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Commentary

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On February 15, 2021, the International Bar Association ("**IBA**") released the long awaited 2020 update to its highly influential Rules on the Taking of Evidence in International Arbitration ("**IBA Rules**"). Known for their flexibility and practical blend of common law and civil law traditions, the IBA Rules have come to reflect the most common practices in international arbitration proceedings over the past two decades. The 2020 update is important because, prior to the 2020 update, the IBA Rules had only been revised once, in 2010, after first being formalized in 1999. As a result, given the prevalence of the IBA Rules, the 2020 update is likely to remain the benchmark standard for international arbitration practice for the next decade.

Notwithstanding the significance of the 2020 update, the most recent revisions are by no means a complete overhaul of the prior 2010 version of the IBA Rules. Although the drafters incorporated some substantive changes intended to address recent trends in international arbitration practice, the 2020 update largely reflects a subtle attempt to clarify certain provisions of the IBA Rules. The degree to which the drafters resisted the temptation to include far more prescriptive guidelines is a recognition that international arbitration proceedings remain varied and that the need to protect party autonomy is of paramount significance to international arbitration practice.

The following article introduces the most salient portions of the 2020 update to the IBA Rules and accompanying "Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration" (the "**Commentary**")—a detailed guide prepared by the drafters of the IBA Rules that provides important context to the intent of the provisions. In doing so, the authors intend to provide some perspective and practical guidance about what these updates say about the current state of international arbitration and what they may mean for the practice in the coming years.

Article 1 – Scope of Application Revisions

The 2020 update includes two relatively minor revisions to Article 1 that are intended to address potential questions arising out of the scope of the rules' application. While these two revisions successfully reconcile the language of Article 1 with potentially inconsistent obligations, as explained below, they are unlikely to have a significant practical impact on how parties or tribunals use the IBA Rules.

First, in Article 1.2, the 2020 update makes clear that parties can agree to apply the rules "in whole or in

part." Thus, there is no prohibition against allowing parties or a tribunal to apply only selected portions of the IBA Rules. Although uncontroversial—it is common for parties to only utilize specific provisions of the IBA Rules in particular proceedings—this revision simply reconciles the text of Article 1 with the language of the Preamble, which already provided that parties or tribunals could adopt the IBA Rules "in whole or in part."

Second, the 2020 update makes clear that, in the case of a direct conflict between the IBA Rules and any applicable institutional or *ad hoc* arbitration rules, the tribunal should try to harmonize the two sets of rules to the greatest extent possible. As the Commentary acknowledges, because the IBA Rules are often more specific about evidentiary issues than generally applicable arbitration rules, it is more often the case that the IBA Rules will take priority. However, the 2020 update is an acknowledgement that it may not be possible, in all circumstances, to simultaneously apply the IBA Rules and applicable arbitration rules.

Article 2 – Initial Consultation: Cybersecurity and Data Protection

Article 2 of the IBA Rules has historically called for the tribunal and the parties to conduct an initial consultation at the outset of the arbitration to discuss various logistical and procedural matters related to the arbitration. As set out in Article 2, those matters include, for example, document production procedures, witness and expert statements/reports, and hearing procedures.

The 2020 update to the IBA Rules now recommends that the tribunal and parties also take into account "the treatment of any issues of cybersecurity and data protection." The inclusion of these two additional items for potential consideration by the tribunal and parties reflects two increasingly important trends in international arbitration since the 2010 update to the IBA Rules.

First, given the sensitive nature of many international arbitration proceedings and the overarching goal of confidentiality, cybersecurity has always been relevant to the practice of international arbitration. However, in 2015, cybersecurity rose to the forefront of the international arbitration field following the 2015 cybersecurity breach at the Permanent Court of Arbitration. Now, with the dramatic expansion of remote hearing technology as a result of the COVID-19 pandemic, cybersecurity concerns are likely to continue well into the future. The 2020 update to the IBA Rules is a reminder that cybersecurity risks must be addressed and minimized.

