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Document production and the 2010 IBA Rules on the Taking of Evidence in International Arbitration: a commentary

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**Int. A.L.R. 210* Introduction

International arbitration arises out of an arbitration agreement and is governed by relevant arbitration rules and national laws. These sources, however, are silent on the applicable rules of evidence. This is deliberate so that the parties and arbitral tribunals have maximum freedom to take advantage of the flexibility that arbitration offers compared with the necessarily somewhat rigid rules applied in national courts. It follows that international arbitral tribunals must look to sources other than their own legal systems, or those of the parties or the seat of the arbitration when determining the procedure to be adopted.

In such cases, the International Bar Association's Rules on the Taking of Evidence in International Arbitration (the IBA Rules) are useful in guiding the parties on matters relating to evidence. The IBA Rules provide guidelines for the gathering and presentation of evidence in international arbitration. They provide specific guidance to the parties on, inter alia, the presentation of documents, witnesses, inspection of evidence and the conduct of evidentiary hearings. In sum, the IBA Rules are designed to provide measures for the efficient, economical and fair taking of evidence in international arbitration.

The IBA Rules reflect common practices used in international arbitration that harmonise civil and common law approaches in relation to evidence taking.¹ They may be adopted by parties (in whole or in part) either by including it in an arbitration agreement or even after a dispute has arisen. They are intended to supplement the institutional or ad hoc rules that apply to the conduct of international arbitration. The IBA Rules are used by the parties as guidelines of good practice in relation to evidence taking. Although the IBA Rules are applied frequently, cases discussing the IBA Rules are not readily available because international arbitrations (apart from those involving states) remain largely confidential. Moreover, arbitral awards are not generally published, and even if they are, they are published in a redacted format.²

In 1983, the IBA adopted the first edition of the IBA Rules titled the "Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration". However, this edition of the IBA Rules was rarely used. This may have been because it leaned too much towards the evidence-gathering techniques used in the common law systems or because it was inadequately promoted, or, perhaps, simply because the time was not yet ripe for a harmonisation project of this kind. The second edition of the IBA Rules was published in 1999 and retitled the "Rules on the Taking of Evidence in International Commercial Arbitration". This version gradually became used extensively in international arbitrations where the parties (including lawyers and arbitrators) came from different legal systems. However, as arbitration practitioners became more familiar with the opportunities the 1999 version of the IBA Rules offered for saving time and money, they came to be acknowledged as the international standard for fact-finding by tribunals, often being used as guidelines rather than as a rigid code.

By the second half of the first decade of the 21st century, they were adopted, used as guidelines or at least referred to in a majority of international arbitrations. In order to keep it in line with modern practice, the relevant section of the IBA deemed it appropriate to undertake a "10-year" review of the 1999 version, and a new sub-committee was formed for this purpose in 2008. The 2010 IBA Rules, which came into effect on May 29, 2010, introduced changes to the 1999 version intended to reflect current practices in international arbitration. Like its earlier version, the 2010 IBA Rules recognise that the extensive production of documents is inappropriate in international arbitration and that requests for document production must identify the description, relevance, and materiality of each document or category of documents.

This commentary will discuss the changes that have been made in art.3 of the IBA Rules, which deals with the production of documentary evidence. This commentary is divided into four sections, two of which are in turn divided into parts. The section entitled "General changes to the 2010 IBA rules" will highlight the general changes that have been made to the 2010 IBA Rules which will have an impact on the overall process of evidence gathering, including documentary evidence. **Int. A.L.R. 211* Following this, the article will consider and discuss the main changes that have been made (or should have been made) in relation to art.3 of the 2010 IBA Rules. The final section contains the conclusion of this commentary.

General changes to the 2010 IBA Rules

Applicable to international arbitration

At the outset, it is important to note that the 2010 IBA Rules apply to all international arbitrations and not only to international commercial arbitrations. The omission of the word "commercial" from the title indicates that the 2010 IBA Rules may also be used in taking evidence in non-commercial arbitrations such as investment treaty arbitrations and arbitrations involving issues of pure public international law. With the growth of international law disputes and the increasing popularity of international arbitration as a mechanism to resolve such disputes, it seems that the need for the 2010 IBA Rules could not have been timelier. This is particularly because, in most of these cases, parties to the arbitration will either have come from different legal backgrounds or have experiences from different jurisdictions (especially if the differences arise as a result of coming from a mix of civil and common law backgrounds). Accordingly, it seems advantageous for all, in order to bring uniformity to arbitral procedures, to take practical guidance from the 2010 IBA Rules on how to manage evidentiary procedures in international arbitration fairly and uniformly.

Duty to take evidence in an efficient, economical and fair manner

The preamble of the 2010 IBA Rules states that the IBA Rules are intended to govern the taking of evidence "in an efficient, economical *and fair*" manner. Procedural solutions with regard to the taking of evidence are the result of the arbitrators reaching a compromise that they consider to be fair and just in the circumstances. Accordingly, under the 2010 IBA Rules, the term "fair" has been added. However, the inclusion of the term "fair" may also help to resolve another tacit problem currently facing international arbitration. Apart from the duty of arbitral tribunals to render an internationally accepted award, arbitrators also have an inherent duty to satisfy the requirements of a fair hearing. With the rise in the number of national advocates conducting international arbitration, disputes over the omission and admissibility of evidence will inevitably increase. Accordingly, the inclusion of the term "fair" will help to remind the tribunals to bear this requirement of fairness in mind and may help to keep challenges to procedural decisions on evidence by national courts to a minimum. It is universally accepted that national courts generally retain a level of control in order to ensure that arbitrations meet the minimum standards of fairness.³

