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Evidence in international arbitration

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A note providing an overview of the principles governing evidence in international arbitrations and important issues that practitioners should be aware of when considering the use of evidence in international arbitration.

Scope of this note

Parties to an international arbitration are not normally bound, insofar as the production and use of evidence is concerned, by any particular national law or civil procedure rule. Instead, the production and use of evidence is governed by a flexible matrix of rules that will vary from arbitration to arbitration. The use and application of evidence will largely be determined by the arbitral tribunal, which is normally granted a wide discretion in the conduct of the arbitration. The tribunal in turn will be guided in the exercise of its discretion by the laws of the seat of the arbitration, the national legal backgrounds (and therefore expectations) of the parties and their legal representatives, any agreements reached by the parties and tribunal and any applicable institutional rules or guidelines.

This note provides an overview of how these different factors influence the production and use of evidence in an international arbitration. It also highlights a number of specific evidential issues that often need to be considered at the outset and during the course of an arbitration. Links to more detailed practice notes on specific topics relating to evidence in international arbitration are provided throughout.

Difference in common v civil law approaches to evidence

In international arbitration the parties, their legal representatives and the members of the tribunal are likely to come from different jurisdictions. It is important to be aware of the different means by which litigation is conducted in common and civil law systems as this may give rise to different expectations as to how evidence should be produced and used in arbitration proceedings.

In common law jurisdictions, court proceedings are usually adversarial. Each party to the dispute presents evidence to the court to prove its case, the judge or judges apply the laws and rules of evidence to examine the relevance and admissibility of the evidence presented and make a decision based on the material presented. Witness statements are submitted as evidence and it is common for parties to rely on expert evidence in support of their case.

In civil law jurisdictions, proceedings are inquisitorial. The parties present the facts that support the relief sought and witness statements are unusual: instead, the witness appears at the hearing. Experts tend to be appointed by the court and act as advisers to the court. Although parties may also rely on their own expert evidence, the courts tend to give it less credibility than evidence from court-appointed experts. Judges independently identify additional evidence and take an active part in obtaining evidence by questioning witnesses. Courts consider documentary evidence more reliable than oral testamentary evidence. Disclosure is considered excessive in civil law traditions.

The main differences between the common and civil law approaches to evidence are:

- Disclosure of documents after the case has commenced is often required in common law systems, whereas in civil law systems, disclosure is usually limited to specific documents that are relevant to facts alleged.
- Documents presented are considered by civil lawyers as self-authenticated, whereas a common law lawyer would expect documents to be authenticated, presented and explained by the testimony of a witness.
- The common law places emphasis on both the oral testimony of witnesses (who would be sworn), and on

cross-examination. In civil systems, judges question witnesses, cross-examination is considered unnecessary and written testimony is given more weight.

In international arbitration neither the parties nor the tribunal are bound to follow any particular national laws or regulations on the use and application of evidence. Generally, formal evidentiary rules governing the admissibility of evidence do not apply in international arbitration, and all evidence is accepted for whatever weight it has.

The only rule about evidence that should apply in arbitration is that the arbitrator should act fairly and in accordance with the rules of natural justice. For further discussion on this point, see Practice note, Minimum procedural standards in international arbitration.

A flexible approach is encouraged in international arbitration practice, partly because a "lack of opportunity to be heard" may be a ground for challenging the award, and is also a ground for refusing recognition or enforcement of an award (*Article V,* New York Convention). However, grounds for a challenge like this are narrowly construed in many jurisdictions.

For example, in England an allegation that a tribunal did not give enough weight to a piece of evidence was not a sufficient basis for challenge of an award for serious irregularity under section 68 of the Arbitration Act 1996 (AA 1996) (*World Trade Corporation Ltd v C Czarnikow Sugar Ltd (unreported), 18 October 2004, (Commercial Court) , Colman J*). In *BSG Resources Ltd v Vale SA [2019] EWHC 3347 (Comm),* the Commercial court refused applications under section 24 an 68 of the AA 1996 to set aside an LCIA award for apparent bias or procedural irregularity, where the arbitrators had refused to admit into evidence a transcript of parallel ICSID proceedings. It was open to the LCIA arbitrators and well within their discretion not to allow the ICSID evidence to be added to the record of the LCIA arbitration. For further details see Legal update, LCIA arbitrators' decision not to admit further evidence did not demonstrate apparent bias or procedural irregularity (English Commercial Court).

