interests of that party. This inference also applies when an opposing party does not make a proper objection to a request to produce within the time-limit set by the arbitral tribunal, but nevertheless fails to produce requested documents. As an additional deterrent, new Article 9.7 provides that in assigning costs, the arbitral tribunal may also consider the failure of a party to conduct itself in good faith in the taking of evidence. Such failure may include a failure to comply with orders to produce.

Stages

New Article 3.14 provides that the taking of documentary evidence may also be scheduled in phases. This procedure was already contemplated by the previous text of the IBA Rules with reference to witness testimony (Article 4.4), and has now been expanded to encompass documentary evidence as well. This mechanism can be an important means to manage time and control costs in particular circumstances and may be proposed by the parties or introduced by the tribunal of its own accord.

Article 4 — Witnesses of Fact

In arbitration, the facts of the case are often established through witnesses, who testify about events of which they have personal knowledge. This personal knowledge distinguishes the witnesses of fact from experts, who provide opinions based on their expertise in a particular field. Witnesses of fact are addressed in Article 4 of the IBA Rules of Evidence; experts are addressed in Articles 5 and 6.

While witness testimony is less frequently used as evidence in civil law courts, where documentary evidence is preponderant, than in common law courts, arbitration proceedings in both the civil law and common law traditions often rely on witnesses. In the common law tradition, witnesses are questioned by the parties. In the civil law tradition, they are questioned by the court; parties may at most suggest to the court questions to be asked. In transnational arbitrations, the arbitral tribunal and the parties need to establish how to handle witnesses of fact.

Arbitration rules and statutes are usually silent on witness testimony. The IBA Rules of Evidence thus fill in a substantial gap: Article 8 of the IBA Rules of Evidence, discussed later, addresses how witnesses are examined at the hearing; Article 4, to be discussed here, organises the stages before this hearing.

Information on Witnesses

Article 4.1 requires each party to identify the witnesses on whose testimony it intends to rely, as well as the subject matter of that testimony. As a result of this requirement, which is common practice and explicitly confirmed in various sets of arbitration rules,⁶ the opposing party cannot be surprised by unannounced witnesses or facts and can select its own evidence in response well in advance of the hearing.

The revised text of the IBA Rules of Evidence requires that each witness statement contain a statement as to the language in which it was originally prepared and the language in which the witness anticipates giving testimony at the evidentiary hearing (Article 4.5(c)). If no witness statement is prepared for a witness, each party should inform the arbitral tribunal and the other parties in the event the witness intends to testify in a language other than the language of the arbitration proceedings. If the witness cannot present evidence in the language of the arbitration proceedings, translation has to be provided.

⁶ See, e.g., HKIAC Rules, Article 23.5; ICDR Arbitration Rules, Article 20.2; LCIA Rules, Article 20.1; SCC Arbitration Rules, Article 28(1); UNCITRAL Arbitration Rules, Article 25.2; WIPO Arbitration Rules, Article 54.

The 1983 IBA Rules imposed a fixed time period for submitting this information on witnesses if parties did not agree or if the tribunal did not impose another time frame.⁷ The UNCITRAL and ICDR Arbitration Rules require that the information must be given at least some time before the hearing.⁸ The IBA Rules of Evidence leave it entirely to the tribunal to impose the time within which the information must be given.

Affiliated Persons as Witnesses

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. This status as a witness may have important consequences. For instance, in some legal systems, a party may be a witness in its own case, whereas in others only third parties may testify as witnesses. In such systems, a party providing information would not be considered a "witness", and the information would not be provided under oath or a similar commitment to tell the truth.

Article 4.2 of the IBA Rules of Evidence, however, provides that the party's officers, employees and other representatives may be witnesses for the purpose of the IBA Rules of Evidence. Therefore, under Article 8.4, the arbitral tribunal may ask a party witness to affirm, "in a manner determined by the Arbitral Tribunal to be appropriate", some commitment to tell the truth. The arbitral tribunal may also consider the identity of a witness, and his or her affiliation with any party, as one of many factors that may or may not affect the weight to be given to such evidence (*see* Article 9.1).

Preliminary Contacts Between Party and Witness

Another important difference between legal systems is the extent to which parties may have contacts with the witnesses they offer.⁹ In some systems, parties may discuss with their own witnesses the facts on which they will submit testimony. The degree of "witness preparation" may vary from a general overview of the issues at stake to an extensive rehearsal of the witness' answers to questions expected to be asked. On the other hand, in some systems it may be impermissible for a lawyer to discuss the case with a witness prior to his testimony in court.

