

Evidence in international arbitration

by *Practical Law Arbitration*

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This note provides an overview of the principles governing the use of evidence in international arbitration and important issues that practitioners should be aware of when dealing with evidence.

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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 national law or civil procedure rule. Instead, the production and use of evidence is governed by a flexible matrix of rules that varies from arbitration to arbitration. The use and management of evidence will largely be determined by the arbitral tribunal. The tribunal in turn will be guided in the exercise of its discretion by 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 national laws, institutional rules or guidelines. The legal backgrounds of tribunal members may also influence the approach that is taken.

This note provides an overview of how these different factors influence the preparation and use of evidence in an international arbitration. It also highlights several specific issues that may 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 varying 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, and the judge or judges then apply the appropriate laws and rules of evidence to assess the relevance and admissibility of the evidence presented, and make a decision based on the material before them. The scope of document disclosure is often very broad. Witness statements are routinely 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 and documents that support the claim advanced and witness statements are unusual. Experts tend to be appointed by the court and act as advisers to the court. Although parties may rely on their own expert evidence, the courts tend to give it less weight than evidence from court-appointed experts. Judges independently identify additional evidence that is needed and take an active part in obtaining evidence by questioning witnesses at the hearing. Courts consider documentary evidence more reliable than oral testimonial evidence, and a party may not always have the formal status of a witness if giving evidence in their own claim. Disclosure of documents as undertaken in the common law tradition is considered excessive in civil law traditions.

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

- Automatic disclosure of documents (harmful or helpful) after the case has commenced is often required in common law systems whereas, in civil law systems, parties generally produce only documents that support their case, and additional disclosure is usually limited to specific documents that are identified as 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 evidence is given more weight.

Flexibility of approach to evidence in international arbitration

Under most national arbitration laws and institutional rules, tribunals are given a very wide discretion in relation to the use of evidence in international arbitration. In particular, formal evidentiary rules governing the admissibility of evidence do not apply, and generally all evidence presented by the parties will be admitted, although the weight that will be attributed to it will be a matter for the tribunal to decide based on the nature and provenance of the evidence.

This flexible approach to admission of evidence in international arbitration practice may be adopted, in part, because a party's lack of reasonable opportunity to present its case may provide a basis for challenging the award (see, for example, [section 33 \(1\)\(a\)](#) and [section 68\(2\)\(a\)](#) of the English [Arbitration Act 1996](#) (AA 1996), and is also a ground for refusing recognition or enforcement of an award ([Article V\(1\)\(b\)](#), [New York Convention](#)).

Basic principles

Party autonomy and tribunal discretion

A key feature of arbitration is the principle of party autonomy. Parties can tailor the arbitration procedures to the needs of the particular dispute. As a result, subject to any mandatory rules at the seat of the arbitration, the general principle in relation to evidence is that the parties are free to agree on the type of evidence to be used in an arbitration, and how and when it should be presented.

Where parties have agreed to arbitrate their dispute under the rules of an arbitral institution, this position is largely unaffected. Those rules generally provide a broad framework for the production and use of evidence, leaving the detail to be agreed between the parties.

Where parties cannot reach agreement, most national arbitration laws and major institutional rules provide the tribunal with a broad discretion in relation to management of evidence, subject always to due process requirements (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 consider the arbitration law at the seat of the arbitration (as well as any applicable institutional rules) and assess what scope there is under that law for party agreement on procedure and evidence, and what powers are available to the tribunal (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 if so, the scope and timing of disclosure ([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 strict rules of evidence as to the admissibility, relevance or weight of any evidence, and the timing and form of the evidence presented ([sections 34\(2\)\(f\)](#)).
- Whether the tribunal should take the initiative in obtaining evidence. This permits a 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 on International Commercial Arbitration](#) (Model Law) also gives effect to party autonomy. In many countries the Model Law has either been adopted as the national arbitration law or the local law is based on the Model Law (for example, see [Practice note, Arbitration in Singapore](#) and [Practice note, An introduction to the English Arbitration Act 1996: The role of the UNCITRAL Model Law](#)).