The Mexican Supreme Court has also ruled that the power of an arbitral tribunal to determine the admissibility, relevance, materiality and weight of all evidence is absolute and, therefore, cannot be held to breach Mexican public policy rules (see Facultad de Atracción 78/2011, discussed in Legal update, Mexico Supreme Court shows deference towards arbitral tribunal's absolute powers to admit and weigh evidence.)

Basic principles

A key feature of arbitration is the principle of party autonomy. Parties can tailor the arbitration procedures to the needs of the particular dispute. So, subject to any mandatory rules of the applicable law of the seat of the arbitration, the general principle in relation to evidence is that the parties are free to agree on how evidence should be adduced, presented and evaluated by the tribunal.

Where parties have agreed to arbitrate their dispute under the rules of an arbitral institution, those rules will provide a broad framework for the production and use of evidence. Most of the arbitral institutional rules also provide the tribunal with a broad discretion in relation to the use and application of evidence.

In addition, there are a number of guidelines that have been issued by the International Bar Association (IBA) and the Chartered Institute of Arbitrators (CIArb), such as the IBA Rules on the Taking of Evidence in International Arbitration 2010 (IBA Rules) (see The IBA Rules below) and the CIArb Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration and CIArb Guidelines for witness conferencing in international arbitration. These guidelines are often adopted by parties and the tribunal and provide a useful framework for the taking and provision of evidence. Further, the Inquisitorial Rules on the Taking of Evidence in International Arbitration (Prague Rules) are available for use in arbitrations between parties from civil law jurisdictions (see The Prague Rules below).

In the absence of agreement between the parties, the tribunal will decide issues relating to evidence, subject to due process requirements. For further discussion, see Practice note, Minimum procedural standards in international arbitration.

Applicable national laws

Many national arbitration laws give effect to party autonomy. It is important prior to the commencement of proceedings or as soon as possible thereafter, to determine what the seat of the arbitration is and what the scope under those laws of party autonomy and tribunal powers are (see Practice note, How significant is the seat in international arbitration?).

So, for example, if the arbitration is seated in London, the AA 1996 will apply. This states at section 34(1) that "it shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter". Section 34(2) then sets out more

specifically what is meant by "procedural and evidential matters". For example:

- Whether statements of case should be supplied, and if so, when and in what form (*section 34(2)(c)*).
- Whether documents should be disclosed and produced, and if so, the extent and manner of disclosure and/or production (*section 34(2)(d)*) (see also Practice note, Document production in international arbitration).
- Whether questions should be put to and answered by the parties and, if so, when and in what form (*section 34(2)(e)*).
- Whether to apply the strict rules of evidence (*sections 34(2)(e) and (f)*).
- Whether the tribunal should take the initiative in obtaining evidence. This aims to allow the tribunal to be more inquisitorial as in civil law systems (*section 34(2)(g)*).
- Whether there should be oral or written evidence (*section 34(2)(h)*).

The UNCITRAL Model Law also gives effect to party autonomy. In many countries it has either been adopted by countries as their arbitration law or has been the basis for national arbitration laws (see Practice note, The English Arbitration Act 1996: What is the role of the UNCITRAL Model Law?).

Article 19(1) of the Model Law recognises that the parties are, subject to the provisions of the Model Law, free to agree on the procedure to be followed by the tribunal in conducting the proceedings.

Article 19(2) provides that, in the absence of agreement between the parties, the tribunal may (subject to the Model Law) conduct the proceedings in such manner as considered appropriate, provided that the parties are treated with equality and that each party is given full opportunity to present his case (*Article 18*).