Traditionally, arbitral tribunals decided their own procedures and so long as they acted within the basic boundaries of fairness, national courts did not readily intervene in such matters and the parties accepted procedural directions as part of the arbitral process. However, in recent times, this does not appear to be the case. Since modern arbitration laws have increasingly restricted judicial review of arbitrator's awards, the trend of procedural complaints and related challenges have substantially increased.⁴ Not being able to make a frontal attack on the award as to the merits, the focus now seems to be on procedural issues.⁵ The addition of the term "fair" under the 2010 IBA Rules helps to tackle these problems by reminding tribunals to ensure that procedural directions on evidence are fair at all times. The amendment serves as an express guidance for tribunals to act within the mandatory frontiers of fairness in relation to evidence taking in international arbitration.

Duty to act in good faith

Apart from the express requirement to act in a fair manner, the preamble of the 2010 IBA Rules also requires the parties to act in good faith. As a matter of principle, parties before arbitral tribunals are expected to conduct themselves in relation to the case in such a manner so as to avoid bringing into question the reliability, impartiality or effectiveness of the arbitral process. The preamble of the 2010 IBA Rules supports this principle by expressly requiring the parties to act in good faith when taking evidence.

In order to reinforce this position an interesting amendment has been made in art.9(7) of the 2010 IBA Rules whereby arbitral tribunals can take into account the failure of a party to act in good faith when assessing the costs of the arbitration. This revision is in line with the tribunal's duty to maintain procedural fairness. As an example, where a party makes a deliberate disclosure request knowing about the evidentiary privileges that apply to that evidence and therefore wastes time and increases costs for the other party, the tribunal may take into consideration the party's lack of good faith in requesting such evidence when awarding costs.

Although the requirement of good faith and related cost consequences are theoretically useful additions, its value with respect to making the arbitral process more efficient is questionable. Standards such as good faith are very difficult to gauge and, if doubts are raised in relation to a party's conduct, it will be difficult to prove that the parties have acted in bad faith or that they have failed to adhere to the minimum standard of good faith. It follows **Int. A.L.R. 212* that such an amendment may invite more uncertainty and problems than it is worth. It remains to be seen whether the exercise of this kind of judgment by arbitral tribunals will gain the confidence of parties in the medium and long term.

Changes to art.3 of the 2010 IBA Rules

It is recognised that documents are often the most reliable form of evidence for parties in arbitration.⁶ International arbitral tribunals have always given greater weight to documentary evidence than to testimonial evidence. According to Sandifer:

“Probably the most outstanding characteristic of international judicial procedure is the extent to which reliance is placed in it upon the written word, both in the matter of pleadings and of evidence, but especially the latter.”⁷

Although oral evidence is now common in arbitral procedures, tribunals treat documents to have a more probative value than testimonial evidence. This is because contemporaneous documents, subject to any issue of its authenticity, record or otherwise tend to prove the facts in issue in a more credible manner. As Bin Cheng stated:

“Testimonial evidence, it has been said, due to the frailty of human contingencies is most liable to arouse distrust. On the other hand, documentary evidence stating, recording, or sometimes even incorporating the facts at issue ... is ordinarily free from this distrust and considered of higher probative value.”⁸

One of the main reasons for increase in costs and delays in arbitrations has been document production and the provision of written evidence for witnesses. Increasingly, there is a consistent trend by lawyers to flood arbitral tribunals and the other party with voluminous documents, without explaining the purpose or use of these documents in the party's line of evidence. ICC statistics show that 82 per cent of the costs involved in ICC arbitrations are incurred by the parties in document production and unnecessary evidentiary measures.⁹

It is recognised under modern arbitration laws that expansive document discovery is generally undesirable in international arbitration and requests should be carefully drafted to issues that are relevant to the determination of the merits of the case. Article 3 deals with documents that the parties wish to introduce as evidence in the arbitral proceedings. Article 3 of the IBA Rules gives guidance on whether, and in what conditions, a party should be able to request production of documents from another party in a fair and efficient manner. Certain important amendments have been made to art.3 in the 2010 IBA Rules. These will now be considered in turn under the relevant headings.

Meaning and implications of Request to Produce

The definition of “Request to Produce” has been amended under the 2010 IBA Rules which states that it has to be a written request to the other party that the requested documents are produced. Under the 1999 version of the IBA Rules, a “Request to Produce” meant that an application had to be made to the arbitral tribunal for a procedural order directing the other party to produce the requested documents.

The revision of the meaning of the phrase “Request to Produce” is aimed at reducing the costs and time spent by the parties in this connection. The previous definition would require the requesting party to make an application to the tribunal for a procedural order which would involve drafting a formal

request and then getting the members of the tribunal to execute the procedural order in this connection. Such actions inevitably entailed costs and were time consuming for lawyers and, hence, expensive for the parties.

It seems that this revision is logical and more efficient as it requires “a step less” than the previous definition. Here, the requesting party can address the “Request to Produce” simultaneously to the other party outlining the documents which they feel are relevant to the case and material to its outcome along with a copy to the tribunal. Since the request is being addressed directly to the other party, it may simply be a written communication, either by a letter or an email, asking for the documents as opposed to a formal request which had to be, under the 1999 IBA Rules, addressed to members of the tribunal. It follows that the procedure under the 2010 IBA Rules is much simpler.