In transnational arbitration, it is now generally well established "that a party and its counsel are, as a general rule, permitted to contact a potential witness on its behalf and question him or her about the facts of the dispute".¹⁰

⁷ 1983 IBA Rules, Article 5: "Within 60 days of the delivery of the last introductory submission made by the defendant or by the date agreed between the parties or determined by the arbitration . . .".

⁸ *See, e.g.*, HKIAC Rules, Article 23.5; ICDR Arbitration Rules, Article 20.2—at least 15 days; UNCITRAL Arbitration Rules, Article 25.2.

⁹ UNCITRAL Notes on Organising Arbitral Proceedings, para 67.

¹⁰ M. Schneider, "Witnesses in International Arbitration", *ASA Bulletin*, 1993, 302, at 306. However, attorneys from certain civil law countries may deem it a violation of their ethical rules to contact witnesses. Consequently, LCIA Article 20.6 allows such contracts "subject to the mandatory provisions of any applicable law ...".

Reflecting the generally accepted practice, the IBA Rules of Evidence, in Article 4.3, confirm that it is not "improper" for a party or its lawyers to interview its own witnesses. The revised text of the IBA Rules further clarifies that such an interview need not remain general, but may indeed relate to the subject-matter of the prospective testimony. At the same time, of course, the arbitral tribunal may consider the scope of any such interview in assessing the weight it accords the witness's testimony (*see* Article 9.1). Of course, the drafting of a witness statement presupposes contact between the witness and the party that is presenting him or her.

Witness Statements

Pursuant to the IBA Rules of Evidence, the arbitral tribunal may order the parties to submit to the arbitral tribunal and the other parties a written "witness statement" (*see* Article 4.4). The arbitral tribunal, in consultation with the parties, should determine whether or not to require such witness statements, depending on the circumstances of each case.

If witness statements are used, the evidence that a witness plans to give orally at the hearing is known in advance. The other party can thereby better prepare its own examination of the witness and select the issues and witnesses it will present. The tribunal is also in a better position to appreciate the testimony and put its own questions to these witnesses. Witness statements may in this way contribute to a shortening of the length of oral hearings. For instance, they may be considered as the "evidence in chief" ("direct evidence"), so that extensive explanation by the witness becomes superfluous and examination by the other party can start almost immediately.

In order to save on hearing time and expense, witnesses need not appear unless their presence is requested by a party or the arbitral tribunal (Article 8.1). Often the arbitral tribunal and the parties may agree that a witness whose statement is either not contested or not considered material by the opposing party need not be present at the oral hearing.¹¹

Article 4.5 of the IBA Rules of Evidence specifies that a witness statement shall contain:

- the name and address of a witness; any present and past relationship with any of the parties; his or her background and qualifications;
- a full and detailed description of the facts and the source of the witness's information, as well as any documents on which the witness relies that have not already been submitted;
- a statement as to the language in which the witness statement was originally prepared and the language in which the witness anticipates giving testimony at the evidentiary hearing; and

¹¹ The possibility that uncontested witnesses can limit their testimony to the written statement and do not have to attend the oral evidentiary hearing is provided for in ICDR Arbitration Rules, Article 20.5; LCIA Rules, Article 20.3; SCC Rules, Article 28(3); WIPO Arbitration Rules, Article 54(d).

- an affirmation of the truth of the statement confirmed by the witness's signature.

The IBA Rules of Evidence do not require that the statement be made under oath. Arbitration practice and legal systems differ too much on this point. In many civil law systems, sworn declarations can be made only before the state court authorities, or a *notaire*, which makes sworn affidavits too cumbersome. Consequently, sworn affidavits cannot be the required form for witness statements in transnational arbitration proceedings.¹² The IBA Rules of Evidence simply require a witness of fact to affirm that he or she commits to tell the truth (Article 8.4). This wording was revised in 2010 for purposes of greater clarity and precision.

Article 4.4 of the IBA Rules of Evidence leaves it to the arbitral tribunal to specify when the written statements have to be submitted. There is a basic choice to be made in this respect: the parties may exchange their statements simultaneously or consecutively. The second round of witness statements should address only information contained in witness statements, expert reports or submissions submitted by another party in the first round or otherwise not previously presented in the arbitration (*see* Article 4.6).