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

Article 19(2) of the Model Law provides that, in the absence of agreement between the parties, the tribunal may (subject to the Model Law) conduct the arbitration in such manner as it considers appropriate. The power conferred on the tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

As with any other aspect of an arbitration, a tribunal must act fairly between the parties when dealing with questions of evidence. See, for example, [section 33](#) of the English [Arbitration Act 1996](#) (AA 1996) and Article 18 of the [Model Law](#). For further discussion on this point, see [Practice note, Minimum procedural standards in international arbitration](#). Assessment of evidence is a matter for the tribunal alone.

Institutional rules

In similar fashion, where the parties have agreed to arbitrate their dispute under the rules of an arbitral institution, those rules will generally provide considerable scope for the parties to agree a procedural framework for production of evidence and, absent party agreement, confer on the tribunal broad discretionary powers to manage that evidence. For example:

- [The ICC Rules](#) provide that the tribunal should determine the facts by all appropriate means (*Article 25.1, 2012, 2017 and 2021 Rules*). The ICC Rules also contain an express power for the tribunal to summon any party to provide additional evidence at any time (*Article 25.5, 2012 and 2017 Rules; Article 25.4, 2021 Rules*) and, after consultation with the parties, to appoint an expert (*Article 25.4, 2012 and 2017 Rules; Article 25.3, 2021 Rules*).
- [The LCIA Rules](#) state that it shall be for the tribunal to decide whether to apply any strict rules of evidence as to the admissibility, relevance or weight of any material tendered by a party (*Article 22.1 (vi), 2014 and 2020 Rules*) and the tribunal may take the initiative in ascertaining relevant facts (*Article 22.1 (iii) 2014 and 2020 Rules*). The LCIA Rules also 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(iv), 2014 and 2020 Rules*). The tribunal can also order any party to produce any documents in their possession, custody or power which the tribunal considers to be relevant (*Article 22.1(v), 2014 and 2020 Rules*).
- [The SIAC Rules](#) state that the tribunal shall determine the relevance, materiality and admissibility of all evidence, and is not required to apply the rules of any applicable law in making such determination (*Article 16.2, 2013 Rules; Article 19.2, 2016 Rules*). Other provisions allow the tribunal to exclude cumulative or irrelevant testimony or other evidence, appoint an expert and order the production of any document that the tribunal considers to be relevant and material (*Articles 16.4, 23.1 and 24.1(g) 2013 Rules; Articles 19.4, 26.1, 27 (f) 2016 Rules*).
- Under the [UNCITRAL Rules \(2010 and 2013\)](#), the tribunal determines the admissibility, relevance, materiality and weight of the evidence offered by the parties (*Article 27.4*). Statements by witnesses, including expert witnesses, may be presented in writing and signed by the witness, unless the tribunal directs otherwise (*Article 27.2*). Article 27.2 also states that a party to the arbitration may be a witness. The tribunal may require the parties to produce documents, exhibits or other evidence at any time during the proceedings (*Article 27.3*).

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 22.4 of [The ICC Rules](#) (2012, 2017 and 2021); as well as Article 17.1 of the [UNCITRAL Rules \(2010 and 2013\)](#).

For a summary of the provisions 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

A number of guidelines on management of evidence in international arbitration have been issued by the International Bar Association (IBA), the Chartered Institute of Arbitrators (CIArb) and other international organisations. These guidelines are often adopted by parties and tribunals when formulating a framework for the taking and presentation of evidence.