Second, data protection, and in particular data privacy regulations, including the European Union's General Data Protection Regulation that was released in 2016, has also become increasingly significant to international arbitration proceedings. Although the IBA Rules were intended to limit expansive electronic discovery like that more common to U.S. litigation, international arbitration is not free from the requirements of national or supranational data protection regulations. As a result, the 2020 update is a thoughtful reminder to tribunals and parties that data protection considerations must also be accounted for at the outset of an arbitration.

Article 3 – Document Exchange: Clarification of the Process

Among the most resilient features of the IBA Rules are the document exchange procedures set out in Article 3 (and relatedly in Art. 9). As a result, and unsurprisingly, the 2020 update to the IBA Rules left the core features of Article 3 untouched. However, the drafters included a series of subtle clarifications both in the text of the IBA Rules and the accompanying Commentary that warrant attention.

Timing of Document Requests

Although not explicitly addressed in the text of the IBA Rules themselves, the Commentary to the 2020 update makes clear that, "[a]lthough document requests are typically exchanged within a discrete phase of the proceeding, Article 3.2 does not prevent the parties from agreeing, or the arbitral tribunal from directing, that document requests (and document productions responsive thereto) may take place at multiple points throughout the proceeding as the case evolves." The Commentary also notes that, "[i]n some circumstances, document requests may be warranted prior to the first substantive pleadings, *e.g.*, when a claimant no longer has access to documents due to circumstances outside its own control . . . ." These comments are helpful reminders to parties and

tribunals that the IBA Rules do not impose a rigid timeline for document exchange. Moreover, parties who seek document disclosure procedures that fall outside common norms would be well advised to remind the tribunal of the Commentary's discussion of this topic.

Document Request Format

The IBA Rules, even after the 2020 update, are silent on the question of how parties or tribunals should format document requests. Nevertheless, the Commentary acknowledges that while the IBA Rules do "not specify a particular format for requests to produce," the most common approach used by parties and tribunals are Redfern schedules where parties set out requests, objections, replies, and, ultimately, the tribunal's determination in a single tabular format. The Commentary's statement concerning the format of document requests is a recognition that while Redfern schedules have become the dominant approach to document disclosure in international arbitration, the IBA Rules themselves permit parties and tribunals to approach document exchange in any manner they deem appropriate.

Document Request Replies

The 2020 update to the IBA Rules has revised Article 3.5 to allow parties to make reply submissions in connection with document requests and, in doing so, brings the language of Article 3.5 in line with common international arbitration practices. Specifically, according to the 2010 version of the IBA Rules, the language of Article 3.5 only accounted for two rounds of exchanges regarding document requests: (i) an initial request and (ii) an objection. Thereafter, it was incumbent on the parties and tribunal to resolve the objection either through some form of compromise or a tribunal decision. Notwithstanding this format, tribunals commonly allowed a third round of exchanges to permit the requesting party to reply to an objection. Thus, by updating Article 3.5 to accord with common international arbitration practices, the drafters clarified any potential questions regarding a party's right to reply to a document request objection under the IBA Rules.

Document Request Consultation

Under the 2010 version of the IBA Rules, following the parties' document requests and objections, the tribunal was ostensibly required, pursuant to Article 3.7, to consult with the parties prior to rendering any decision on any disputed document requests. However, in practice tribunals commonly render decisions on document requests without actually consulting with the parties. Accordingly, the 2020 update did away with the prior consultation requirement in Article 3.7 and, in doing so, brought the IBA Rules in line with more common international arbitration practices.

Translations

Last, the 2020 update to the IBA Rules modified Article 3.12 to clarify when translations of foreign language documents are required. Specifically, Article 3.12(d) makes clear that foreign language documents that are produced in response to a document request *need not be translated by the producing party*. Instead, only foreign language documents that are submitted into evidence (and thus reviewed by the tribunal) need to be accompanied by a translation. Again, this approach generally reflects common practice and avoids the costly expense of translating foreign language documents that parties would never rely on in a proceeding.