Appearance of Witnesses for Testimony in an Evidentiary Hearing

Revised Article 8.1 requires each party to inform the arbitral tribunal and the other parties of the witnesses whose appearance at the hearing it requests. This aligns the IBA Rules to current best practice, according to which witnesses appear only if cross-examination has been requested or the party presenting the testimony wishes to do so by means of live testimony rather than written statements alone.

Any witness whose appearance has been so requested by any party, or from whom the arbitral tribunal wishes to hear, shall attend the hearing. If a witness whose appearance has been requested fails to attend without a valid reason, the arbitral tribunal shall disregard the witness statement unless exceptional circumstances justify this failure to attend (Article 4.7).¹³

If the parties and the arbitral tribunal agree that a fact witness need not appear, the progress of the arbitration may be enhanced. Article 4.8 states that such an agreement does not reflect agreement on the content of the witness statement. Article 5.6 contains a similar rule for expert reports.

The revised text of the IBA Rules of Evidence provides that a witness's "appearance" shall be in person, unless the arbitral tribunal allows the use of videoconference or similar technology (Article 8.1). An application for permission for a particular witness to appear by videoconference should state the reasons why that particular witness is unable to appear in person and propose a protocol. The tribunal's decision should depend, among other things, on the sufficiency of the reasons given and the ability of the proposed protocol to maintain equality

¹² Under LCIA Rules, Article 20.3, and WIPO Arbitration Rules, Article 54(d), the parties for instance, have the choice between mere signed statements or sworn affidavits, unless the tribunal has ordered otherwise.

¹³ *See also* LCIA Rules, Article 20.4, and WIPO Arbitration Rules, Article 54(d).

and fairness among the parties and approximate live testimony. The technology used should ensure sufficient quality of transmission and include a fall-back plan should the quality become insufficient. The ability to share exhibits between the witness and the hearing room is desirable. Additionally, the protocol should ensure that the witness testifies under the same conditions as he or she would have in the hearing, *i.e.* without conferring with anyone else during testimony or referring to any documents to which the other participants do not have access.

Recalcitrant Witnesses

If a witness whose testimony is requested by a party refuses to cooperate, that party may ask the arbitral tribunal to take whatever steps are available to obtain that testimony, or seek leave from the arbitral tribunal to take such steps itself (*see* the discussion of Article 3.9 above relating to document production from third parties). The arbitral tribunal, however, may exercise its discretion to refuse this request if it considers the potential testimony of the witness not to be relevant to the case or material to its outcome (*see* Article 4.9).

Under most arbitration laws, either the arbitral tribunal or a party with the approval of the arbitral tribunal may ask the State courts to compel the witness to appear or to examine the witness itself.¹⁴ As a general rule, it shall be the State courts at the seat of arbitration which may help the arbitral tribunal to obtain testimony from a recalcitrant witness. In transnational proceedings, however, witnesses often are not domiciled in the country where the arbitration has its seat. The arbitral tribunal may then have to request help from foreign courts, directly or indirectly. The power of an arbitral tribunal in such circumstances is, of course, limited to "whatever steps are legally available" to it (*see* Article 4.9). In some cases, however, the tribunal may elect instead to authorise a party to take such steps and approach the foreign courts itself. Proceeding in this manner might be more practical or efficient if, for instance, the party requesting the evidence was located in that country, spoke the local language or already had local legal counsel.

Witnesses Requested by Tribunal

Witnesses of fact are the responsibility of the parties. The parties have to select the witnesses they will present and the issues on which they will testify. However, the revised text of the IBA Rules provides that the arbitral tribunal may request the appearance of a particular witness even if neither party requests that witness's appearance (Article 8.1). As a general matter, the arbitral tribunal may order any party to provide for, or to use its best efforts to provide for, the appearance for testimony of any person, including one whose testimony has not yet been offered (Article 4.10). However, a party also has the right to object to any such request addressed to it for the reasons set forth in Article 9.2.

¹⁴ *See, e.g.*, UNCITRAL Arbitration Model Law, Article 27.

Article 5 — Party-Appointed Experts

Modern arbitration rules specifically refer to party-appointed experts.¹⁵ In particular, most of these rules codify the well-established notion that a party can present its own expert witnesses to testify on the points at issue.