As with everything else, the flipside of this amendment is that now the “Request to Produce” can be addressed directly to the other side. The caution which the parties usually exercised when they had to request for such documents through a procedural order from the arbitral tribunal may no longer be exercised. The parties may be free from the initial check and balance and may, in some cases, overburden the other party with a preliminary request which may be unduly extensive or burdensome. This may result in unnecessary delays when the party to whom the request has been made objects to the production of the requested documents.

****Int. A.L.R. 213 E-disclosure***

In recent times, electronic documents have become perhaps the most important source of evidence in international arbitrations, especially where the dispute involves multiple parties in different jurisdictions. Clear guidelines are needed on electronic documents in order to reduce costs and increase efficiency in international arbitration. Although there is no difference in the test that is applied for electronic disclosure (“E-disclosure”), electronic documents require separate consideration than paper documents because of their distinct natures, which may give rise to numerous practical issues when it comes to disclosure requests.

E-disclosure has always been more problematic than disclosure in relation to paper documents.¹⁰ This is primarily because electronic documents are more likely to be voluminous in nature. Electronic documents are easy to create and quicker to transmit than paper documents. It can be forwarded to various parties at the same time easily. As a result, party communications, which form a vital part of evidence in any given case, usually take the form of emails. Nowadays, people also tend to frequently use their blackberry devices to send emails instead of calling them directly for casual business messages.

Adding to this problem is the fact that electronic documents can exist in different locations at the same time. Electronic documents can be found in computers, blackberry devices, mobile phones and so on. As a result, there are more places to search when a party makes a document request. Another important difference is that electronic documents are more durable than paper documents. Most parties maintain back-up copies and/or storage of electronic documents where even deleted items can be found. With the availability of sophisticated technology and computer experts, parties can easily recover electronic information even when it has been deleted many months ago. All this makes electronic documents an important source of evidence.

In light of the differences mentioned above and the likely problems that they may pose, electronic documents have changed the definition of “document” and, in the process, changed the very process of disclosure in international arbitration. It is important to note, at the outset, that disclosure in international arbitration is very different to disclosure/discovery in litigation. In international arbitration, documents are disclosed pursuant to specific requests and arbitral tribunals are reluctant to allow parties to make broad requests and seek voluminous documents.¹¹ This is different from litigation, particularly in the United States of America, where discovery involves an obligation to disclose all relevant non-privileged documents, whether helpful or harmful to one's case.

Various guidelines and rules address the issue of electronic disclosure, although mostly in the context of litigation before courts¹² In the context of international arbitration, the 2010 IBA Rules address the issue by amending art.3 in the following way:

“...in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall, be required to identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner”.¹³

This is a very helpful addition which had not been addressed in the 1999 IBA Rules. The ability to locate and filter electronic documents through the application of specific search terms will allow the requesting party to be more specific in their document requests thereby reducing the possibility of requesting voluminous electronic documents. The new amendment encourages the parties to use computerised search techniques so that relevant electronic documents can be retrieved quickly and efficiently without substantially increasing the costs of the arbitration. However, given the relevance and importance of electronic documents in modern disputes and the problems that may arise in connection thereto, it was hoped that the 2010 IBA Rules would address the issue in more detail.

This is especially because parties to international arbitration, including members of the tribunal, usually come from different backgrounds and are accustomed to different cultures. Parties from civil law countries are used to very little disclosure as opposed to parties from common law countries where disclosure is very common. The 2010 IBA Rules should have taken this fact into consideration and provided more detailed guidelines in relation to E-disclosure, which can be very complex and require separate consideration by the parties in order to maintain the very ethos of arbitration, i.e. to settle disputes quickly and efficiently.¹⁴ The purpose of this commentary is not to suggest a separate set of guidelines which should be used by parties when dealing with E-disclosure requests in international arbitration,¹⁵ but to highlight some salient points which should have been addressed in the 2010 IBA Rules.

***Int. A.L.R. 214** Article 2, an important addition to the 2010 IBA Rules, deals with early consultation on evidentiary issues. However, in the sub-clauses, the 2010 IBA Rules do not deal with or address any concerns that parties may have, or rather should have, in relation to E-disclosure issues. Given the complexity of E-disclosure, a helpful addition in the 2010 IBA Rules could have been an early consultation that would take place between the parties specifically to address issues arising out of E-disclosure. As is rightly stated:

"Identifying for parties the kinds of e-disclosure issues that ought to be addressed early in the proceedings -- while leaving to their disposal how best to do so in each particular case -- will provide the needed guidance specific to e-disclosure."¹⁶

The main logic behind early consultation is to identify potential issues, at the outset, before the disclosure process has begun, so that the parties know and understand the issues which they may face and come to an agreement (where possible) about these issues. The parties to the arbitration should make use of this early consultation to control and address any issues regarding E-disclosure so as to make the exercise proportionate to the issues at stake. In this respect, due lessons could be taken from the new Practice Direction 31B (PD 31B) of the English Civil Procedure Rules which deals with E-disclosure. PD 31B now states that the parties and their legal representatives must have discussions in relation to E-disclosure matters.¹⁷ It is a mandatory requirement that cannot be ignored.