The IBA Rules

The *IBA Rules on the Taking of Evidence in International Arbitration* (IBA Rules), last revised in December 2020, were drafted to accommodate both common law and civil law approaches to taking evidence in international arbitration. They apply if the parties agree or the tribunal so orders. The IBA Rules can be incorporated into arbitration agreements or reference to them may be included in the first procedural order. In practice, even if not formally adopted, the IBA Rules are often used as guidance by tribunals when making decisions relating to evidence. They are widely used and are often referred to in international arbitration (see [Legal update, Good take-up of IBA guidelines on evidence and conflicts of interest](#)). Particularly in relation to document production, the principles contained in the IBA Rules are generally accepted as reflecting best practice in international arbitration.

The IBA Rules supplement the provisions of applicable national laws, and any institutional rules referred to in the parties' arbitration agreement. Since many national arbitration laws and institutional rules merely provide the tribunal with powers and discretion in relation to the taking of evidence, the IBA Rules can be very helpful in providing a more detailed framework that can be adapted according to the facts of the case. The IBA Rules retain a considerable degree of tribunal discretion in relation to specific aspects of the process.

The IBA Rules address all forms of evidence, including document production, witness and expert evidence. Key provisions of the IBA Rules include:

- Article 3, which provides a suggested framework for the production and introduction of documentary evidence in an arbitration, including how document production requests are to be formulated and the information to be provided in support of a request.
- Article 4, which deals with witnesses of fact, including the content of witness statements, arrangements for oral testimony and consequences of non-attendance for cross-examination.
- Article 5, which deals with party-appointed experts, the content of such expert evidence and provisions ensuring transparency around the independence of those experts.
- Article 6, which deals with tribunal-appointed experts, the process for their appointment and provisions aimed at ensuring that parties have a proper opportunity to test this type of evidence.
- Article 8, which deals with management of evidence at the hearing and includes reference to considerations applicable where the hearing is to take place remotely.
- Article 9, which deals with the tribunal's powers in relation to the admissibility and assessment of evidence, and sets out the grounds on which evidence may be excluded.

For a separate discussion on cybersecurity and data protection issues and the IBA Rules, see [Blog post, Plenty of phish in the sea: cybersecurity and the revised IBA Rules on Evidence](#).

The Prague Rules

The *Rules on the Efficient Conduct of Proceedings in International Arbitration* (Prague Rules) were launched in Prague in December 2018 (see [Legal update, Prague Rules launched on 14 December 2018](#)).

They were initially intended for use by parties from civil law countries but can be used in any arbitration regardless of the legal traditions of the participants. Like the IBA Rules they are intended to supplement not replace any institutional arbitration rules that the parties may have agreed on.

The rules are intended to provide a framework and guidance for tribunals and parties to achieve the efficient conduct of an arbitration by adopting a more inquisitorial approach. Some features are:

- The tribunal and the parties are "encouraged to avoid any form of document production, including any form of e-discovery", although the rules also lay down a procedure for requesting documents from an opposing party should this be necessary (*Article 4*).
- Parties must explain to the tribunal how any witness testimony will contribute to proving facts relevant to the issues in dispute (*Article 5.1*).
- The tribunal is to take a more active role in the questioning of witnesses (*Article 5.9*).
- 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 (*Articles 2.5 and 9*).

For a separate discussion of the Prague Rules, see *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 on evidence in international arbitration, many of which are often referred to and used by parties and tribunals. They include the following:

- [The IBA Guidelines on Party Representation in International Arbitration 2013](#).
- [CIArb Guideline 7, Party Appointed and Tribunal Appointed Expert Witnesses \(2016\)](#)
- [CIArb Guideline 13, Witness Conferencing \(2019\)](#)
- The International Institute for Conflict Prevention and Resolution (CPR) [Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration](#). The Protocol suggests various "modes" of dealing with disclosure and witness evidence.
- 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 *CIETAC guidelines on evidence (2015)*.
- The International Centre for Dispute resolution (ICDR) *Guidelines on exchange of information in arbitration*.
- *ICC Commission Report, The Accuracy of Fact Witness Memory in International Arbitration* (see *Legal update, ICC analyses accuracy of witness memory in international arbitration* and *blog post, Witness recollection and international arbitration*). The report highlights how the memory of an honest witness may become distorted and therefore less reliable. It describes measure that can be taken by in-house and external counsel to preserve or improve the accuracy of witness evidence.