Early Disclosure of Expert Evidence

In accordance with the last paragraph of the Preamble and Article 5.1, a party intending to rely on expert testimony must so notify the other party. As with other provisions of the IBA Rules of Evidence, the arbitral tribunal shall determine when such notification and the submission of expert reports shall occur (*see* Article 5.1). In scheduling the reports, the arbitral tribunal should consider the interaction of this provision with other submissions made by the parties, such as the supplemental witness statements provided for in Article 4.6.

Content of the Expert Report

Article 5.2 sets forth the requirements for expert reports. Most importantly, the expert report must describe "the methods, evidence and information used in arriving at the conclusions" (*see* Article 5.2(e)). This information is required in order to place the other party in a position meaningfully to evaluate the expert report. If the expert has relied on any documents not already submitted in the arbitration, these must be provided as well (Article 5.2(e)).

Article 5.2(g) commits the expert to his or her report. The wording of this subsection differs slightly from the wording found in Article 4.5(d) addressing fact witnesses, as the contents of the expert report will contain opinions and expert views. Nevertheless, the expert should be prepared to take responsibility for the contents of his or her report.

Article 5.2(a) requires disclosure with respect to any and all relationships the expert may have with the parties, their legal advisors and the arbitral tribunal. Article 5.2(c) then requires a statement of the expert's "independence". While the former requirement requires disclosure, satisfaction of the latter requirement requires the expert to evaluate any such relationships and attest that he or she is "independent", for example in the sense that he or she has no financial interest in the outcome or otherwise has relationships that would prevent the expert from providing his or her honest and frank opinion. Receiving payment for services as an expert does not preclude "independence". Article 5.2(c) is intended to emphasise the duty of each party-appointed expert to evaluate the case in an independent and neutral fashion rather than to exclude experts with some connection to the participants or the subject-matter of the case.

Article 5.2(i) requires that where multiple persons sign an expert report, as is sometimes the case when an organisation is hired as an expert, the report must indicate whether the report is attributable as a whole to a single author or, if not, which specific parts thereof may be attributed to each co-author. This requirement is intended to aid parties in determining which experts they

¹⁵ *See, e.g.*, HKIAC Rules, Article 23.5; 1998 ICC Rules, Article 20(3); 1997 ICDR Rules, Article 22(4); 1998 LCIA Rules, Article 21(2); SCC Rules, Article 28; 1994 WIPO Rules, Article 55(c); UNCITRAL Rules, Article 27(4).

wish to attend the evidentiary hearing (Article 8.1) as well as in preparing for questioning one or more of the co-authors.

Pursuant to Article 8.3, parties may submit a second round of rebuttal expert reports. However, these rebuttal reports are limited to responses to matters contained in another party's witness statements, expert reports or other submissions that have not been previously presented in the arbitration. Considerations of efficiency and good faith weigh in favour of giving a party a single opportunity to present its arguments and allowing additional opportunities only when it was not possible to make those arguments at the time. This procedure helps to prevent parties from attempting to surprise other parties with evidence or to derail the procedural timetable late in the proceedings.

Pre-hearing Conference among Experts

Article 5.4 permits the arbitral tribunal to order the party-appointed experts to meet and to discuss the issues considered or to be considered in their expert reports either in advance of their preparation or in advance of the hearing. Article 8.3(f) provides for conferencing of experts or fact witnesses during an evidentiary hearing. If they can reach agreement on any issues, they shall record that agreement in writing as well as any remaining areas of disagreement and the reasons therefor.

The practices suggested here, when deemed appropriate by the arbitral tribunal, can make the proceeding more economical. Experts from the same discipline, who are likely to know each other, can identify relatively quickly the reasons for their diverging conclusions and work towards finding areas of agreement. The revised Rules provide additionally for consultation before the reports are drafted, which may be an effective means to produce reports that identify the areas where the experts agree and are narrowly focused on the remaining areas of disagreement. Where the experts succeed in reaching agreement on their findings, the parties and the arbitral tribunal will likely accept those findings, so that the hearing may focus on the truly disputed aspects of the case.

Appearance of Experts at Evidentiary Hearings

Article 8.1 of the revised IBA Rules foresees the same mechanism for determining whether experts or fact witnesses must appear for testimony at an evidentiary hearing, namely on the request of any party or the arbitral tribunal. As with fact witnesses, the expert report of a non-appearing party-appointed expert may nevertheless be accepted "in exceptional circumstances" if the arbitral tribunal so determines (*see* Article 5.5), and agreement not to require attendance of an expert witness at hearing does not reflect agreement on the content of the expert report (*see* Article 5.6).

