IBA Evidence Rules Updated to Reflect Modern Developments and Best Practices

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On 17 February 2021, the International Bar Association (the "IBA") published amended Rules on the Taking of Evidence in International Arbitration (the "IBA Evidence Rules") along with an updated commentary. The IBA formally adopted the amendments on 17 December 2020, and they apply from that date to arbitrations in which the parties have agreed to incorporate the IBA Evidence Rules. The rules were first published in 1999 and last updated in 2010.

The IBA Evidence Rules are intended "as a resource to parties and to arbitrators to provide an efficient, economical and fair process for the taking of evidence in international arbitration". The rules remain popular amongst the international arbitration community, and their adoption in practice is widespread. The task force charged with updating the rules (the "2020 Task Force"), which included Debevoise partner Samantha J. Rowe, therefore "recommended only a limited number of changes, mostly to ensure greater clarity". These limited changes are nonetheless welcome, as they endorse prevailing best practice and accommodate critical technological advances and the arbitration community's response to major global developments such as the COVID-19 pandemic.

Key amendments include: introducing a definition of "Remote Hearing" and clarifying that the tribunal may order such a hearing at a party's request or of its own volition; empowering the tribunal to exclude (at a party's request or *sua sponte*) evidence that has been obtained illegally; and adding reference to cybersecurity and data protection issues in the context of the tribunal's initial consultation with the parties on evidentiary issues. There are further revisions that provide additional clarity around document production, witness statements and expert reports, and tribunal-appointed experts.

Some of the amendments mirror Debevoise's own efforts to promote efficiency and protect against cybersecurity threats in the sphere of international disputes, for example through our Efficiency Protocol and our Protocol to Promote Cybersecurity in International Arbitration.

We offer a summary of the salient updates to the IBA Evidence Rules below.

Remote Hearings. The newly inserted definition of "Remote Hearing" envisages a hearing, or part of a hearing, where some or all of the participants are based in more than one location and connecting via teleconference, video conference or "other communication technology". The IBA Evidence Rules provide that if a Remote Hearing is ordered by the tribunal, a Remote Hearing protocol should be established to address: the technology to be used; advance testing; hearing sitting times in view of the time zones where participants are located; document-sharing logistics; and measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted. The commentary suggests that such measures might include "questioning the witness at the outset of the examination about the room in which the testimony is being given, the persons present and the documents available; installation of mirrors behind the witness; use of fish-eye lenses; or the physical presence with the witness of a representative of opposing counsel". These amendments helpfully confirm the availability of remote hearings, which have become the norm during the COVID-19 pandemic, and outline helpful guidance for their conduct. (**Definitions; Article 8(2)**)

Evidence Obtained Illegally. A provision has been inserted which states that the tribunal "may, at the request of a Party or on its own motion, exclude evidence obtained illegally". The 2020 Task Force notes in the commentary to the IBA Evidence Rules that they "contemplated capturing the specific circumstances in which such evidence should be excluded but concluded that there was no clear consensus on the issue". Questions that are likely to arise include arguments over the provenance of impugned evidence, applicable law and what "obtained illegally" means in practice. (**Article 9(3)**)

Cybersecurity and Data Protection. The IBA Evidence Rules already provided for an initial consultation between the tribunal and the parties on evidentiary issues, which should take place "at the earliest appropriate time in the proceedings" with a view to "an efficient, economical and fair process for the taking of evidence". The indicative list of topics to be addressed at that consultation has been expanded to include "the treatment of any issues of cybersecurity and data protection". The commentary highlights as useful resources the ICCA-IBA Roadmap to Data Protection in International Arbitration and the ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration. This amendment reflects the increasing importance of these issues in international arbitration proceedings in recent years, particularly in view of the European Union's General Data Protection Regulation. (**Article 2(2)(e)**)

Document Production. The IBA Evidence Rules on the document production process have been amended to clarify that: a party may respond to its counterparty's document production objections if the tribunal so directs; the tribunal need not consult with the parties when determining document production requests; parties need not produce multiple copies of documents that are essentially identical unless otherwise agreed by the parties or ordered by the tribunal; and documents produced need not be translated,

but documents submitted to the tribunal, if not already in the language of the arbitration, must be accompanied by translations. The rules also now explicitly provide that the tribunal may make arrangements for documents produced (in addition to evidence) to be presented or considered with suitable confidentiality safeguards. Each of these updates appears intended to endorse prevailing best practice. (**Articles 3(5); 3(7); 3(12)(c), (d) and (e); 9(5)**)

Witness Statements and Expert Reports. The rules on witness statements and expert reports have been amended to make explicit that second-round statements and reports may address new developments that could not have been addressed in a previous statement or report. Moreover, where a statement or report stands as direct testimony, the tribunal may still permit oral direct testimony from the witness or expert at hearing. This clarifies accepted best practice. (**Articles 4.6(b); 5.3(b); 8(5)**)

Tribunal-Appointed Experts. The provision on tribunal-appointed experts has been amended to remove language that could be misinterpreted as allocating power to the expert to resolve disputes between the parties over information or access to information such as, for example, claims to privilege. (**Article 6**)

We maintain close connections with the IBA, reflecting our critical contributions to thought leadership within the international arbitration community. Partner David W. Rivkin recently served as the IBA's President, as well as having led the original drafting of the IBA Evidence Rules when he served as Chair of the Arbitration Committee. As noted, partner Samantha J. Rowe was a member of the IBA Evidence Rules 2020 Task Force discussed in this Update. Partner Dietmar W. Prager is an officer of the IBA Arbitration Committee (of which partner Mark W. Friedman is a former Chair). Partner Patrick Taylor and international counsel Gavin Chesney recently authored the England & Wales chapter in the newly launched IBA Toolkit on Insolvency and Arbitration. Partner Lord Goldsmith QC is a former IBA Council Member.

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