Institutional rules

Where the parties have agreed to arbitrate their dispute under the rules of an arbitration institution, the applicable rules of that institution will confer a broad procedural framework for the production of evidence by the parties, as well as a discretion on the tribunal to determine the scope of factual and expert evidence. For example, the LCIA Rules 2014 and 2020 provide that the tribunal shall have the power to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any evidence tendered by any party (*Article 22.1(vi)*).

All the major institutional rules also prescribe that the tribunal is under a duty to act fairly and impartially and that it must give each party a fair or reasonable opportunity to be heard, see for example Article 15.2 of the ICC Rules (1998) and Article 22.4 of the ICC Rules (2012); as well as Article 17.1 of the UNCITRAL Rules (2010).

These institutional rules also make other provisions relating to evidence, for example:

- The ICC Rules provide that the tribunal has discretion to determine the facts by all appropriate means (*Article 20, 1998 Rules; Article 25.1, 2012 and 2017 Rules*). An ICC tribunal also has the express power to summon any party to provide additional evidence at any time (*Article 20.5, 1998 Rules; Article 25.5, 2012 and 2017 Rules*).
- The LCIA Rules provide that, unless the parties agree otherwise, the tribunal can order any party to make any property under its control and relating to the subject matter of the arbitration, available for inspection by the tribunal, a party or any tribunal-appointed expert (*Article 22.1(d), 1998 Rules*; *Article 22.1(iv), 2014 Rules*). The tribunal can also order any party to produce any documents in their possession, custody or power which the tribunal considers relevant to it and other parties (*Article 22.1(e), 1998 Rules*; *Article 22.1(v), 2014 Rules*).
- Under the UNCITRAL Rules (1976), the tribunal may require the production of documents at any time (*Article 24.3*).
- Under the UNCITRAL Rules (2010), unless otherwise agreed by the parties, statements by witnesses, including expert witnesses, may be presented in writing and signed by the witness. Article 27.1 also clarifies that a witness may be a party to the arbitration. The tribunal may require the parties to produce documents, exhibits or other evidence at any time during the proceedings (*Article 27.3*).

For a summary of the Articles contained in the major institutional rules that relate to the use of evidence in international arbitration, see Checklist, Evidence in international arbitration: table of institutional rules.

Guidelines on the taking of evidence

The IBA Rules

The IBA Rules on the Taking of Evidence in International Arbitration 2010 (IBA Rules) were drafted to accommodate common law and civil law approaches to taking evidence in international commercial arbitration. They apply if the

parties agree or the tribunal so orders and are, in practice often incorporated as part of the tribunal's terms of reference or at the stage of when the preliminary hearing and timetables are put in place. They have become very popular and are very often used and referred to in international arbitration (see Legal update, Good take-up of IBA guidelines on evidence and conflicts of interest).

The IBA Rules supplement any institutional rules that apply according to the parties' agreement and applicable national laws. The IBA Rules can be incorporated into arbitration agreements or can provide a case-by-case framework for taking evidence efficiently.

The IBA Rules are particularly useful in dealing with witness evidence and document production although they only provide the framework for the process and procedure for taking evidence. All other elements of the arbitration are dealt with, or will need to be dealt with, either in the rules agreed on by the parties or by the tribunal.

The Prague Rules

The Inquisitorial Rules on the Taking of Evidence in International Arbitration (Prague Rules) were launched in Prague in December 2018 (see Legal update, Prague Rules launched on 14 December 2018). They are available for use by parties from civil law jurisdictions as the procedure closely mirrors court procedure in civil law countries.

The rules are intended to provide a framework and guidance for arbitral tribunals and parties for the efficient conduct of arbitration proceedings by using a traditional inquisitorial approach. Some features are:

- The tribunal is to avoid extensive discovery "including any form of e-discovery".
- Parties must explain to the tribunal how any witness testimony will contribute to proving facts relevant to the issues in dispute.
- The tribunal is to take a more active role in the questioning of witnesses.
- The tribunal is encouraged to assist the parties in settling the dispute including by expressing its preliminary view on the parties' positions and acting as mediator.

For a separate discussion of the Prague Rules, see also *Blog posts, Prague Rules... or does it?*, *The Prague Rules: all change?*, *The Prague Rules: is the happy partnership between the common law and civil law evidentiary tradition in arbitration really a fiction?* and *Why the Prague Rules may be needed?*.