Practical issues

Preliminary hearing and timetable: points to consider

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 (2012, 2017 and 2021 Rules)* 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 2021)* 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 and 2013)* also require the tribunal to establish a provisional timetable (*Article 17.2*).

The *IBA Rules* require the tribunal to consult the parties at the earliest appropriate time and invite the parties to consult on a fair process for the taking of evidence (*Article 2.1*). Those rules set out a list of suggested topics for discussion (*Article 2.2*).

Correspondence between the parties and the tribunal, or a preliminary hearing (or case management conference), should address the following matters:

- Rules and procedures.
- Terms of reference (if applicable).
- Whether the IBA Rules or any other guidelines relating to the production and use of evidence are to apply to the arbitration.
- Requests for any urgent or interim measures (for example, preservation or inspection of evidence).
- Procedural Timetable.

- The treatment of any issues of cybersecurity and data protection (for further discussion, see [Practice note, Data protection and cybersecurity issues at outset of arbitration proceedings](#)).
- Identifying issues in the case.
- Whether there are any preliminary issues for which delivery of evidence should be advanced.
- Form of memorial submissions or statements of case (such as claim, defence and any cross-claims).
- Documentary evidence (disclosure and production, use of Redfern schedules).
- Witness evidence, including the form of witness statements and any issues around witness preparation.
- Expert evidence – party-appointed or tribunal-appointed expert, and in relation to which issues.
- Confidentiality of proceedings and evidence.
- Management of evidentiary hearings. For example:
 - whether it is possible to fix a date;
 - in person or remote hearings;
 - time allocation;
 - use of transcribers and interpreters;
 - agreed scope of cross-examination; and
 - whether any form of trial presentation platform (for example, Opus 2 Magnum or CaseLines) is to be used.

For further discussion see [Practice note, Procedural orders and preliminary meetings](#) and [Practice note, Preliminary Hearings and Procedural Orders in US Arbitration](#). For examples of a procedural order, see [Standard document, LCIA arbitration \(2020 Rules\): Procedural order \(order for directions\)](#), [Standard document, Procedural Order for Video Conference Arbitration Hearings](#) and [Standard document, 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 statements of case. Requests for additional disclosure of documents are generally submitted after at least one round of pleadings has taken place. This practice facilitates a greater understanding of what are the issues between the parties, and allows the tribunal to be reasonably informed about the dispute when it determines any disputed requests for document production

Note that, unlike in English and US-style litigation, the parties to an international 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](#).

Electronic disclosure

As in court litigation, electronic disclosure generally forms a significant part of document production and may merit special consideration in procedural directions so that it may be undertaken as efficiently as possible. Early discussion and agreement between parties on the approach to be taken can prevent issues arising later in the process when they can be more difficult to address without delay or wasted costs. See [Practice note, Document production in international arbitration: Electronic documents](#). The [ICC Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration](#) and the [CIArb Protocol for E-Disclosure in International Arbitration](#) contain recommendations and practical suggestions for dealing with electronic disclosure. Article 3(3)(a)(ii) of the [IBA Rules](#) suggests that parties identify in requests for production of electronic documents "specific files, search terms, individuals or other means of searching for documents in an efficient and economical manner". The tribunal may order the provision of such particulars.

For a detailed discussion on electronic disclosure, please see [Practice note, Disclosure of electronic documents in international arbitration](#).

Witness evidence

Factual witness evidence

Factual witness evidence is often used in international arbitration, and provision for it is generally made in the First 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 the direct evidence of that witness, and for oral cross examination (and questioning by the tribunal) to be conducted at a hearing. The following are examples of issues that may arise in relation to the use of fact witness evidence in an international arbitration.

