The rise of international arbitration as a means of resolving cross-border business disputes is evidenced by the caseloads reported by prominent administering institutions and the extension of international arbitration to such new areas as investor-state arbitration. However, international arbitration presents a number of challenges relating to evidentiary rules and procedure.

In a typical case involving two parties of differing nationalities, it is common that the lawyers and arbitrators involved come from different jurisdictions, and that a half dozen or more jurisdictions are represented in the hearing room. In this environment the difficulty in organizing the presentation of evidence is obvious. Procedural rules have to be understood by all and accord with reasonable standards of fairness that appeal to parties from different jurisdictions.

To meet this challenge, a set of standardized rules of evidentiary procedure has been developed. The IBA Rules on the Taking of Evidence in International Arbitration (IBA Rules) depart from a number of the usual practices in arbitration and litigation in California. Significant areas of divergence include due process, discovery, expert witnesses, and the evidentiary procedure.

Arbitral due process requires that a party be able to present its case and be afforded equal and unbiased treatment. These broad criteria may be met by a variety of procedural approaches, and it is not a requirement that, for due process to be respected, arbitral tribunals seated abroad or in the United States follow American litigation style evidentiary procedure.

This principle derives from the fact that arbitration is a consensual process that the parties have chosen as an alternative to the intricate rules and procedures of the court system. Thus arbitrators are not required to adopt court procedures in order to fulfill their mandate. This principle is put into practice when parties are of different nationalities, as it is a fair assumption
that their choice for arbitration was influenced by a desire to avoid the court system of one party or the other.\(^5\)

Therefore, the most popular sets of international arbitration rules—such as the International Centre for Dispute Resolution (ICDR) or the International Chamber of Commerce Court of Arbitration Rules (ICC)—typically allow tribunals to exercise wide discretion in determining the methods for presenting evidence. For example, the 2012 ICC Rules use broad language: “The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.”\(^6\)

While court procedure may be too intricate for some, the lack of detail in some arbitration rules can understandably give a party the uncomfortable feeling that there is little predictability to evidentiary procedure in international arbitration. To address this issue, the International Bar Association commissioned a committee of legal practitioners representing a wide array of jurisdictions and legal backgrounds to develop the IBA Rules.

Originally adopted in 1983, the most recent iteration of the IBA Rules debuted in 2010. In general, these rules lay out the common modes of evidentiary procedure used in international arbitration and cover the presentation and use of documentary evidence, fact and expert witnesses, inspections by arbitrators, the conduct of a hearing, and the accepted objections to the disclosure and admissibility of evidence. The IBA Rules are often adopted as nonbinding guidelines but are nonetheless instructive.\(^7\)

**DOCUMENT DISCOVERY**

In international arbitration, contemporaneous documents are generally considered the most reliable form of evidence. Article 3 of the IBA Rules establishes rules and standards relevant to the presentation, confidentiality, and discovery of documents.

Document discovery in international arbitration bears a faint resemblance to discovery conducted in United States courts. Because international arbitration draws its procedural approach from a mix of legal heritages, the common law practice of discovery has been historically balanced against civil law jurisdictions, where discovery does not exist. Indeed for many European practitioners and others who come from countries that derive their procedural approach from the civil law tradition, discovery is often viewed with suspicion if not outright hostility.

Thus, a wholesale adoption of liberal documentary discovery has never been accepted in the practice of international arbitration. Article 3 of the IBA Rules reflects this fact. Nonetheless, it is generally accepted that requests for disclosure may be made in accordance with specific standards set forth in Article 3.3 of the IBA Rules. Article 3.3 requires a request for the production of documents to be “narrow and specific,” meaning that requests for all documents

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\(^6\) ICC RULES art. 25(1).

relating to a topic are often rejected. Rather, the article requires that the parties use their best efforts to identify the proper documents that they are seeking to have produced and demonstrate that the request seeks information “relevant to the case and material to its outcome.”

Under Article 3.3, the party requesting the evidence bears the burden of showing its relevance. Thus, the requesting party will often have to put forward a credible argument as to the likely or prima facie relevance of the requested evidence. An experienced ICC arbitrator once described this standard: “The requesting party actually must demonstrate that it requires the document sought in order to discharge its burden of proof.” Arguments as to relevance will generally be made on the basis of facts already pled in the case; however, the representations of counsel may also be given weight. In sum, the rule in regard to relevance simply calls for the moving party to articulate convincingly why it believes that a particular document will support a particular contention.