Other guidelines

There are a number of other guidelines that are relevant to evidence in international arbitration, and which are often referred to and used by the parties and tribunals in international arbitration. They include the following:

- The IBA Guidelines on Party Representation in International Arbitration 2013.
- The CIArb Protocol for the Use of Party Appointed Expert Witnesses in International Arbitration.
- The CIArb Protocol for E-disclosure in International Arbitration (see Legal update, CIArb issues Protocol for E-disclosure in Arbitration). The Protocol provides practical suggestions for dealing with electronic disclosure.
- The CIArb Guidelines for Witness Conferencing in International Arbitration.
- The International Institute for Conflict Prevention and Resolution Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration (see Legal update, New arbitration protocol on disclosure of documents and presentation of witnesses). The Protocol suggests various "modes" of dealing with disclosure and witness evidence.
- The CIETAC guidelines on evidence (2015).
- The ICDR guidelines on exchange of information in arbitration.

Electronic disclosure

As in court litigation, electronic disclosure is becoming an increasingly significant part of international arbitration. The IBA Rules specifically address the issue of e-disclosure. For example, Article 3(3)(a)(ii) provides that the parties and/or the tribunal may be required to "identify specific files, search terms, individuals or other means of searching for" documents in electronic form in an efficient and economical manner. The ICC Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration also contains a number of recommendations for dealing with electronic documents in arbitration. While, the Prague Rules provide that the tribunal is to avoid extensive discovery "including any form of e-discovery".

For a detailed discussion on electronic disclosure, please see Practice note, Disclosure of electronic documents in international arbitration.

Practical issues

Preliminary hearing and timetable: points to consider

Agreed directions

At the outset of the arbitration, it is usual practice for parties and the tribunal to set out a procedural framework and timetable for the future conduct of the arbitration. Such directions are normally provided by way of a Procedural Order or an Order for Directions, which is made by the tribunal in consultation with parties either in correspondence or at a preliminary hearing.

The ICC Rules (1998) require the arbitration tribunal to establish a provisional timetable for the arbitration in the Terms of Reference (*Article 22*). The ICC Rules (2012) and (2017) expressly require the tribunal to hold a case management conference when drawing up the Terms of Reference, or as soon as possible thereafter, in order to consult on procedural matters and to establish the procedural timetable (*Articles 24.1 and 24.2*). The LCIA Rules (2014) and (2020) provide that the parties and the tribunal are to make contact within 21 days from receipt of the notification of the appointment of the tribunal (*Article 14.1, LCIA Rules 2014; Article 14.3, LCIA Rules 2020*) and they are encouraged to come to agreement on the conduct of the arbitration (*Article 14.2, LCIA Rules 2014; Article 14.4, LCIA Rules 2020*). The UNCITRAL Rules (2010) also require the tribunal to establish a provisional timetable (*Article 17.2*).

Correspondence between the parties and the tribunal or a preliminary hearing (or case management conference) will need to deal with the following matters:

- Outline of statements of case (such as claim, defence and any counter-claim).
- Any preliminary issues.
- Rules and procedures.
- Timetable.
- Documentary evidence (disclosure and production, use of Redfern schedules).
- Witness and expert evidence.
- Whether the IBA Rules or any other guidelines relating to the production and use of evidence are to apply to the arbitration.
- Confidentiality of proceedings and evidence.
- Terms of reference.
- Submissions.
- Clarification of issues.
- Any protective measures.
- Hearings.
- Time allocation at hearings.
- Use of transcripts and translation issues.
- Order of witnesses.
- Whether there should be cross examination.

For further discussion, see Practice note, Procedural orders and preliminary meetings. For examples of a procedural order, see Standard document, LCIA arbitration (2020 Rules): Procedural order (order for directions) and Report of Preliminary Hearing and Scheduling Order for US Arbitrations.

Document production

Parties normally submit the documents on which they seek to rely at the time that they file their memorials or written submissions or statements of case. The practice also allows the tribunal to be reasonably informed about the dispute to enable consideration of requests for additional documents if there is any disagreement over the extent or scope of what's requested.

