INTERNATIONAL ARBITRATION:  
REVISED 2020 IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION

The IBA Rules on the Taking of Evidence in International Arbitration continue to be widely used in arbitral proceedings. It has been drafted to provide an efficient, economical and fair process for the taking of evidence in international arbitration proceedings, particularly those between parties from different legal traditions. It has also been designed to supplement the law and institutional, ad hoc or other rules that apply to the conduct of the arbitration.

On 17 December 2020, the International Bar Association adopted a third edition (the Rules) intended to supersede the 2010 edition to address the changes that need to be made in the way arbitration proceedings are conducted. It was published on 17 February 2021. It is a timely revision considering that the amendments relate to issues that have been highlighted more in a pandemic year that up-ended the “usual way” of doing arbitration.

In brief, the Rules introduce welcome additions that provide clarity in the conduct of remote hearings and concerns relating to security and privacy arising from increased use of online technologies in the course of the arbitral proceedings.

The Rules will apply to all arbitrations in which the parties agree to apply the Rules (as part of their arbitration agreement or as agreed and set out in a tribunal’s procedural order) after 17 December 2020.

Key updates include:

1. **Cybersecurity and data protection**

   The new Article 2 provides for the consultation on evidentiary issues to address the scope, timing, and manner of the taking of evidence including “the treatment of any issues of cybersecurity and data protection”.
This is a welcome development in a time of increased use of cloud technologies in the exchange of sensitive documents and use of online platforms at the evidentiary hearing. This also comes as a precautionary measure after multiple hacking attempts in arbitrations involving States, and upon considering security and data protection issues in light of the European Union’s General Data Protection Regulation.

Various resources relating to cybersecurity and data protection protocol are now available online for the parties’ and tribunal’s guidance: a) ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration, and b) ICCA-IBA Roadmap to Data Protection in International Arbitration

2. Remote hearings

“Remote Hearing” is now defined in the Rules as “a hearing conducted, for the entire hearing or parts thereof, or only with respect to certain participants, using teleconference, videoconference or other communication technology by which persons in more than one location simultaneously participate”. This includes the concept of ‘hybrid hearings’ where only certain participants or only parts of the hearing use videoconferencing or other online platforms.

In particular, the Rules outline a procedure to guide arbitral tribunals to order an evidentiary hearing by Remote Hearing. The procedure requires arbitral tribunals to consult with the parties with a view to establishing a protocol to conduct the Remote Hearing efficiently, fairly and without unintended interruptions, to an extent possible. The question as to who bears the responsibility for preparing the protocol remains open. The Rules however have provided examples of issues that could be addressed in the protocol: a) the technology that will be used, b) advance testing of the technology or training in use of the technology, c) the starting and ending times considering, in particular, the time zones in which participants will be located, d) how documents may be placed before a witness or the arbitral tribunal, and e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted.

3. Second round witness statements and expert reports

Article 4(6) has been modified to address “new factual developments that could not have been addressed in a previous [w]itness [s]tatement” by way of second round submission of witness statements, which is the usual best practice in most jurisdictions and as provided for in major arbitral institutional rules.

Similarly, Article 5(3) has also been modified to address “new developments that could not have been addressed in a previous [e]xpert [r]eport” by way of second round submission of expert reports.

Previous version of the Rules provide for the opportunity to give further evidence being limited to responses to the other party’s evidence. The new Rules expanded the scope to give further evidence when new relevant evidence has come to light that has not been possible to include at the first round of submissions. This development appears to reflect prevailing international best practices in the conduct of arbitration.
4. Illegally-obtained evidence

The new Article 9(3) provides for the tribunal’s power, at the request of a party or on its own motion, to exclude evidence obtained illegally.

An example of such evidence is a recording of a conversation without the permission of those involved in a country where such act would be illegal. National laws vary with respect to their treatment of evidence obtained illegally. The new Rules provide clarity on the treatment of evidence illegally obtained.

5. Tribunal-appointed experts

Article 6.3 has been amended by deleting some parts susceptible to ambiguous interpretation. By such deletion, it is now clear that a tribunal-appointed expert does not have the power to resolve any disputes between the parties over information or access to information.

Though not ground-breaking, the amendments are a welcome development for arbitration users who continue to use the Rules as a guideline in taking evidence in international arbitration proceedings. A redline comparison of the 2020 and 2010 IBA Rules, as published on the IBA website, is available here.