The formula also calls for a party to demonstrate the materiality of a request for production. This standard is distinguishable from relevance and refers to the tribunal’s right to evaluate the requested records in the light of whether such documents will bear upon the final award. As another international tribunal phrased it, “the . . . likely merit of the point the requesting party seeks to support.” Even if a party establishes a clear connection between the document it seeks and a contention it wishes to prove, the tribunal may nevertheless determine that the contention itself would not affect the outcome of the case and thus deny the request.

Unlike United States practice, international arbitrators tend to place the time for document discovery after each party has made their case in writing, or what is often referred to as the filing of the statements of claim and defense. There are several reasons for this, but a core one is that in order to identify whether documents meet the standard for relevance and materiality, a tribunal must first understand the case. Because this approach is often taken, parties may be expected to present their statement of claim and defense on the strength of the evidence they already have in their possession, before any document disclosure is allowed. This is not to say that tribunals will

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8. “[A] substantive inquiry into whether the documents requested are relevant to, and in that sense necessary for, the purposes of the proceedings where the documents are expected to be used.” Procedural Order No. 3, ¶3-4, ADF v. United States of Am., ICSID Case No. ARB (AF) 10012 (Oct. 4, 2001).
9. See e.g., Procedural Order No. 1, ¶19, Tidewater v. Venezuela, ICSID ARB/10/5 (Mar. 29 2011) (“[T]he two categories of documents requested by the Claimants are reasonably likely to be both relevant and material in assisting it to determine the proper construction of art. 22.”).
11. ICC Case No. [redacted], Procedural Order No. 3, 9 (2007) (unpublished, on file with author); Virginia Hamilton, Document Production in ICC Arbitration, ICC BULL., Special Sup. at 70 (2006) (“In ruling on the request for the production of documents, the Arbitral Tribunal will rule on the prima facie relevance of the requested documents, having regard to the factual allegations made by the Parties in the sub-missions filed to date. At this stage of the proceedings, the Arbitral Tribunal will not be in a position to make any ruling on the ultimate relevance of the requested documents to the final determination of the Parties’ claims and defenses in this arbitration.”).
12. ICC Case No. [redacted], supra note 11. (“[T]he affirmation of counsel, for the objecting party, whose good faith is assumed, that the documents in question are neither directly relevant nor material, while not determinative, has to be accorded weight.”).
not approve earlier requests for production, but these requests tend to be more the exception than the rule.

**FACT WITNESSES AND WITNESS STATEMENTS**

The general preference for documentary evidence in international arbitration notwithstanding, fact witnesses are often relied on as well. Usually, each witness submits a written statement.\(^{14}\) For various reasons, not the least of which is procedural economy, the written statements serve as direct testimony. Furthermore, a witness statement is often required before a witness is allowed to testify at a hearing.\(^{15}\)

Article 4 of the IBA Rules covers witness statements, with article 4.5 describing the form and content customarily used. Most often, the written witness statements are presented in the form of a first-person account. One tribunal, for example, ordered that a statement “[c]ontain the evidence that the Party presents of that witness in the form of a narrative.”\(^{16}\) This type of narrative, as described by Article 4.5(b), often sets forth a complete picture of the factual basis for the statements and indicates whether the information is based upon direct knowledge (e.g., an eyewitness account), the recollection of others,\(^{17}\) or the review of documents.\(^{18}\)

The accepted practice before international arbitral tribunals is that if a witness submits a written reference to documents or supporting evidence, that evidence should either be previously admitted to the record or appended to the statement.\(^{19}\) Surprise testimony or the last-minute revelation of relevant documents by a witness at the hearing is typically frowned upon and may be a cause for exclusion.\(^{20}\)

Article 4.5 confirms that a witness statement should include an affirmation that the facts it reports are true. While United States practitioners may be comfortable asking witnesses to swear an oath under penalty of perjury, or even request witnesses to notarize their statements, these practices are not generally adhered to in international arbitration. The formality with which such a declaration is made is often not a cause for a tribunal to assign any further weight to the testimony.\(^{21}\)

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14 Jorf Lasfar Energy Co. SCA v. AMCI Export Corp., UNCITRAL, Final Award, ¶50 (2005) (unpublished) (“It is standard practice in international arbitration to require the submission of direct testimony in the form of witness statements served in advance of the hearing as part of pre-hearing submissions. The practice ensures both the fairness and the efficiency of the proceedings by providing the parties full notice of the factual allegations advanced by the opposing party.”).