Finally, it is worth noting that the IBA Rules of Evidence do not address how to deal with the testimony of an expert called upon to testify when such expert had previously been appointed by a national court in connection with the same issues. European parties frequently apply to their local courts, immediately upon the occurrence of an injury and long before arbitration is commenced, for the appointment of an expert to determine the cause of the damage and possible remedies or to preserve evidence. It is often difficult for an Anglo-American lawyer to be

convinced that such a judicially appointed expert is by definition independent, as such an appointment has first been sought by the other party. In such circumstances, an arbitral tribunal will therefore have to determine how such an expert should be considered—as a party-appointed expert, a tribunal-appointed expert, or otherwise—and to issue directions with respect to the production in evidence of his or her report or with respect to his or her appearance at an evidentiary hearing.

Article 6 —Tribunal-Appointed Experts

Article 6 regulates the appointment of independent experts by the arbitral tribunal. A general principle underlying Article 6 is the substantial involvement of the parties in the process, even though the expert is being appointed by the arbitral tribunal itself. Article 6.1 makes clear that the arbitral tribunal is to consult with the parties before appointing such an expert and also with respect to the terms of reference for such an expert. The parties also have an opportunity, pursuant to Article 6.2, to identify any potential conflicts of interest and to state any objections (*e.g.*, lack of independence, insufficient qualification, lack of availability, cost) on such basis. Most importantly, parties have an opportunity to be involved in the information-gathering process by the tribunal-appointed expert and to respond to any report by that expert. However, to avoid delays, Article 6.2 now provides that later objections may be made only if they relate to reasons of which the party becomes aware after the appointment has been made.

Article 6.3 provides the parties and their representatives with the right to receive any information obtained by the tribunal-appointed expert and to attend any inspection conducted by the expert.

Article 6.4 sets forth the required contents of the expert report. These requirements are the same as those in Article 5.2 with the exception of the statement of independence required of party-appointed experts (which the tribunal-appointed expert had already submitted before accepting the appointment (Article 6.2)).

Article 6.5 permits the parties to examine any documents that the tribunal-appointed expert has examined and any correspondence between the arbitral tribunal and the tribunal-appointed expert. That Article also provides any party with the opportunity to respond to a report by a tribunal-appointed expert, within the time ordered by the arbitral tribunal. The Working Party and the Subcommittee believed strongly that parties should know what the arbitral tribunal is being told by a tribunal-appointed expert and should have an opportunity to rebut his or her conclusions. A party may respond either by making its own submission or by submitting a witness statement or an expert report by its party-appointed expert.

The tribunal-appointed expert shall be present at an evidentiary hearing and available for questioning at that hearing, so long as any party or the arbitral tribunal requests such presence. Article 6.6 permits the parties or their party-appointed experts to question the tribunal-appointed expert at the hearing. However, the scope of this questioning is limited to the issues covered in his or her expert report and the responses provided pursuant to Article 6.5: namely, a party's submission, witness statement or an expert report by a party-appointed expert that is provided in response to the tribunal-appointed expert's report. This provision is included to assure that the tribunal-appointed expert knows in advance the subjects on which he or she might be questioned, in order to prepare his or her responses. The Working Party wanted to avoid situations where

issues were raised involving the tribunal-appointed expert's report for the first time at the hearing, which would inevitably require an adjournment for the party-appointed expert to consider that issue before the hearing could resume.

Article 6.3 makes certain that the tribunal-appointed expert shall have access to whatever information he or she needs to respond to the issues posed in his or her terms of reference. The tribunal-appointed expert may request the party to provide any relevant and material information, which includes relevant documents, goods, samples, property, machinery, systems, processes or access to a site for inspection. Parties have the right to object to such requests, based upon the provisions of Article 9.2. If such an objection is raised, the arbitral tribunal shall make a determination as to the materiality and the appropriateness of the tribunal-appointed expert's request in the manner provided in Articles 3.5–3.8, which concern requests to produce.

Finally, in Article 6.7, the IBA Rules of Evidence make clear that it is the arbitral tribunal, not the tribunal-appointed expert, who is to determine the issues in the case. That Article provides that a tribunal-appointed expert's report "and its conclusions shall be assessed by the Arbitral Tribunal with due regard to all circumstances of the case".