Note that, unlike in English and US-style litigation, the parties in an arbitration are not normally under an automatic duty to disclose documents which adversely affect their case.

For a full discussion of document production, see Practice note, Document production in international arbitration.

Witness evidence

Factual witness evidence

Factual witness evidence may be used in international arbitration, and provision for this is often made at an early stage of the proceedings, in the Procedural Order or Order for Directions. The usual practice is for witness evidence to be submitted in the form of a witness statement which stands as direct evidence of that witness, and for oral cross examination (by both the tribunal and the legal representatives) of that witness to be conducted at a hearing. The following are examples of issues that may arise in relation to the use of factual witness evidence in an international arbitration.

- **Parties as witnesses**. In some systems, persons affiliated with a party may be heard as that party's representatives, although not as witnesses. In civil law systems, a party or representative of a party (such as an officer, employee, or director) cannot testify as a witness at a hearing. In most common law systems, any witness can be heard on a factual matter.

  Arbitration rules generally recognise the common law approach that a party-affiliated witness can testify. The IBA Rules, for example, clarify that any person can present evidence as a witness, including the parties and their officers, employees or other representatives (*Article 4(2)*). There is a similar provision in the LCIA Rules 2014 and 2020 (*Article 20.6 and Article 20.7* respectively) and the UNCITRAL Rules (2010) (*Article 27.2*).

  However, many tribunals will give less weight to evidence given by parties than to evidence given by independent third parties.

- **Contact with witnesses**. Contact with witnesses is accepted practice in common law jurisdictions, but not in civil law jurisdictions. In some countries, contact is disapproved because it might compromise the credibility of the testimony.

- **Oaths**. It is uncommon for witnesses in international arbitrations to be required to swear oaths. However, in some legal systems, arbitrators can put witnesses on oath, although the tribunal would usually have discretion whether to do so. In other systems, only a judge or notary has authority to administer oaths. In England, for example, subject to any agreement between the parties, or any rules that apply, the tribunal has discretion as to whether an oath/affirmation is required and has power to administer oaths/affirmations (section 38(5)*, AA 1996*). In some jurisdictions, such at the United Arab Emirates, witnesses must swear an oath and if they do not do so, there is a risk that the award may be set aside, see Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell, 6th ed), Chapter 5, paragraph 5.21.

  If the parties' arbitration agreement provides for oaths, it may be necessary to specify by whom the oath or affirmation should be administered and whether formal authentication is required.

For a full discussion of the issues relating to the use of witness evidence, see Practice note, Dealing with witnesses in international arbitration.

Expert evidence

Expert evidence is used in international arbitration, although given the different legal backgrounds of the parties, their legal representatives and the tribunal, its use and application may differ and parties and the tribunal may find themselves disagreeing on its use. For a full discussion of the use of expert evidence, see Practice note, Expert evidence in international arbitration, which deals with the following key issues:

- The rules governing the use of expert evidence in international arbitration.
- Party v tribunal appointed experts.
- Experts meetings and directions.
- Presenting expert evidence.

Hearings

Hearing or documents-only arbitration

The UNCITRAL Model Law and the AA 1996 provide that, unless the parties have agreed otherwise, the tribunal can decide whether to hold a hearing or to conduct a documents-only arbitration (*Article 24(1)*, UNCITRAL Model Law and *section 32(2)(h), AA 1996*).

The institutional rules differ slightly in their approach to the right to an oral hearing. For example, under the ICC Rules (1998, 2012 and 2017), the tribunal may decide the dispute on the basis of a document only arbitration, unless a party (1998 Rules) or any of the parties (2012 and 2017 Rules) requests a hearing (*Article 20.6, 1998 Rules; Article 25.6, 2012 and 2017 Rules*). The LCIA Rules (1998, 2014 and 2020) state that the parties have a right to be heard orally unless they have agreed on document-only arbitration (*Article 19.1, 1998, 2014 and 2020 Rules*).

Hearings are usually held in private. Only the tribunal, parties and their representatives are allowed to attend, unless the parties and tribunal agree otherwise.