19 IBA RULES art. 4.5(d).

20 Uiterwijk Corp. v. Islamic Republic of Iran, No. 381, Partial Award No. 375-381-1, 16 (July 6, 1988).

21 AL Solis v. United Mexican States, 4 RIAA 359 (Oct. 3, 1928) (The decision to formally swear a witness statement may be influenced by domestic practice but does not necessarily influence the weight assigned to the testimony.).
EXPERT TESTIMONY

There are essentially two modes of presenting expert testimony in international arbitration. The first is through introduction by a party of an expert’s testimony. Referred to as the party-appointed expert, the role and the purpose of this expert are familiar to United States practitioners. This approach is to be distinguished from the second mode of introducing expert testimony, which is the tribunal-appointed expert. As the phrase suggests, the tribunal-appointed expert is retained to work on behalf of the tribunal and does not accept direct compensation for his or her work from either party.

In the modern practice of international arbitration, the use of party-appointed experts has eclipsed tribunal-appointed experts and has become the more-often-used means of introducing expert testimony. This being said, concern has been voiced in the international arbitration community over battles of the experts, in which technical debates between experts do little to shed light on the issues in the case.

To address this problem, Article 5.4 of the IBA Rules permits a tribunal to require experts to meet and confer and produce a joint report. This simple but useful procedural mechanism allows arbitrators to narrow the issues by directing the experts to show where their positions differ and where they are on common ground. It is rare for two experts to be utterly unable to find any points of agreement.

A joint report is not the only method of avoiding battles of the experts. International arbitrators are known to request that experts appear jointly to answer questions from the tribunal. This procedure is generally referred to as expert witness conferencing and is provided for in Article 8.3(f) of the IBA Rules. Proponents of witness conferencing argue that experts will tend to take a less partisan and more constructive approach to testifying if they testify alongside their counterparts. Many tribunals have found it useful to observe an expert’s reactions and answers in the company of the opposing expert. Parties to an international arbitration should thus not be surprised if their tribunal asks for a joint report and a joint appearance from their experts.22

While these procedures address party-appointed expert witnesses, it is more common than in United States courts that an international tribunal may also appoint an expert to act on its own behalf.23 Lawyers from the civil law tradition tend to favor tribunal-appointed experts because of their widespread use in those jurisdictions.24

This method of adducing evidence is inquisitorial in nature, as it is carried out at the direction of the tribunal and not the parties.25 As a consequence, the tribunal-appointed expert may act on

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22 ICDR Case No. 50T180, Transcript of Oct. 2, 2002, at 83, II, 11-13 (unpublished) (“It is my wish to have both witnesses declaring at the same time to see how one reacts to the questions of the other.”).
23 Courts and domestic arbitrators have been known to appoint neutral appraisal experts, for whom costs may be awarded. CODE CIV. PROC. §1033.5.
24 DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 197 (1975) (“Evidence furnished by expert witnesses or obtained through an inquiry by experts . . . normally stands in high repute in the procedure of civil law countries, being second in importance only to so called authentic documents.”).
behalf of the arbitrator, request additional evidence from the parties, conduct interviews of witnesses, prepare a report for the tribunal, and appear at the hearing to answer questions as required.\(^{26}\)

Because the use of tribunal-appointed experts is fairly common in international arbitration, the IBA Rules include Article 6, which details the standards for the appointment and administration of a tribunal-appointed expert. Article 6.2 sets forth the general practice for qualifying an expert. The expert must provide assurances of his or her independence prior to appointment. There is little guidance given in the IBA Rules about how to assess the independence of an expert, but international jurisprudence tends to support the application of a criterion of justifiable doubt. Under this standard, if there is sufficient evidence to support a prima facie finding that the expert would be partial to one party or its argument, he or she should be disqualified.\(^{27}\)

Because the tribunal-appointed expert operates under the control and pursuant to an arbitrator’s mandate, the parties to an international arbitration are obliged to cooperate with the expert and produce evidence if requested. This is expressly stated in Article 6.3 of the IBA Rules. Furthermore, the IBA Rules state that an appointed expert must treat the parties with equality in producing his or her report, allowing each party to be privy to the evidence and inspections that the expert relies upon.\(^{28}\)

**THE EVIDENTIARY HEARING**

Hearings in international arbitration tend to be dominated by the taking of evidence, with little time given to opening arguments and submissions. It is not uncommon for tribunals to place limitations on opening arguments and ask counsel to limit the direct testimony of witnesses to 10 minutes. Closing arguments are also often prohibited by tribunals that prefer to focus the hearing on the cross-examination of relevant witnesses.