- **Parties as witnesses.** In some systems, persons affiliated with a party may not be given the status of a witness, although they may be heard as party representatives. For example, in many 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 individual can give evidence as a witness on a factual matter. Arbitration rules generally recognise the common law approach that a party-affiliated witness can testify. The [IBA Rules](#), for example, state 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](#)) and in the [UNCITRAL Rules \(2010 and 2013\)](#) ([Article 27.2](#)). In some cases, a tribunal may give less weight to evidence given by parties to the dispute than to evidence given by independent third parties.
- **Contact with witnesses.** Contact with witnesses is accepted practice in common law systems, but this is not the case in all civil law jurisdictions. In some countries, contact is not permitted because it might compromise the credibility of the testimony. For this reason, it is often desirable to agree at the outset what approach will be adopted in the arbitration. Article 4(3) of the [IBA Rules](#) states expressly that it is not improper for party representatives or

legal advisors to interview a witness or discuss their prospective testimony with them. The *LCIA Rules* (*Article 20.5, 2014 Rules* and *Article 20.6, 2020 Rules*) contain similar provisions.

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

Expert evidence

Expert evidence is routinely used in international arbitration. However, given the different legal backgrounds of the parties, their legal representatives and the tribunal, proposals about the nature and use of this type of evidence may differ. Participants from common law jurisdictions may be more familiar with use of party-appointed experts whereas those from civil law jurisdictions may have more experience of court or tribunal-appointed experts. The *IBA Rules* address expressly the use of both party-appointed experts (*Article 5*) and tribunal-appointed experts (*Article 6*), setting out provisions designed to meet concerns about the independence of the former and party scrutiny of evidence prepared by the latter. A number of arbitration rules have discrete provisions dealing with tribunal-appointed experts whereas the appointment of party-appointed experts is often addressed in the same provision as witnesses of fact. For example see the *LCIA Rules 2020* (*Articles 20 and 21*) and the *SIAC Rules 2016* (*Rules 25 and 26*).

For a more detailed discussion of the use of expert evidence, see *Practice note, Expert evidence in international arbitration*, which deals with the following key issues:

- Rules and guidelines governing the use of expert evidence in international arbitration.
- Party v tribunal appointed experts.
- Identifying and narrowing issues.
- Preparing and presenting expert evidence

Hearings

Evidentiary hearings at which evidence is presented to the tribunal, and where the tribunal and other parties may test or challenge that evidence, are very common in international arbitration. Sometimes these hearing are combined with oral submissions and in other cases submissions may be in writing or take place on a different occasion.

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

Particular issues that may arise in relation to evidentiary hearings include:

- **Sequestration.** Some tribunals prefer witnesses to be outside the hearing room when they are not giving their own evidence. In other cases, the presence of all witnesses throughout is thought to provide some disincentive for untrue testimony. This is an issue that should be discussed and agreed with the tribunal prior to the hearing commencing.

- **Oaths.** It is uncommon for witnesses in international arbitrations to be required to swear oaths before giving evidence. In some systems, only a judge or notary has authority to administer oaths. However, in other legal systems, arbitrators can put witnesses on oath, although the tribunal generally has a discretion whether to do so. In England, for example, subject to any agreement between the parties, or any rules that apply, the tribunal has a 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 as 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 discuss and agree by whom the oath or affirmation should be administered and whether formal authentication is required.

- **Cross-examination.** An oral hearing provides an opportunity for parties to test the evidence of fact and expert witnesses relied on by the other party. The non-attendance of a professional expert is relatively rare, but fact witnesses can sometimes fail to attend. Some arbitration rules make express provision for parties to give formal notice that they require witnesses to attend the hearing for oral examination, or the tribunal may order this, and that the witness attend as requested. A failure by the witness to attend the hearing can result in adverse consequences for the party relying on that fact evidence. For example, the tribunal may be asked to draw adverse inferences from a failure to attend, or to exclude the witness statement of that witness from the evidentiary record, unless there is a satisfactory explanation for the non-attendance. See, for example, Articles 4(7) and 9(7), *IBA Rules*; Article 20.5, *LCIA Rules 2020*; and Rule 25.4, *SIAC Rules 2016*.