Some tribunals prefer witnesses to be outside the hearing room when they are not giving their own evidence. In other cases, the presence of the witnesses throughout is considered to provide some disincentive for untrue testimony.

The tribunal will usually draw adverse inferences from a failure to make evidence (including testimony) available, unless there is a satisfactory explanation (*Article 9(6), IBA Rules*).

Language of proceedings and translations of evidence

The tribunal may decide on the language to be used and whether translations of any evidence should be supplied

(section 34(2)(b), *AA 1996*). When translations are necessary, the tribunal may prefer that all translations be made by a single neutral translator.

Other factors

Determining disputes about admissibility or relevance

International arbitrations tend not to be constrained by formal rules of evidence. The tribunal determines the admissibility, relevance, materiality and weight of evidence (for example, see *Article 19(2), UNCITRAL Model Law* and *section 34(2)(f), AA 1996*). This is also provided for in the institutional rules. For example, the LCIA Rules 1998, 2014 and 2020 provide that it is for the tribunal to decide whether or not to apply strict rules of evidence (*Article 22.1(f), 1998 Rules, and Article 22.1(vi), 2014 and 2020 Rules*). Article 9.1 of the IBA Rules also provides that it is for the tribunal to determine the admissibility, relevance, materiality and weight of evidence.

The IBA Rules indicate that the tribunal may exclude evidence that:

- Lacks relevance or materiality.
- Is privileged, confidential or politically/commercially sensitive (see Privilege in international arbitration).
- Is unreasonably burdensome to produce.
- Has been lost or destroyed.
- Is unfair.

(*Article 9(2)*.)

Generally, in arbitration friendly jurisdictions, courts do not readily override a tribunal's assessments of admissibility, relevance or weight unless its decisions deprive a party of due process (such as fairness, equality or the opportunity to present their case) (see Practice note, How significant is the seat in international arbitration?). Tribunals tend to allow wide scope for admission of evidence as, otherwise, they might face the claim that there has been irregularity by refusing to hear relevant or material evidence.

For example, in two decisions of the Swiss Supreme Court dated 27 March, 2014, the court found that the arbitral tribunal, in relying on an unlawfully obtained video recording that turned out to be decisive in the case, did not breach a fundamental principle of Swiss procedural law. Arbitral tribunals, like domestic courts, are entitled to undertake a case-specific assessment of whether illegally obtained evidence should be admitted or not (see Decisions *4A_362/2013* and *4A_448/2013*, as discussed in Legal update, Arbitral tribunal's admission of unlawfully obtained evidence did not violate procedural public policy (Swiss Supreme Court)).

The Swiss Supreme Court, in a decision published on 24 April 2013, confirmed the standard of review that it will impose in relation to examining whether a tribunal has made a proper assessment on the admissibility of evidence. In *Decision 4A_335/2012*, the Swiss Supreme Court confirmed that the petitioner's right to be heard would not be violated if the sole arbitrator considered that the evidence offered would not establish the relevant facts, or based on an anticipated appreciation of the evidence, that further investigation would not alter the sole arbitrator's opinion based on the evidence already introduced (see Legal update, Swiss Supreme Court confirms standard for reviewing anticipated assessment of evidence by arbitrators).

For a separate discussion of illegally obtained evidence in international arbitration, see *Blog post, Lagging behind: is there a clear set of rules for the treatment of illegally obtained evidence in international arbitrations?*.

Privilege in international arbitration

Privilege entitles a party to litigation or arbitration to withhold evidence (which would or should otherwise be produced) from production to a third party, court or tribunal. Most jurisdictions have their own rules and laws regulating what evidence may be withheld on the basis of privilege. Although there may be common grounds of public policy underlying the existence of such privileges, national laws will vary in their application and ambit. Disputes may arise in international arbitration as a result of these conflicting rules and expectations.

These disputes are often complicated by the fact that there are no set rules, or published or binding authority on how international arbitral tribunals should exercise their discretion to resolve such a claim for privilege.

For a full discussion of this issue, see Practice note, Privilege in international arbitration. In particular, the note deals with how a claim for privilege might be resolved and how to raise or resist a claim for privilege.