Articles 4 and 5 – Reply Witness Statements and Expert Reports

According to the 2010 version of the IBA Rules, reply witness statements and reply expert reports were permitted to respond to the "matters contained in another Party's Witness Statements, Expert Reports, or other submissions that have not been previously presented in the arbitration." However, there is no mention of whether a reply witness statement or expert report can respond to new events not raised in a prior witness statement or expert report. While tribunals commonly grant witnesses and experts the opportunity to address new factual developments—even if those matters were not raised in a prior statement—the language of the 2010 version the IBA Rules sparked some debate by parties seeking to limit the arguably late introduction of witness or expert evidence. The 2020 update to Article 4 (Fact Witnesses) and Article 5 (Party Appointed Experts) clarified this matter and now expressly permits parties to submit reply witness statements and expert reports in response to "new factual developments that could not have been addressed in a previous [witness statement/expert report]." While not necessarily controversial, for the reasons discussed above, the revision clarifies a procedural issue that might otherwise give rise to unnecessary and costly disputes.

Article 6 – Powers of Tribunal Appointed Experts

Previously, Article 6.3 of the 2010 version of the IBA Rules stated that "[t]he authority of a Tribunal Appointed Expert to request such information or access shall be the same as the authority of the Arbitral Tribunal." In practice, as the Commentary explains, this provision was intended to mean that a tribunal-appointed expert should have access to whatever information he or she needs to respond to the issues posed in the proceedings. However, upon review, the drafters of the 2020 update to the IBA Rules concluded that this sentence could be "misinterpreted to suggest that the tribunal-appointed expert would have the power to resolve any disputes over information or access, including, for example, claims that information was privileged . . . ." Accordingly, the drafters of the 2020 update modified Article 6.3 to remove this sentence entirely and clarify that the authority to resolve disputes regarding access to information resided with, and only with, the arbitral tribunal.

Article 7 - Inspections

The drafters of the 2020 update to the IBA Rules largely left the original text of Article 7—the rules governing the physical inspection of "any site, property, machinery, or any other goods, samples, systems, processes or Documents"—untouched. Nevertheless, the Commentary to the 2020 IBA Rules includes substantive guidance concerning the scope of Article 7 and, more importantly, potential considerations parties and tribunals should keep in mind when establishing the protocols associated with an inspection. For example, the Commentary raises questions concerning whether an inspection should be led by party representatives, witnesses, or experts; whether parties may make submissions during or after the inspection; or whether witnesses and experts should be permitted to give evidence in connection with the inspection. The Commentary also raises questions of how, if at all, the inspection should be incorporated into the record, whether by some form of transcription, video-recording, or expert reports (whether separate or joint). These considerations emphasize the varied and flexible approaches parties and tribunals may take in connection with inspections in international arbitration proceedings and supply helpful guidance to parties and tribunals attempting to better define a specific protocol.

Article 8 – Evidentiary Hearings

The 2020 update's revisions to Article 8, the rules governing evidentiary hearings, reflect the most substantive and practically significant revisions to the IBA Rules.

Remote Hearings

As most practitioners are aware, the COVID-19 pandemic rapidly required the field of international arbitration to utilize remote hearing technology to conduct proceedings. As a result, the 2020 IBA Rules contains a new Article 8.2 governing the use of remote hearings in international arbitration proceedings. As explained below, the new Article 8.2 not only reflects a practical effort by the drafters to provide very basic guidance on remote hearing proceedings, but also a recognition that remote hearings are unlikely to disappear once the COVID-19 pandemic has passed.

First, Article 8.2 establishes that "[a]t the request of a Party or on its own motion, the Arbitral Tribunal may, after consultation with the Parties, order that the Evidentiary Hearing be conducted as a Remote Hearing." While the question of whether a tribunal could compel a remote evidentiary hearing over the objection of a party was hotly debated during the early phases of the COVID-19 pandemic, the 2020 update to the IBA Rules grants the tribunal discretion to compel remote hearings in lieu of in-person hearings. Nevertheless, careful attention should be paid to the applicable arbitral laws and arbitral rules. Indeed, as Article 1 of the IBA Rules acknowledges, there are still circumstances in which the IBA Rules may conflict with applicable arbitral rules and mandatory law.