It may also be sensible to find out in advance if the tribunal intends to use witness-conferencing (see [Practice note, Dealing with witnesses in international arbitration: Cross-examination and witness conferencing](#)).

- **Use of interpreters:** an international arbitration often involves parties from different jurisdictions, and witnesses and experts may sometimes need the assistance of an interpreter when giving oral evidence. This is an issue that should be discussed by the parties in good time prior to the hearing.
- **Allocation of time.** Each party will wish to ensure that it has an equal amount of time to deal with the evidence. When discussing this issue with an opponent, counsel may wish to take into account the proposed use of interpreters, the possibility of extensive questioning from the tribunal and an imbalance in the number of witnesses for each party.
- For further discussion on organising hearings, see [International Arbitration Pre-Hearing Checklist](#).

Oral hearing or documents-only arbitration

In some cases, there may be no oral hearing. The parties may have decided that a documents-only arbitration will work for them or the tribunal may consider this appropriate.

The AA 1996 and the UNCITRAL Model Law provide that, unless the parties agree otherwise, the tribunal can decide whether to hold a hearing or to conduct a documents-only arbitration ([section 34\(2\)\(h\)](#), AA 1996 and [Article 24\(1\)](#), *UNCITRAL Model Law*).

Institutional rules differ slightly in their approach to the right to an oral hearing in preference to having the dispute decided on the documents only. For example, under the *ICC Rules*, the tribunal may decide the dispute on the basis of a documents-

only arbitration, unless any of the parties requests a hearing (*Article 25.6, 2012 and 2017 Rules; Article 25.5, 2021 Rules*). The LCIA Rules (1998, 2014 and 2020) state that the parties have a right to be heard orally unless they have agreed on a documents-only arbitration (*Article 19.1, 1998, 2014 and 2020 Rules*). The SIAC Rules contain a similar provision (*Article 24.1, SIAC Rules 2016*).

In person, remote or hybrid hearings

Following the Covid-19 pandemic, parties and tribunals have become more comfortable with holding remote hearings, or a combination of participants physically present and those joining remotely (hybrid hearings). Recent changes in some institutional rules reflect the fact that an in-person hearing is no longer the default position (see, for example, Article 19.2 of the *LCIA Rules 2020*). The *ICC Rules 2021* expressly permit tribunals to conduct hearings "remotely by videoconference, telephone or other appropriate means of communication" (Article 26.1). The December 2020 revisions to the *IBA Rules on the Taking of Evidence in International Arbitration*, contain express reference to the power of the tribunal to order that an evidentiary hearing take place remotely. Those revisions also refer to the desirability of the parties and tribunal establishing a remote hearing protocol (*Article 8(2)*).

Remote or hybrid hearings may be appropriate because of travel restrictions, considerations of urgency, participant commitments elsewhere or for reasons of cost and efficiency. Such hearings present particular challenges in relation to the presentation of evidence, particularly cross examination of witnesses. For further discussion on this topic, see *COVID-19: tips for arbitrating during the pandemic* and *Standard document, Procedural Order for Video Conference Arbitration Hearings*. See also *Article, The show must go on, but at what cost? Due process challenges to arbitration awards arising from virtual hearings*.

Language of proceedings and translations of evidence

In the absence of party agreement, the tribunal may generally decide on the language to be used, and whether translations of any evidence should be supplied (see, for example, *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 relevant to evidence

Determining disputes about admissibility or relevance

International arbitrations tend not to be constrained by formal rules of evidence. Under most institutional rules, and many national arbitration laws, the tribunal determines the admissibility, relevance, materiality and weight of evidence. See *Basic principles*.