Article 7 —Inspection

Article 7 is a simple provision, making possible inspections of relevant site, property, machinery or any other goods, samples, systems, processes or documents that may help the decision-making process, wherever they may be located. Such inspections most frequently occur in construction arbitrations, in which the arbitral tribunal visits the construction site in dispute.

Article 8 —Evidentiary hearing

Article 8 deals with the evidentiary hearing, a term defined in the Definitions section. The evidentiary hearing may be held in person, by teleconference or other method, and it involves the presentation of oral or other evidence to the arbitral tribunal. In most international arbitrations, this hearing is preceded by substantial preparation, on the principle that each party shall be entitled to know reasonably in advance the evidence on which the other parties rely (*see* Preamble, paragraph 3). There may have been a Terms of Reference or other type of preliminary or preparatory hearing.¹⁶ There will have been an exchange of extensive written submissions containing allegations of fact and often discussions of law. Documents will have been submitted (*see* above, Article 3). Witnesses of fact may have submitted written witness statements (*see* above, Article 4). Party-appointed experts or tribunal-appointed experts may have submitted written expert reports (*see* above, Articles 5 and 6). The parties must have adequate notice of the evidentiary hearing.¹⁷

¹⁶ *See*, ICC Rules, Article 18; ICSID Arbitration Rules, Rule 21; UNCITRAL Notes on Organising Arbitral Proceedings, paragraph 17; WIPO Arbitration Rules, Article 47.

¹⁷ *See, e.g.*, HKIAC Rules, Article 23.3; ICC Rules, Article 21(1); ICDR Arbitration Rules, Article 20.1 (30 days); LCIA Arbitration Rules, Article 19.2; SCC Arbitration Rules, Article 27.2; UNCITRAL Arbitration Rules, Article 25(1); WIPO Arbitration Rules, Article 53(b). The 15 days in Article 25 of the UNCITRAL Arbitration Rules are usually too short.

As a result of all this preparation, by the time the evidentiary hearing is conducted the various participants in the arbitral process are likely to know each other better, and they will also know the case better than at the outset of the arbitration.

Article 8 of the IBA Rules of Evidence is the most general of all the provisions. The Article provides a general framework for the procedure to be followed at the evidentiary hearing. This is necessary because the variety of procedures and order to be followed at an evidentiary hearing is enormous. Ordinarily, parties and the arbitral tribunal will be able to devise the procedures best suited to the circumstances of the case. While some of the special features described in Article 8 will be seen in many evidentiary hearings, an evidentiary hearing incorporating them all should be rare.

Managing the Hearing

Article 8.2 makes clear that the power to manage the evidentiary hearing rests with the arbitral tribunal, not the parties, an idea which originally came from civil law procedure but which has been widely adopted.¹⁸ The arbitral tribunal may limit or exclude questioning, or even the appearance of a witness, if it is irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. While some counsel are accustomed to raising objections, the arbitral tribunal may also apply these standards on their own. This Article also finds objectionable unreasonably leading questions, which may render direct and re-direct testimony worthless. These provisions are all designed to give the arbitral tribunal the ability to focus the hearing on issues material to the outcome of the case and thereby make hearings more efficient.

Order of Witnesses

Articles 8.3 (a), (b) and (c) set out the basic order of witnesses followed in many cases: claimant's witnesses, followed by respondent's witnesses, and experts. For each witness, testimony is first presented by the party offering that witness, followed by examination by the opposing party and then an opportunity for re-examination by the presenting party. Usually, any re-examination is limited to new matters raised in the previous oral testimony. Many arbitral tribunals ask their questions only towards the end, except for questions designed to help the process along or to make a witness feel comfortable.

However, arbitral tribunals, particularly in more complex cases, are increasingly adapting these procedures to provide for better examination of the issues in dispute. Article 8.3(g) confirms the arbitral tribunal's ability to pose questions at any time. Arbitral tribunals often hear oral argument by counsel for the parties, which may be a part of, or may be separate from, the evidentiary hearing. Therefore, Article 8.3(f) confirms the discretion of arbitral tribunals to vary this order of proceeding in the manner best suited for the circumstances of that case. For example, the provision allows the arrangement of testimony by particular issues or that witnesses be questioned at the same time and in confrontation with each other about particular issues (witness conferencing). Such techniques may enable arbitral tribunals better to understand the

¹⁸ See, e.g., ICC Rules, Article 21(3); ICDR Arbitration Rules, Article 16.1; LCIA Arbitration Rules, Article 14.2 (to the extent no party agreement to the contrary); SCC Rules, Article 19; UNCITRAL Arbitration Rules, Article 15.1.

contradictions in testimony and to be able to determine the weight and credibility to be given to the testimony. Ultimately, the IBA Rules of Evidence leave it to the arbitral tribunal and the parties to determine how best to proceed.