In order to make the meeting more productive and effective, the parties could also take advantage by exchanging electronic document questionnaires. The purpose of the questionnaires is to have a written record of issues which the parties would need to consider in respect of their E-disclosure obligations. The questionnaire will act as a useful checklist identifying issues that may arise in relation to E-disclosure and provide the tribunal with a written structured outline. As a result, it will bring certainty to E-disclosure issues and help the arbitral process to proceed more quickly and efficiently.

It is well known that whenever issues of document disclosure arise, the courts and tribunals inevitably have to conduct a balancing exercise to assess whether it would be unreasonably burdensome to locate and retrieve the requested documents and whether, in such circumstances, production should be ordered.¹⁸ Thus, both in litigation and arbitration, disclosure requests are considered against the burden of locating the electronic document and its likely importance in light of the nature and value of the case. This balancing exercise is always undertaken on a case-by-case basis.

Article 9.2(c) of the IBA Rules is of general application and makes no distinction between paper and electronic documents. In light of the differences between the two forms of documents and the likely problems that may arise, uniform application of this provision may be inappropriate. Separate guidelines are needed, in this respect, for electronic documents. This is because the requirement in art.9.2(c) of the 2010 IBA Rules that compliance with a request should not be unreasonably burdensome needs to be considered in view of the constant improvement in the technology available for electronic disclosure. As the task of storing and searching for electronic information becomes cheaper and easier, the test of what is reasonable and proportionate also changes.¹⁹ With the help of new technology and numerous filtering options, relevant documents are now easily identified and

retrieved without having to spend substantial costly hours on the process. The result being that the requesting party may now easily satisfy the requirements of art.9.2(c) and may make requests which have the potential to flood the tribunal and the ensuing arbitration with huge volumes of documents analogous to the US litigation-style discovery. This could make the whole process more costly and marred with delays, going against the very purpose of arbitration. This is coupled with the fact that tribunals are party-appointed and tend to operate within set guidelines, one of them being the IBA Rules. The tribunals are usually reluctant to decline requests which satisfy the relevant rules as they do not want their decisions to be exposed to procedural challenges by the aggrieved party at the courts of the seat of the arbitration.

While advances in technology push for greater disclosure, another important matter which needed consideration in the 2010 IBA Rules is the extent to which the tribunals should order the disclosure of metadata and deleted documents. Although it may be argued that such matters come within the tribunal's discretion and could be addressed during the course of hearings, with which the author agrees, some guidelines in this respect would certainly provide the clarity which parties desire from the arbitral process. As rightly pointed out, production of metadata cannot be understated and metadata can win cases.²⁰ As an example, Hill cites a case where the central issue revolved around evidence gathered from metadata.²¹ The main issue was whether a company's incentive plan applied to the former Chief Executive's employment. The document was displayed to the tribunal in a form in which the metadata could be seen. This showed all of the **Int. A.L.R. 215* amendments that had been made during the course of drafting the document. The metadata demonstrated that the Chief Executive had made or attempted to make amendments that would only have been necessary to deal with his own personal situation. None of this could be seen from the face of the document when it was printed. In relation to metadata, perhaps the most important consideration is the costs that are involved with its production.

In order to deal with this problem, the 2010 IBA Rules could have taken lessons from the cost-shifting method used commonly in the United States of America. Arbitral tribunals can employ the cost-shifting analysis in order to adjust the scope of electronic disclosure appropriate in the context of each case. Cost shifting can be enforced by tribunals by ordering the requesting party to pay for the costs if they genuinely need the documents they have requested. In *Abela v Hammond Suddards (a firm)*,²² the Deputy Judge held that a party's willingness to bear the costs may well be very relevant to any question of striking the balance between requiring or not requiring particular steps to be taken as part of an E-disclosure exercise.

Another issue which could have been addressed by the 2010 IBA Rules is the imposition of cost sanctions for the mismanagement of the E-disclosure exercise. If this was addressed expressly in the 2010 IBA Rules, the parties would take great caution in dealing with E-disclosure issues and ensure that they are conducted as efficiently as possible. In *Earles v Barclays Bank*,²³ the judge went as far as saying that "it is gross incompetence" not to know E-disclosure rules and imposed costs sanctions on the successful defendant for failing to conduct the E-disclosure process satisfactorily. The judge criticised both the defendant's lawyer and in-house counsel for not producing or preserving key information (in this case, a key employee's telephone and e-mail records and transfer sheets) which could have led to a summary disposal of the case, or a more efficient conduct of the trial.

This section highlighted some of the salient points which should have been addressed in the 2010 IBA Rules. In arbitration, costs are usually the prime concern of the parties. In modern times, an arbitration practitioner cannot carry out a cost-benefit analysis on behalf of his clients without properly evaluating, at the very outset, the implications of E-disclosure. The author does not suggest in any way that the above suggestions are comprehensive and sufficient to deal with all problems that may arise in relation to E-disclosure. However, the suggestions, if incorporated, would help the arbitral process by reducing cost and increasing efficiency.

Relevance and materiality of requested documents

The very concept of detailed discovery in international arbitrations is costly, time-consuming and inconsistent with the primary object of arbitration. However, adequate discovery is important in discovering key facts, claims and/or defences. The aim of disclosure in arbitrations is to ensure that all documents, including those that are unfavourable to a party, are produced since an arbitral tribunal is expected to establish the facts of the case by all appropriate means.

The right of discovery in international arbitration is generally limited to documents which are relied upon in the pleadings of the other party. This right is a result of the rule that parties to international

arbitration are meant to produce those documents upon which they rely to prove their case. US-type discovery, under which the parties are required to disclose *all* relevant documents, is rarely used in international arbitration. Fishing expeditions have no place in international arbitration. Parties in international arbitration should not be allowed request for documents that do not support their case.