Article 8 of the IBA Rules provides guidance on the conduct of hearings in international arbitration. It is common practice for the party who has not submitted a witness’s statement to call that witness to appear at the hearing.\(^{29}\) This practice derives from the general principle that the witness statement itself serves as the primary or main portion of any direct testimony offered into the record.\(^{30}\) It follows that if the direct testimony is on record, it is the opposing party’s decision on whether to call the witness to challenge the written testimony at the hearing. The tribunal also may determine to hear a witness at the hearing sua sponte, as provided in Article 8.5.

\(^{26}\) IBA Rules art. 6.3.
\(^{28}\) IBA Rules art. 6.3.
\(^{29}\) See Final Award, ICC Case No. 4975 of 1998, in Albert Jan van den Berg (ed.), 14 Yearbook Commercial Arbitration 122 (1989) (“The only occasions on which witnesses for the respondents did not give their evidence in person were when the claimants elected not to require their attendance for cross-examination.”).
It is comparatively rare for parties to an international arbitration to raise numerous objections to the questions posed to witnesses. 31 Most notably, the hearsay objection is generally not adhered to in international arbitration, 32 and arbitrators are typically slow to chastise witnesses for failing to provide yes or no answers in response to leading questions, as long as the tribunal is satisfied that a good faith effort to address the question has been made.

Nevertheless, Article 8.2 of the IBA Rules provides that the tribunal controls the hearing and that arbitrators may limit witness testimony for irrelevance and immateriality, because the testimony is duplicative or otherwise covered by privilege. 33 An example may be taken from an ICC hearing conducted in Paris where the arbitrator stopped a line of questioning because it seemed to be aimed at exposing the witness’s personal liability. As the arbitrator could not establish a connection between exposing the witness’s personal, legal liability, and the questioning party’s arguments in the case, he prohibited the examination of the witness from moving forward on those issues. On later challenge to the enforcement of the award, the Seventh Circuit Court of Appeals upheld the arbitrator’s limitation as appropriate because it had not affected the adverse party’s ability to present its case on the relevant matters at hand. 34

**RULES ON ADMISSIBILITY AND PRIVILEGE**

As may be anticipated by lawyers who have participated in arbitrations generally, evidentiary rules are not applied strictly in international arbitration either. Although arbitrators tend to admit evidence without many restrictions, there are some well-defined exceptions to this liberality in international arbitration.

Article 9 sets forth those exceptions. This section of the IBA Rules permits arbitrators to reject evidence or requests for disclosure that are irrelevant, burdensome, or subject to governmental secrecy or privilege. Rejection is also allowed if it would be otherwise unfair to permit the disclosure or admissibility of the evidence.

Of these principles, privilege may be the issue that raises the most difficulties in international arbitration. Privilege, whether it is attorney-client or otherwise, often poses a conflict-of-law problem because communications may be made by attorneys or others who are qualified to make confidential statements in jurisdictions that have no connection to the place of arbitration or the substantive law of the proceedings. 35 Also, in countries where document discovery is not a usual practice, the rules on privilege are oriented towards the protection of different rights and may be held by lawyers but not by clients. 36

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31 ICDR Case No. 50T180, Transcript of Oct. 2, 2002 Hearing, at 29, ll 17-20 (unpublished) (“Try to leave the objections outside.”).
34 Generica Ltd. v. Pharm. Basics, Inc., 125 F. 3d 1123, 1129-30 (7th Cir. 1997).
These problems naturally pose different considerations compared to privilege questions analyzed under California law alone.

**Objections Based on Privilege**

International arbitrators have struggled to find equitable ways in which to deal with objections based on privilege in an international context. Through the development of case law and academic writings, several transnational principles have emerged that are now generally accepted. Those rules are set forth in Article 9.3 of the IBA Rules and require arbitrators to consider whether the communication in question was issued in connection with obtaining legal advice or settlement negotiations, the expectations of the parties at the time of making the statement, the possibility that privilege was waived, and the equities of the situation.⁷

As one can imagine, it may become burdensome to engage in a separate conflicts analysis for each communication over which privilege is raised. The solution that is generally accepted is to apply the most favorable privilege to all communications in the proceeding. This theory prescribes that if different possible privileges may be afforded to communications in the proceedings based on a conflict-of-law or private international law analysis, the privilege providing the greatest and widest protection of confidentiality should be applied equally to all communications offered in the proceeding.⁸

The IBA Rules have done a lot to make procedures more uniform. The standards are multinational in character and differ significantly from standard United States practice. California practitioners who may serve as counsel or arbitrators must therefore be aware of the unique approaches to evidentiary procedure that are accepted and preferred in international arbitration.

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