The IBA Rules of Evidence do not address whether witnesses who have not yet testified may be in the hearing room or whether witnesses who have testified may remain. This is left for the arbitral tribunal to decide, because it depends on the circumstances of the case, the nature of the dispute and the persons involved.

The affirmation by a witness that he or she commits to telling the truth, as described in Article 8.4, is widely observed. Often, the arbitral tribunal will also simply admonish the witness to tell the truth, and sometimes it will additionally advise the witness of criminal sanctions applying at the seat of the arbitration or at the physical place of the hearing. Arbitral tribunals, at least in some countries, rarely swear in the witness themselves.

Where witnesses and experts have provided written witness statements or expert reports, they are first confirmed at the beginning of the testimony. The third sentence of Article 8.4 states the rule applied in many arbitrations where witness statements are used, that such statements may serve in lieu of the witness's direct testimony. Having the witness statement stand entirely in lieu of direct testimony provides an incentive for witness statements to be comprehensive.

Nothing in the IBA Rules of Evidence, however, prevents an arbitral tribunal from hearing witnesses in another manner, such as the traditional method in certain civil law countries where witnesses are initially questioned by the arbitral tribunal, followed by questioning by the parties. This is a technique which presupposes a thorough knowledge of the case and a full study of the law by the arbitral tribunal.

Tribunal Witnesses

Inquisitorial powers of the arbitral tribunal follow from the *lex arbitri* of the seat of the arbitration.¹⁹ Inquisitorial powers may also follow from the arbitration rules agreed by the parties.²⁰ The IBA Rules of Evidence do not provide for similarly sweeping inquisitorial powers of the arbitral tribunal, but Article 8.5 covers the main case where inquisitorial powers may be exercised: the hearing of a key witness who typically had an earlier association with both parties but whom the parties for some reason failed to persuade to appear, perhaps because they no longer have close ties with the witness. Such a tribunal witness will often be questioned in the inquisitorial fashion described above. To proceed in this fashion is not mandated, but is contemplated by the second sentence of Article 8.5.

At the close of an evidentiary hearing, the parties are sometimes invited to comment on the assessment of the evidence and on the law. Such comments may also be made in post-hearing briefs or at a separate "final" or "pleading" hearing, or in both. The IBA Rules of Evidence do not address this phase of the proceeding.

¹⁹ See, e.g., Article 34, subs. 2 lit. g, English Arbitration Act 1996; Article 184 Swiss Private international Law Act.

²⁰ See, e.g., ICC Rules, Article 20; LCIA Rules, Article 22.1(c).

Article 9 —Admissibility and Assessment of the Evidence

Articles 1–8 of the IBA Rules of Evidence provide the mechanisms for the gathering and presentation of evidence to the arbitral tribunal. Article 9 provides the principles by which the arbitral tribunal should determine what evidence it should properly consider and how it should assess the evidence that is properly before it.

Article 9.1 states the general principle, also found in many institutional and *ad hoc* arbitration rules, that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of evidence. Obviously, the arbitral tribunal shall exercise its discretion in making such determinations, which are central to its role.

Article 9.2 provides the limitations on admissible evidence, whether oral or written. These limitations also apply to the production of documents pursuant to Article 3 and inspections pursuant to Article 7. These limitations are important, for they preserve the lines of distinction between the rights of the parties and the authority of the arbitral tribunal. While the provision states that the arbitral tribunal "shall" exclude evidence meeting one of the specified exceptions, the arbitral tribunal obviously retains its discretion to determine whether one of the specified criteria has been met.

Article 9.2(a) states the simple proposition that the arbitral tribunal shall exclude evidence that is not sufficiently relevant to the case or material to its outcome.

Article 9.2(b) provides protection for documents and other evidence that may be covered by certain privileges, under the appropriate applicable law, such as the attorney-client privilege, professional secrecy or the without prejudice privilege. The Working Party felt that it was important that such privileges be recognised in international arbitration.