It follows that only documents which are “relevant to the case and material to its outcome” should be permitted to be requested and produced. This is a fundamental principle in the IBA Rules and is stated in art.3(3)(b) of the 2010 IBA Rules. As Shore suggested:

“You cannot embark on a fishing expedition, but you are entitled to make the other side produce some particular types of fish.”²⁴

The particular types of fish allowed in the expedition exercise are documents which are relevant to the case and material to its outcome. Under the 1999 IBA Rules, the requested documents only had to be relevant and material to the outcome of the case. It seems that the 2010 IBA Rules incorporated a two tier test for the parties that need to be satisfied before such requests can be granted.

Documents are relevant to a case when they are associated with the subject matter of the dispute. The content of the requested documents needs to relate to the procedural or substantive allegations made by the requesting party. The arbitral tribunal will have to decide if the requested documents are in fact appropriate for the allegations of the requesting party.²⁵ This requirement of relevance would prevent parties from requesting documents which may be helpful to prove a particular issue but may not be directly relevant to the present dispute at stake.

Coupled with the test of relevance is the requirement that the requested documents be material to the outcome of the case. The 2010 IBA Rules have been cautious not to allow this category of documents to open the door for **Int. A.L.R. 216* inadmissible fishing expeditions. Accordingly, if additional documents are requested, the arbitral tribunal will have to closely examine whether or not these documents are actually material to the outcome of the case. This has significantly increased the burden on the parties as the requesting party must now show, to a large extent, why the requested documents are important and crucial to the outcome of the case. This is in line with the primary objective of the 2010 IBA Rules to make the process more efficient, economical and fair. It enables the tribunals to filter documents where they feel that their production will not affect the outcome of the proceedings.

For the sake of completeness, it is necessary to mention that the 2010 IBA Rules have changed the language used in art.3 so that art.3(3)(b) now requires a statement from the requesting party that the requested documents are “relevant to the case and material to its outcome”. At the same time, art.9(2)(a) corresponds to the modified language and states that the arbitral tribunal will exclude evidence or refuse a request for production for “lack of sufficient relevance to the case or materiality to its outcome”. Article 9(2)(a) empowers the tribunal to take measures to prevent fishing expeditions and make the process of gathering evidence less cumbersome.

Burdensome for the requesting party to produce documents

An interesting revision to the 1999 IBA Rules has been the addition to art.3(3)(c)(i) whereby a further statement has to be now given to show why it would be burdensome for the requesting party to produce the requested documents. This is an important addition which was not required under the 1999 IBA Rules. In many cases, particularly in international arbitration involving states and/or state entities, it is very difficult to produce documents which are or should have been in the possession of the requesting party. These documents can either be: (i) documents created by the requesting party which have now been lost or cannot be located due to the passage of time; or (ii) they can be documents which have been received by the requesting party before the dispute had arisen but have been lost or misplaced due to poor storage facilities or simply inaccessible for bureaucratic reasons. In such cases, the requesting party may now ask for such copies of documents which may be in the possession of the other party provided it clearly mentions why it would be burdensome for the requesting party to produce the requested documents. It must also state the facts on which it bases its assumption that the requested document is at the disposal of the other side.

Grounds of objection expanded to include requirements under art.3(3)

It has been long established that arbitral tribunals determine the relevance and materiality of all documentary evidence submitted by the parties in international arbitration. It is for the parties to

submit the evidence and for the tribunal to evaluate it. In the *South-West Africa* cases, in responding to objections concerning testimony of the respondent's witness, the President of the International Court of Justice said:

"... the Court is quite able to evaluate evidence, and if there is no value in the evidence, then there will be no value given to this part of the evidence"²⁶

Under the 2010 IBA Rules, arbitral tribunals may rule in favour of the requesting party only if two requirements are fulfilled. The tribunal must be convinced that: (i) the documents are relevant to the case and material to its outcome; and that (ii) none of the reasons for the objections set forth in arts 9(2) and 3(3) apply.

The grounds of objecting to the requested documents have been increased under the 2010 IBA Rules. In addition to the substantive objections under art.9(2) which can be raised by the other party against the Request to Produce, the requesting party must now also fulfil the requirements of art.3(3), otherwise it runs the risk of a successful challenge to the requested documents. The grounds of objection now include, inter alia, that the requesting party has failed to satisfy the requirements of relevance and materiality, failed to describe the document in sufficient detail or failed to explain why it would be burdensome for the party to produce such documents.

Parties are encouraged to meet and resolve objections to document requests

Under the 1999 IBA Rules, the parties would simply communicate their objections to the arbitral tribunal, which would then deal with the document requests and the objections in consultation with the parties. Under the previous regime, it seemed that the involvement of the arbitral tribunal was inevitable.

Article 3(6) of the 2010 IBA Rules is a positive step forward in relation to cutting the delays and the additional costs involved with objections to document requests, thus promoting the efficiency of arbitral proceedings. Under this provision, the parties are encouraged to meet and resolve any objections which they have raised in relation to the document requests. This involves a meeting between the parties' counsel during which an amicable agreement is attempted so that the parties can agree to exclude some documents which have been objected to, thereby efficiently managing the disclosure process. The simple rationale for art.3(6) is that, if successful, it **Int. A.L.R. 217* reduces the number of the requested documents to a manageable proportion and helps to achieve a balanced and informed evidence gathering process.