Second, Article 8.2 calls for the tribunal and parties to develop a remote hearing protocol that addresses five very basic considerations: (1) the specific technology to be used; (2) the need for advanced testing of the technology; (3) the start and end times of hearings (in light of conflicts arising from parties in different time zones); (4) how documents are presented to witnesses during the hearing; and (5) how parties can ensure that witnesses provide their testimony without being inappropriately influenced. To practitioners and tribunals that have been involved in remote arbitration hearings, these five considerations are not controversial. Yet, notwithstanding their simplicity, these five items are core practical issues that parties and

tribunals must consider when developing a remote hearing protocol. Thus, rather than provide detailed and prescriptive rules to govern remote hearings, the 2020 update's drafters recognized that remote hearing practices remain varied and elected to provide a flexible checklist of topics aimed at aiding parties and tribunals to develop tailored and cost-effective approaches to remote arbitration hearings.

Oral Direct Testimony

The 2020 update to the IBA Rules also modified Article 8.5 to include a subtle yet practically important revision concerning the role of oral direct testimony in international arbitration proceedings. Specifically, it is a common practice in international arbitration proceedings for parties to rely on written witness statements and expert reports in lieu of oral direct testimony. As explained in the Commentary, by "[h]aving the witness statement [or expert report] stand entirely in lieu of direct testimony provides an incentive for witness statements to be comprehensive and will in general shorten the hearing." However, as the 2020 update and accompanying Commentary acknowledge, this practice is not required by the IBA Rules. Instead, even in cases where witness statements are used in lieu of direct testimony, "tribunals may find it useful to hear some direct oral testimony, for example, to address new allegations or new developments that may have arisen since the submission of the witness statement." Accordingly, the 2020 revisions to the IBA Rules account for the possibility that even if the parties utilize witness statements in lieu of direct testimony, some form of limited oral direct may still be appropriate.

The Commentary further explains that the revisions to Article 8.5 were also intended to address a particular procedural strategy aimed at limiting a witness's or expert's ability to proffer oral direct testimony. Specifically, in cases where witness statements are used in lieu of direct testimony, parties occasionally waive the right to cross examine particular witnesses or experts. In doing so, the party who waives cross-examination commonly seeks to deny the witness the ability to respond to any new allegations through oral direct that the witness could not have previously addressed. The 2020 update to the IBA Rules makes clear that even if a party declines to cross-examine a witness, the tribunal may nevertheless permit that witness to offer some form of oral direct testimony.

Limited Direct Expert Presentations

In a similar vein, the Commentary concerning Article 8 acknowledged an increasingly common practice by Tribunals to permit experts to provide some form of limited direct testimony at a hearing. These limited presentations are often thought to be useful because they enable experts to clarify and explain opinions on complex topics that arbitrators may not immediately grasp upon review of the expert reports. By acknowledging the prevalence of this practice, the Commentary clarified that limited direct expert presentations remain consistent with the text of Article 8 of the IBA Rules.

Article 9 - Illegally Obtained Evidence

Last, the 2020 update incorporated an entirely new Article 9.3 that provides "[arbitral tribunals] may, at the request of a Party or on its own motion, *exclude evidence obtained illegally*." While the commentary to the IBA Rules uses the example of nonconsensual audio recording as a potential type of illegally obtained evidence, the new rule appears to be in response to cybersecurity concerns and whether hacked or improperly leaked information can be used in an international arbitration proceeding.

The drafters of the 2020 update intentionally kept the language of Article 9.3 broad in large part because national laws vary widely on the issue of whether illegally obtained evidence should be excluded from criminal and civil court proceedings. As a result, the question of whether illegally obtained evidence can be presented in an arbitration will hinge, in large part, on the applicable law as well as the discretion of the arbitral tribunal itself, taking account of the totality of the circumstances.

In practice, however, it is not entirely clear how Article 9.3 will affect international arbitration proceedings apart from highlighting a potentially complex area of debate. As disputes captured by Article 9.3 arise, one potential area of focus should be on whether arbitral tribunals apply a flexible standard for assessing whether to exclude illegally obtained evidence or more standardized doctrinal rules of evidence based on applicable national laws.

Conclusion

While much will be said about the 2020 update to the IBA Rules, its modest revisions reflect a general con-

sensus that the IBA Rules remain practical, effective, and in need of relatively limited change. In that vein, the members of the IBA's 2020 IBA Rules of Evidence Review Task Force deserve tremendous credit for their careful and precise work ensuring that these rules remain the gold standard in international arbitration practice and resisting the temptation to incorporate far more paternalistic guidelines and rules.