Confidentiality of evidence

Although most institutional arbitration rules provide for arbitration hearings to be held in private, this does not mean that the hearing, documents or other evidence

produced at the hearing are confidential. Therefore, it is important for the parties to expressly deal with the issue of confidentiality early on the proceedings, in any event, no later than the first Procedural Order.

Institutional rules

The approach of institutional rules to the confidentiality of documents and evidence varies.

UNCITRAL Rules

The UNCITRAL Rules (1976) provide that the award should be made public only with the parties' consent (*Article 32*). Under the UNCITRAL Rules (2010), an award may only be made public with the consent of all the parties or where, to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority (*Article 34.5*). UNCITRAL encourages the tribunal to discuss confidentiality issues with the parties at the start of proceedings and to make appropriate provision for confidentiality (paragraph 6 of the UNCITRAL Notes on Organising Arbitral Proceedings 1996). This may be done, for example, via a confidentiality agreement between the parties or a tribunal order or directions.

ICC Rules

The ICC Rules (1998) provide that the tribunal can take measures to protect confidential and other sensitive information (*Article 20(7)*). The ICC Rules (2012) and (2017) include more extensive provisions on confidentiality, and allow the tribunal to make orders concerning the confidentiality of the arbitration proceedings "or of any other matters in connection with the arbitration" (*Article 22(3)*).

LCIA Rules

The LCIA Rules 1998, 2014 and 2020 provide that parties will keep confidential all awards, materials and documents produced which are not already in the public domain, subject to certain exceptions (*Article 30(1)*).

National laws on confidentiality of arbitral proceedings

The laws of most countries do not address confidentiality in arbitration, leaving that for the parties to agree through the arbitration rules they select or otherwise (see Practice note, Document production in international arbitration: Use and confidentiality of documents). The tribunal is likely to discuss confidentiality with the parties, given the different meaning accorded to confidentiality in different legal systems, and record agreements on the extent of any duty of confidentiality. Agreements on confidentiality are likely to cover:

- Information to be kept confidential.
- Measures for protecting confidentiality.
- Exceptions to confidentiality.

In many jurisdictions it is possible to seek injunctive relief from the tribunal or the courts to restrain disclosures which are confidential.

For more information on confidentiality, see Practice notes, Confidentiality in English arbitration law and Document production in international arbitration.

Burden of proof

Civil and common law systems (and the various different national laws within those systems) take different approaches to the issues of burden and standard of proof. Although tribunals are not normally bound by any particular national legal system, it is inevitable that practitioners and tribunal members will approach the issue with some form of expectation relating to the appropriate burden and standard of proof.

In order to avoid disputes that may arise, parties may try to agree on who should discharge the burden of proof as well as the standard of proof that should be met. However, in practice this is rare and the parties and the tribunal simply proceed on the basis that the parties are required to prove the facts upon which their claim is based. This approach is also set out in Article 27(1) of the UNCITRAL Rules. See also, Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, Chapter 6, paragraph 6.84.

In practice, (apart from when issues of fraud arise), the standard of proof required to discharge the burden of proof is usually similar to the "balance of probability" test, see also Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, Chapter 6, paragraphs 6.84 to 6.88. For a discussion of the burden and standard of proof in fraud and money laundering disputes, see Practice note, Bribery, corruption and money laundering in international arbitration.

Orders to preserve evidence or property

Parties

The tribunal can usually give directions relating to the preservation of evidence in a party's custody or control. For example, where an arbitration is seated in London, see section 38(6) of the AA 1996.

The tribunal can also usually give directions in relation to property over which a question arises in the arbitration and which is owned by, or is in the possession of, a party (*section 38(4), AA 1996*).

For further discussion, see Practice note, Procedural powers of the arbitral tribunal under the English Arbitration Act 1996.