Exclusion of evidence

Because they are not bound by strict rules of evidence that may apply at a national level, tribunals will generally admit evidence unless there are good grounds not to do so. Tribunals will often address factors that, in other forums, might affect admissibility, by appropriate adjustment to the weight it attaches to a piece of evidence.

The *IBA Rules* state expressly that the tribunal "shall" exclude evidence in certain specified circumstances. Although reliance on those circumstances most often occurs in the context of document production, the grounds stated may be relied on in respect of all types of evidence, including witness and expert evidence. The circumstances mentioned are that the evidence:

- 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.

The *IBA Rules* also provide that a tribunal shall exclude evidence for compelling considerations of procedural economy, proportionality, fairness or equality of the parties (*Article 9(2)(g)*) and that the tribunal "may" exclude evidence that has been obtained illegally (*Article 9(3)*). In relation to the latter, there is no further guidance given as to when the tribunal should exercise this discretion. This matter will generally involve a case-specific assessment of relevant factors, including the circumstances in which the party wishing to rely on the evidence obtained it, whether the evidence is in the public domain, the evidential value of the evidence in question and the provisions of any applicable national law. For further discussion of this topic see *blog post, Lagging behind: is there a clear set of rules for the treatment of illegally obtained evidence in international arbitrations?*

Court intervention on tribunal decisions on admissibility and weight

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 *Applicable national laws*).

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 AA 1996 (*World Trade Corp Ltd v C Czarnikow Sugar Ltd [2004] EWHC 2332 (Comm)*). In *BSG Resources Ltd v Vale SA [2019] EWHC 3347 (Comm)*, the Commercial Court refused applications under *section 24* and *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*).

In two decisions of the Swiss Supreme Court, it was held that reliance by a tribunal 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, 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 has also found (*Decision 4A_335/2012*) 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](#)).

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 its opponent in the dispute, or to a court or tribunal. The evidence may be either written or oral but in most cases disputes about privilege will arise in relation to documentary evidence.

Most jurisdictions have their own rules and laws regulating what evidence may be withheld and on what basis. Although there may be common public policy themes underlying the existence of such privileges, the laws giving rise to an entitlement or obligation not to produce certain categories of document will vary in their nature, scope and application. Disputes may arise in international arbitration because of conflicting rules and expectations.

Such disputes are often complicated by the fact that there are no clearly defined rules on how international arbitral tribunals should exercise their powers to resolve privilege claims. If there is more than one system of privilege potentially applicable in an arbitration, this can give rise to issues of fairness between the parties.

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. It also sets out some practical steps to consider before and during the arbitration.

Confidentiality of evidence

Where documents and other evidence are presented in arbitral proceedings, questions may arise as to how far that evidence is protected by an obligation of confidentiality on the part of other participants in the proceedings. There is also the related question of the confidentiality of the arbitration proceedings themselves, and any hearings that take place within it.

National laws on confidentiality of arbitral proceedings

The laws of many jurisdictions do not contain any express provisions on the confidentiality of arbitration, or materials used in arbitration proceedings, leaving this as a matter for agreement of the parties through the arbitration rules they select or otherwise. In some countries, courts have found that confidentiality is implied in their national law. For example, subject to certain exceptions, there is an implied obligation in England and Wales on a party obtaining documents in arbitration not to disclose or use them for any purpose other than the proceedings in which they were obtained.

Institutional rules

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

UNCITRAL Rules. Under the *UNCITRAL Rules (2010 and 2013)*, 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 for directions.

ICC Rules. The *ICC Rules (2012, 2017 and 2021)* allow the tribunal to "make orders concerning the confidentiality of the arbitration proceedings" (*Article 22(3)*).

LCIA Rules. The *LCIA Rules 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)*).