Given the international acceptance of the "Redfern Schedule" in the arbitral process, it seems that it would be a good idea if the 2010 IBA Rules had included the Schedule as part of the guidelines. The Redfern Schedule has the advantage of saving time and money spent on case management meetings in relation to dealing with objections to documents requests. The purpose of the Redfern Schedule is to narrow the precise issue at dispute, so that arbitral tribunals are aware of the parties' position in relation to their objections to document requests following exchanges between them. This enables the tribunal to make an informed decision as to whether or not a particular document or category of documents should be produced, without having the need to be involved in details of the exchanges between the parties' lawyers. This in turn saves the need for a meeting or telephone/video conferences, which substantially reduces costs and delays for the parties.

Rules of confidentiality expanded

Confidentiality of arbitral proceedings is probably one of the most important reasons for parties choosing international arbitration. Unlike court proceedings, arbitral proceedings are not public proceedings. The importance of the obligation of confidentiality in arbitral proceedings was stated by the English Court of Appeal recently in the case of *John Forster Emmott v Michael Wilson & Partners Ltd*,²⁷ in which it was held that:

"... case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration"²⁸

The 2010 IBA Rules expanded the rules regarding the confidentiality of the requested documents. Under the 2010 IBA Rules, the key amendments regarding the confidentiality requirements include: (i) that the documents shall be kept confidential even if it is produced by non-parties in connection with

the arbitration; (ii) confidentiality requirements do not apply to documents that are in public domain; (iii) such documents shall only be used in connection with the arbitration; (iv) the confidentiality requirement is qualified to the extent that the documents are required in order to fulfil a legal duty, protect or pursue a legal right, or enforce or challenge an award before national courts. The 2010 IBA Rules expressly provides exception to the confidentiality rule by stating situations when this obligation can be overridden, such as fulfilling a legal duty, pursuing a legal right and so on. However, the revision does not consider or incorporate an important exception which is accepted by many arbitral tribunals in the current times, i.e. the grounds of public interest.

In *Esso Australia Resources Ltd v The Honourable Sidney James Plowman*,²⁹ the Australian court concluded that although confidentiality might arise in certain situations, the requirement was not absolute and the “public’s legitimate interest in obtaining information about the affairs of public authorities” prevailed.³⁰ In another Australian case, *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd*,³¹ the Appellate Court decided that an arbitrator had no power to make a procedural order imposing an obligation of confidentiality which would have the effect of preventing the Government from disclosing to a state agency, or to the public, information and documents generated in the course of the arbitration which ought to be made known in light of public interest.

In current times, it is the concern of public interest that has led to the erosion of the principle of confidentiality in arbitral proceedings. Since the 2010 IBA Rules reflect the most current guidelines in relation to issues of evidence, it is felt that the 2010 IBA Rules should have inserted the “public interest” exception in the confidentiality obligation in order to reflect the current trends developing in international arbitration.

Document production for separate phases of international arbitration

The 1999 IBA Rules were designed specifically for international commercial arbitration whereas the 2010 IBA Rules gives guidance for evidence taking in international arbitration generally. Members of the IBA Working Committee, who are accomplished arbitration practitioners from their respective fields, have brought about this amendment based on their past experiences in international arbitration. International arbitration is usually divided into various phases such as jurisdiction, merits, liability and/or damages. Each phase has its separate allegations and respective submissions which need to be supported by accompanying documentary evidence. It would be impractical and cumbersome for the parties if they were required to produce their documentary evidence in respect of the whole case without due regard to the various phases.

An example would help to illustrate this point. In an investment treaty arbitration, the first stage, after a claim has been served, is usually an objection to the jurisdiction of the tribunal, if such an option is available. The jurisdictional phase entails allegations that the tribunal does not have jurisdiction over the disputes. These allegations need to be supported by the relevant documentary evidence. Only if the jurisdictional challenge is unsuccessful or joined with the merits will the **Int. A.L.R. 218* arbitration proceed to the merits phase. Accordingly, along with the pleadings, the documents which are relied on by the parties as evidence would have to be produced separately. Otherwise there will be voluminous documents which would then be produced to the tribunal and the other party which would inevitably lead to high costs and additional delays in the process.

Article 3(14) has been added under the 2010 IBA Rules which states that if the arbitration is organised into separate phases (such as jurisdiction, preliminary determinations, liability and/or damages), the tribunal may, after consultation with the parties, schedule the submission of documents and requests to produce separately for each phase or issue. In light of the above, it seems that this revision is a good addition which will assist the tribunal and parties to effectively manage documentary requests without burdening each other with documents which may not be necessary at the present stage. This will in turn help to save costs in the arbitral process and increase the efficiency and speed with which the case is decided.

Guidance on issues of legal privilege

Privilege has been explained as follows:

“[A] legally recognised right to withhold certain testimonial or documentary evidence from a legal proceeding, including the right to prevent another from disclosing such information.”³²

It is now clear that the basis of privilege is the protection and promotion of free and honest

communication between the parties and their advisors.³³ The issue of privilege in international arbitration has long been problematic both for the parties and the arbitral tribunal. Although the principal is commonly accepted, both by parties from the civil and common law system, its application and scope still remain unclear. This is because there are very few rules on the application of privilege in international arbitration.