Third parties

Given the consensual nature of arbitration proceedings, applications to preserve evidence or property in the hands of third parties to the proceedings must usually be made to the court of the seat of the arbitration (see *Article 27*, UNCITRAL Model Law). (Note that following the decision in *DTEK Trading SA v Mr Sergey Morozov and another (2017) EWHC 94 (Comm)* it appears that the English courts cannot grant orders against third parties under section 44 of the AA 1996, see Legal update, Section 44 Arbitration Act 1996 cannot be used against third parties (Commercial Court).)

Procedure: inspection of evidence by tribunal

In practice, parties tend to be present at any inspection by the tribunal. If they are absent, the tribunal would report observations to the parties, who would have the opportunity to comment. It would be improper for the tribunal to undertake independent investigations without the knowledge or consent of the parties. Implied consent may be given through reference to arbitration rules in the arbitration agreement or by the conduct of the parties.

Subpoenas

The agreement of the parties, and the applicable national arbitration laws (*lex arbitri*), usually govern the scope of the power of the tribunal to issue subpoenas. The tribunal's powers are usually limited to the parties to the arbitration agreement and do not extend to non-parties.

The IBA Rules provide that the tribunal may order a party to provide for, or use its best efforts to provide for, the appearance for testimony at a hearing of any person (*Article 4(10)*).

In most countries, a party may apply to court to subpoena a witness or to secure that their evidence is available for use at the arbitration. For example, see section 43 of the AA 1996 in England and section 7 of the Federal Arbitration Act in the USA (for further guidance, see Practice note, Dealing with witnesses in international arbitration: National Court Subpoenas).

If a witness is abroad, an application has to be made to take his evidence abroad. Courts usually have power to order the issue to a foreign court of a commission or request for the examination of a witness who is abroad where the seat of the arbitration is local. Such applications should be distinguished from a request under the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Cases (the Convention), which does not apply to arbitration tribunals (*Viking Insurance Company v Rossdale [2002] 1 WLR 1323, Moore-Bick J*).

In relation to the EU, Council Regulation 1206/2001/EC (the Regulation) provides for co-operation between EU member states in the taking of evidence, and prevails over other provisions relating to taking evidence abroad, including the Convention. Article 1 provides that a member state court may request another member state court to take evidence for use in judicial proceedings. The guide published by the European Commission to accompany this Regulation states that an arbitral tribunal is not a 'court' for the purposes of the Regulation. It may therefore be arguable that a national court can request another member state court to take evidence which ultimately will be used in arbitral proceedings.

Depositions

Depositions are uncommon and there is a general presumption against their use in international commercial arbitration, except when there is no other way to preserve or present the testimony of a witness (for example, in the case of a witness who might not live to give testimony at a hearing).

When depositions are used, this is usually because the parties have expressly agreed to this.

Depositions of non-parties to be used in international arbitrations can pose problems as courts may not be authorised to enforce subpoenas seeking the deposition of non-parties.

Sanctions for breach of the tribunal's orders

If a party fails to attend a hearing or submit evidence, the law of the seat of the arbitration may provide that the tribunal may proceed in the absence of the party or evidence and make an award on the basis of the evidence before it (*Article 25, UNCITRAL Model Law*; section 41(4), *AA 1996*). Some institutional rules also provide for this, for example, see Article 15.8 of the LCIA Rules 1998, 2014 and 2020.

If a party fails to comply with a tribunal order, the tribunal may have power to make a peremptory order (*section 41(5), AA 1996*).

If a party fails to comply with any order of the tribunal, an application can usually be made (by the tribunal or a party) to court unless the parties have, by their agreement, excluded that power (*Article 27, UNCITRAL Model Law* and section 42, *AA 1996*).

In relation to arbitrations that are seated in England, where a party has refused to comply with a tribunal's order to provide evidence, it may not later rely on such evidence in a challenge to an arbitration award under section 67 of the AA 1996. For example, see Central Trading and Exports Ltd v Fioralba Shipping Company [2014] EWHC 2397 (Comm), as discussed in Legal update, Right to rely on new evidence in section 67 challenge to award (Commercial Court).

Evidence in international arbitration: table of institutional rules

For a comparative table on evidence under the ICC, ICDR, LCIA, SCC and UNCITRAL arbitration rules, see Checklist, Evidence in international arbitration: table of institutional rules.