SIAC Rules. The *SIAC Rules 2016* contain express provisions requiring tribunal and parties to treat all matters relating to the arbitration, including pleadings, documents produced, evidence and other materials in the proceedings, as confidential and not to be disclosed to any third party save in certain stated circumstances (*Rule 39*).

Procedural orders dealing with confidentiality

Given the potential for varying approaches to confidentiality in different legal systems, the tribunal may wish to discuss confidentiality with the parties at an early stage in the proceedings, and record agreement or make directions 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.

If evidence of a particularly confidential or commercially sensitive nature is introduced into the arbitration it may be appropriate for the parties to agree, or the tribunal to order, protective measures to be attached to that evidence. Some arbitration rules make express provision for this (see, for example, Article 22(3) of the *ICC Rules 2021* and Article 9(5) of the *IBA Rules*) but the power to make such an order will fall within the general discretion available to the majority of tribunals.

For further discussion of this topic see *Practice note, Document production in international arbitration: Use and confidentiality of documents* and *Practice note, Confidentiality in English arbitration law*.

Burden and standard of proof

Civil and common law systems (and the various 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 these issues 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 expressly stated in Article 27(1) of the *UNCITRAL Rules*. See also, Article 41 of the *CIETAC Rules* and 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 generally similar to the "balance of probability" or "more likely than not" test used in common law jurisdictions and not significantly different from the civil law approach of requiring that the "inner conviction" of the tribunal be satisfied on the point. See 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 or inspect evidence

Parties

The tribunal can usually give directions relating to the inspection or preservation of evidence in a party's custody or control. For example, where an arbitration is seated in London, see [sections 38\(4\) and 38\(6\)](#) of the AA 1996. See also Articles 22.1 and 25.1(ii) of the *LCIA Rules 2020* and Rule 27(d) and Rule 27(e) of the *SIAC Rules 2016*.

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 Court of Appeal decision in *A and B v C, D and E [2020] EWCA Civ 409* (see [Legal update, Court has power to make order for the taking of evidence from a non-party in aid of a foreign arbitration \(Court of Appeal\)](#)), it remains uncertain whether the English courts can grant orders against third parties under sections 44(2)(b) to 44(2)(e) of the AA 1996.)

Procedure: inspection of evidence by tribunal

In practice, all parties tend to be present at any inspection of evidence by one of the parties or by the tribunal. An inspection by the tribunal without the attendance of all parties may give rise to issues of procedural unfairness if the conditions under which the inspection takes place are not agreed and carefully managed. For example, if one or more parties are absent, it may be

prudent to make a video recording of the inspection. The tribunal should report any observations to the parties, who should have the opportunity to comment on them. It would be improper for the tribunal to undertake independent investigations without the knowledge or consent of the parties. Article 7 of the *IBA Rules* states expressly that the tribunal shall consult with the parties to determine the timing and arrangements for any inspection, and that the parties and their representatives shall have the right to attend.

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, including one who has not yet provided any witness evidence (*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 their 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. In relation to the English jurisdiction, see *Silver Dry Bulk Company Ltd v Homer Hulbert Maritime Company Ltd [2017] EWHC 44 (Comm)* (paragraphs 47-53) for reference to such an application made under *section 44* of the AA 1996. 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*).

Depositions

Depositions, by which a witness provides pre-trial oral testimony, are uncommon and there is a general presumption against their use in international commercial arbitration. Exceptions may be made where 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 generally 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 can 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 2014 and 2020.

Under the AA, 1996, 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 then fails to comply with that peremptory order, an application to court can usually be made (by the tribunal or a party) for a court order, unless the parties have, by their agreement, excluded that power (*Section 42, AA 1996*).

If a party fails to comply with a tribunal's peremptory order for the production of evidence, the tribunal may also draw adverse inferences from that refusal (*Section 41(7)(b), AA 1996*). For further discussion of this topic in the context of document production, see *Practice note, Document production in international arbitration: Adverse inferences*.

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 Fionalba 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*.