Moreover, it is interesting to note that institutional rules and national laws also do not address this issue. Although institutional rules confer broad powers on the arbitral tribunal to decide procedural issues and evidentiary matters for themselves,³⁴ there was no express guidance on the issues that a tribunal might actually consider when determining whether evidence was subject to legal impediment or privilege. This has been resolved to a certain extent with the addition of art.9(3) of the 2010 IBA Rules. This provision highlights certain factors that the arbitral tribunal may take into account when considering a claim that a legal impediment or privilege should exclude the requested documents. For example, art.9(3) states that the tribunal may take into account, when excluding evidence, any need to protect the confidentiality of settlement negotiations, legal advice and so on. In an area where there is serious uncertainty as to the application and scope of privilege, the 2010 IBA Rules bring a welcome change to guide the parties and thus promote certainty.

However, one issue which the 2010 IBA Rules could have addressed in relation to the privilege issue is the situation where the parties knowingly produce a privileged document before the arbitral tribunal. In some cases, parties will deliberately produce the privileged documents as part of its deliberate tactical strategy so that the tribunal can form an initial adverse impression on its counterpart's case. In such cases, although the tribunal has powers to exclude such evidence, the 2010 IBA Rules could have expressly linked it to the new 'good faith' requirement so that the party producing the privileged documents would have to face costs consequences.

Late production of evidence

As a general rule, the parties to an international arbitration are required to produce, within the time ordered by the tribunal, those documents upon which they rely to prove their case. The parties are expected to submit the documents at the same time as their respective pleadings. However, in many cases, it is often seen that parties are producing documents at a much later stage of the arbitral proceedings. If late evidence is submitted in response to a request by the tribunal, or if the other party consents to its submission, the evidence will invariably be admitted. However, in some cases, even when the other party objects to the late production of evidence, the evidence will usually be admitted subject to the right of the other party to comment on it and submit rebuttal evidence. The reason for this practice was explained by Judge Huber in the *Island of Palmas* case:

"However desirable it may be that evidence should be produced as complete and at as early a stage as possible, it would seem to be contrary to the broad principles applied in international arbitrations to exclude ... evidence relating to such allegations from being produced at a later stage of the procedure."³⁵

Although this seems to be a common problem in international arbitration, the 2010 IBA Rules did not address this issue. Since the 2010 IBA Rules have been introduced to increase the efficiency of arbitral proceedings intending to save time and costs for the parties to the arbitration, this is an area which could benefit from some express guidelines to the parties and the tribunal as to how late production of evidence should ***Int. A.L.R. 219** be treated.³⁶ Late production of documents may, in some cases, lead to the repetition of the objection exercise under art.3(5) of the 2010 IBA Rules, and may lead to a wastage of time and resources for the parties.

The issue with late production of documents and its dire consequences were seen recently in the important annulment decision of *Fraport AG v Philippines*.³⁷ In that case, the Annulment Committee dismissed an ICSID Award rendered by distinguished arbitrators on the basis of procedural irregularity. In *Fraport*, the issue revolved around the late production of evidence once the proceedings had been closed by the tribunal. *Fraport* raised concerns about the late production of evidence and, after some correspondence, the tribunal directed the parties not to make any further submissions in this regard. Nevertheless, the tribunal made use of this correspondence in its award without giving *Fraport* the opportunity to be heard. The Annulment Committee noted that the tribunal should have re-opened the proceedings on the basis that new evidence was produced by the party which was of such a nature so as to constitute a decisive factor. Since the tribunal failed to provide a further opportunity to the parties to make submissions on the new evidence, the Committee felt that the tribunal had breached a fundamental procedural rule and, on that basis, annulled the award in

order to safeguard the integrity of the arbitral procedure.

Conclusion

Procedures relating to evidence gathering in international arbitration will continue to develop through the practice of experienced arbitrators. In most cases, prudent arbitrators will readily identify potential issues from the very outset and apply practical solutions in order to avoid the same. The flexibility and autonomy of the arbitral process allow such manoeuvring by the parties' counsel.

Nevertheless, it is hoped that the remarks made in this commentary will help to identify potential issues for the next review of the IBA Rules. In the meantime, the parties to international arbitration can identify the potential issues from the comments made herein and take adequate steps in the arbitral process so that such issues are resolved speedily without causing any undue delay in the arbitral process. As Tevendale rightly said:

"There should be value -- and economy -- in advising the tribunal of the tools available to them in advance. It is certainly more efficient than waiting until the problem arises and then asking the parties to ... start from scratch"³⁸