The Subcommittee provided additional non-binding guidance on determining the applicable privileges in Article 9.3. Although the standard to be applied is left to the discretion of the arbitral tribunal, it is desirable that the tribunal take account of the elements set forth in Article 9.3, in particular if the parties are subject to different legal or ethical rules. Article 9.3(a) seeks to encompass both the common law understanding of attorney-client privilege and the civil law understanding of the duty of professional secrecy. Article 9.3(b) expresses a generalised understanding of the so-called "without prejudice" or "settlement" privilege, which is recognised in certain jurisdictions and relates to the contents of settlement negotiations. Article 9.3(c) expresses the guiding principle that expectations of the parties and their advisors at the time the legal impediment or privilege is said to have arisen should be taken into consideration. Often, these expectations will be formed by the approach to privilege prevailing in the home jurisdiction of such persons. Article 9.3(d) encapsulates an important exception to privilege in many countries, namely waiver. Finally, Article 9.3(e) emphasises the need to maintain fairness and equality among the parties. The need to protect fairness and equality among the parties may arise when the approach to privilege prevailing in the parties' home jurisdictions differs. For example, one jurisdiction may recognize the settlement privilege, whereas another may not, or one jurisdiction may extend the attorney-client privilege to in-house counsel, whereas another may not. In such cases, applying different rules to the parties could create unfairness by shielding the documents of one party from production but not those of the other.

Article 9.2(c) permits the arbitral tribunal to exclude from production or from evidence any documents or evidence which would be an unreasonable burden to produce. This unreasonable burden can take many forms, and the nature of the burden is purposely left to the discretion of the arbitral tribunal. For example, it may involve the production of documents pursuant to a request to produce which, although properly identified pursuant to Article 3.3(a)(i) and relevant to the case and material to its outcome, would because of their sheer quantity create an unreasonable burden on the receiving party to produce. Similarly, Article 9.2(c) could cover a situation where a certain document exists and may even be considered to be within the "possession, custody or control" of another party (*see* Article 3.3(c)(ii)), but which nevertheless could be unreasonably difficult for the party to obtain. Article 9.2(d) is also straightforward, as a document that has been lost or destroyed cannot reasonably be produced. As it may be impossible to prove a negative (loss of the document), Article 9.2(d) provides that such loss shall be shown with a reasonable likelihood to have occurred.

Articles 9.2(e) and (f) involve special and related concerns. Article 3 reflects the belief that some internal documents are properly subject to production in international arbitration, even documents that may not be producible in a state court in certain jurisdictions. However, the IBA Rules also recognise that some documents may be subject to such commercial or technical confidentiality concerns that they should not be required to be produced or introduced into evidence. When an early draft of the IBA Rules of Evidence referred only to such confidentiality, certain international political organisations pointed out that "commercial and technical confidentiality" might not include confidentiality within such organisations. Therefore, Article 9.2(f) was added to put such special political or institutional sensitivity on an equal footing with commercial or technical confidentiality. In the case of both provisions, 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 those documents or other evidence. As noted in the IBA Rules, the arbitral tribunal must find the concerns to be "compelling" in order to exclude the evidence. Article 9.4 also makes clear that the arbitral tribunal may make certain arrangements, such as entering a confidentiality agreement or order, to permit evidence to be considered subject to suitable confidentiality protection.

Article 9.2(g) is a catch-all provision, intended to assure procedural economy, proportionality, fairness and equality in the case. For example, documents that might be considered to be privileged within one national legal system may not be considered to be privileged within another. If this situation were to create an unfairness, the arbitral tribunal may exclude production of the technically non-privileged documents pursuant to this provision. In general, it is hoped that this provision will help ensure that the arbitral tribunal provides the parties with a fair, as well as an effective and efficient, hearing.

Finally, as noted above in the discussion of Article 3, Articles 9.5 and 9.6 create inferences where a party has failed to produce a document or make available other evidence required by the arbitral tribunal. The arbitral tribunal may then conclude that such document or evidence would be adverse to the interests of that party. New Article 9.7 specifically grants the arbitral tribunal the discretion to sanction parties for breaches of good faith (*see* Preamble paragraph 3) by way of the apportionment of costs or any other means available under the IBA Rules.

The IBA Arbitration Committee and its Rules of Evidence Subcommittee believe that the revised IBA Rules preserve the careful balance achieved by the 1999 IBA Rules of Evidence. They are also confident that the revisions will further promote the use and success of the IBA Rules as an effective mechanism to assist parties in the conduct of international arbitrations.