Indeed, the 2020 update's subtle revisions are, interestingly enough, all the more striking in light of the promulgation of a competing series of arbitral guidelines in 2019 known as the Rules on the Efficient Conduct of Proceedings in International Arbitration, or the "Prague Rules." Led in large part by civil law practitioners who believed the IBA Rules overly relied on common law practices, the Prague Rules questioned the effectiveness of the IBA Rules. The 2020 IBA Rules of Evidence Review Task Force's decision to largely maintain the status quo—made by a group of individuals from both common law *and civil law backgrounds*—is, in many ways, a mild repudiation of the Prague Rules' effort to shift international arbitration practices in favor of more traditional civil law norms.

Overall, the 2020 update provides a welcomed clarification and modernization of these longstanding guidelines.

Endnotes

1. International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (17 December 2020) [hereinafter IBA Rules].

2. The 2020 update to the IBA Rules was the product of the IBA Arbitration Committee's 2020 IBA Rules of Evidence Review Task force made up of more than 30 international arbitration practitioners from around the world. *See Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration* at p. 1 (Jan. 2021).

3. *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration* (Jan. 2021) [hereinafter the "Commentary"].

4. IBA Rules, Arts. 1.2, 1.3.

5. IBA Rules, Art. 1.2.

6. IBA Rules, Preamble; Commentary, p. 6.

7. IBA Rules, Art. 1.3, Commentary, p. 5.

8. Commentary, p. 5.

9. Commentary, p. 5.

10. *See e.g.*, International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art. 2 (29 May 2010).

11. *See e.g.*, International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art. 2 (29 May 2010); IBA Rules, Art. 2.

12. IBA Rules, Art. 2.

13. Jason Healey & Anni Piiparinen, "Did China Just Hack the International Court Adjudicating Its South China Sea Territorial Claims?," DIPLOMAT (27 Oct. 2015), https://thediplomat.com/2015/10/did-china-just-hack-the-international-court-adjudicating-its-south-china-sea-territorial-claims.

14. Commentary, p. 9.

15. Commentary, p. 9.

16. Commentary, p. 10

17. IBA Rules, Art. 3.5.

18. International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art. 3.5 (29 May 2010).

19. International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Arts. 3.6, 3.7 (29 May 2010).

20. Commentary, p. 11.

21. International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art. 3.7 (29 May 2010).

22. Commentary, p. 12.

23. IBA Rules, Art. 3.7.

24. IBA Rules, Art. 3.12.

25. IBA Rules, Art. 3.12; Commentary, p. 14.

26. IBA Rules, Art. 3.12; Commentary, p. 14.

27. Commentary, p. 14.

28. International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Arts. 4.6, 5.3 (29 May 2010).

29. IBA Rules, Arts. 4.6, 5.3.

30. International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art. 6.3 (29 May 2010).

31. Commentary, p. 23.

32. Commentary, p. 23.

33. *Compare* IBA Rules, Art. 7, *with* International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art. 7 (29 May 2010).

34. Commentary, p. 24.

35. Commentary, p. 24.

36. Commentary, p. 24.

37. IBA Rules, Art. 8.2; *see also* IBA Rules, Definitions (defining the term "Remote Hearing.").

38. IBA Rules, Art. 8.2

39. IBA Rules, Art. 8.2

40. IBA Rules, Art. 8.5.

41. International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, Art. 8.5 (29 May 2010); Commentary, p. 27.

42. Commentary, p. 27.

43. Commentary, p. 27.

44. Commentary, p. 27.

45. Commentary, p. 27.

46. IBA Rules, Art. 8.5.

47. Commentary, p. 26.

48. IBA Rules, Art. 9.3.

49. Commentary, pp. 30-31.

50. Commentary, pp. 30-31.

51. Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), *available at* www.praguerules.com; *see also* R. Zachary Torres-Fowler, *The Prague Rules: What U.S. Practitioners Need to Know About the Civil Law World's Answer to the IBA Rules on the Taking of Evidence in International Arbitration*, CONSTRUCTION LAWYER (Spring 2019). ■

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