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1. They are sometimes described as reflecting a compromise among the different approaches from the two separate legal systems.
2. As Professor Lalive observed: "The confidential character of arbitrations, together with their multiplicity and variety, constitutes a tremendous obstacle to a true knowledge of the subject. We must be aware of the fact that our experience is necessarily limited and our data partial."; Lalive, "Enforcing Awards" in, *60 Years of ICC Arbitration: A Look at the Future* (1984) at p.323.
3. M. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008), p.85. The court's role has been described as a "bulwark against corruption, arbitrariness, bias, improper conduct and-where necessary-sheer incompetence"; Kerr, "Arbitration and the Courts: The UNCITRAL Model Law" (1985) 34 *International & Comparative Law Quarterly* 1, 15; see also A. Berg, "Annulment of Awards in International Arbitration", in R. Lillich and C. Brower (eds), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* (New York: Transnational Publishers, 1994), pp.160 and 161.
4. For an example of court interference on procedural directions, see ICC Case No.7934/CK, published in (2000) 18(4) *ASA BULL.*
5. V. Veeder, "Evidential Rules in International Commercial Arbitration: From the Tower of London to the New 1999 IBA Rules" (1999) *Arbitration* 291.
6. For a critical view on the value of documentary evidence, see Shore, "Three Evidentiary Problems in International Arbitration: Producing the Adverse Document, Listening to the Document that does not Speak for Itself, and Seeing the Witness through her Written Statement" (2004) *Schieds VZ* 76.
7. D. Sandifer, *Evidence Before International Tribunals* (1975), p.197.
8. B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, 1953), pp. 318 and 319.
9. *Techniques for Controlling Time and Costs in Arbitration*, (Paris: ICC Publication 843, 2007), p.11.
10. To the extent that commentators have suggested: "If "Discovery" is a dirty word in international arbitration, E-discovery promises to be down right obscene"; R. Smit and T. Robinson, "E-Disclosure in International Arbitration" (2008) 24(1) *Arbitration International* 105; also see *Goodale v Ministry of Justice* [2010] EWHC B40 (QB) at [1]-[4], where Senior Master Whitaker took the opportunity to highlight the practical problems associated with electronic documents.
11. This is highlighted in the IBA Rules in art.3(a)(ii) which suggests that parties should identify a "narrow and specific" category of documents.
12. For example, *Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic Document Production*, the Creswell Committee Report leading to the Practice Direction to Pt 31 of the English Civil Procedural Rules and the recent amendments of the US Federal Rules of Civil Procedure.
13. Article 3(3)(a)(i) of the 2010 IBA Rules.

14. The author suggests this bearing in mind that too many rules may kill the notion of arbitration being a flexible user-friendly process. However, areas such as E-disclosure warrant more guidelines as otherwise parties will be left in state of uncertainty which may lead to unavoidable objections and delays in the whole process. As it stands, the 2010 IBA Rules permit tribunals and parties to reach results on a case to case basis using their own judgment, but without any guidelines as to how the judgement ought to be exercised.
15. For a thorough analysis on E-disclosure and proposed guidelines, see R. Smit and T. Robinson, "E-Disclosure in International Arbitration" (2008) 24(1) *Arbitration International* 105, 130.
16. R. Smit and T. Robinson, "E-Disclosure in International Arbitration" (2008) 24(1) *Arbitration International* 105, 124.
17. PD 31B, para.9. Even before PD 31B, the need for discussion between the parties about issues relating to E-disclosure was considered to be important; see *Earles v Barclays Bank* [2009] EWCH 2500 at [31] and [70], where the judge criticised the lack of co-operation on the part of the defendant's lawyers.
18. In the case of international arbitration, art.9.2(c) of the 2010 IBA Rules states as one of the reasons to exclude evidence, "unreasonable burden to produce the requested evidence."
19. R. Hill, "The New Reality of Electronic Document Production in International Arbitration: A Catalyst For Convergence?" (2009) 25(1) *Arbitration International* 87, 96.
20. R. Hill, "The New Reality of Electronic Document Production in International Arbitration: A Catalyst For Convergence?" (2009) 25(1) *Arbitration International* 87, 98.
21. R. Hill, "The New Reality of Electronic Document Production in International Arbitration: A Catalyst For Convergence?" (2009) 25(1) *Arbitration International* 87, 98.
22. [2008] EWHC 2999 (Ch) at [91].
23. [2009] EWCH 2500 at [71].
24. Shore, "Three Evidentiary Problems in International Arbitration: Producing the Adverse Document, Listening to the Document that does not Speak for Itself, and Seeing the Witness through her Written Statement" (2004) *Schieds VZ* 77.
25. H. Raeschke-Kessler, "The Production of Documents in International Arbitration -- A Commentary On Article 3 Of The New IBA Rules Of Evidence" (2002) 18(4) *Arbitration International* 411, 418.
26. *South-West Africa* cases, (Second Phase), [1966] ICJ Reports.
27. [2008] EWCA Civ 184.
28. [2008] EWCA Civ 184 at [105]-[107].
29. (1995) 193 C.L.R. 10. The case is also set out in (1995) 11(3) *Arbitration International* 235.
30. (1995) 11(3) *Arbitration International* 235, 249.
31. [1995] 36 N.S.W.L.R. 662.
32. R. Mosk & T. Ginsburg, "Evidentiary Privileges in International Arbitration" (2001) 50 *International & Comparative Law Quarterly* 345-385.
33. C. Tevendale and U. Cartwright-Finch, "Privilege in International Arbitration: Is It Time to Recognize the Consensus?" (2009) 26(6) *Journal of International Arbitration* 823, 824.
34. See, for example, art.22.1(f) of the LCIA Rules, art.19(2) of the UNCITRAL Rules and s.34 of the English Arbitration Act 1996.
35. United Nations, *Reports of International Arbitral Awards*, Vol. II, p.841.
36. As an example, it could have been inserted in the 2010 IBA Rules that late production may be denied if it will unduly delay the arbitral

proceedings or unfairly prejudice the interests of the other party.

[37.](#) *Fraport AG Frankfurt Airport Services Worldwide v Philippines*, ICSID Case No.ARB/03/25.

[38.](#) C. Tevendale and U. Cartwright-Finch, "Privilege in International Arbitration: Is It Time to Recognize the Consensus?" (2009) 26(6) *Journal of International Arbitration* 823 at 837.

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