Developments in Arbitration

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Parties engaged in arbitration are, broadly speaking, free to decide how evidence is to be taken and handled during the arbitral process. The parties can tailor the rules of evidence to meet the particular requirements of their dispute, rather than having unfamiliar or less efficient rules forced upon them by a court. This flexibility is one of many advantages that arbitration has over court litigation.

Agreeing what the rules of evidence will be in an arbitration can be difficult. If the Tribunal and the parties' respective legal representatives come from different legal backgrounds, they may have differing and sometimes contradictory expectations as to how evidence is to be presented and adduced. This is often the case in arbitrations in the Middle East where common law lawyers from the West and regionally-trained civil law lawyers may be involved in the same case. This presents a risk that time and money will be wasted deciding and arguing over what rules of evidence to apply.

A solution to this problem is for the parties to adopt, either as guidelines or as binding rules, the IBA Rules of Evidence [1] ("the IBA Rules"), which are a full set of evidential rules issued by the International Bar Association (an international association of lawyers and lawyer's associations). Although the Rules draw upon both the common law and civil law traditions, it is the common law influence which is most apparent. The Rules provide mechanisms for the presentation of documents, the management of witnesses of fact, expert witnesses, inspections, as well as the conduct of the evidentiary hearing itself. They are designed to supplement whatever other rules may apply (be they imposed by the local law or by the arbitration centre under whose auspices the arbitration is being conducted), and their aim is to ensure an efficient, economical and fair process for the taking of evidence.

The Rules were first issued in 1983 and have proven to be extremely successful, being routinely used in arbitrations around the world. They were revised in 1999, and in May 2010 a further version was issued, having been amended by the IBA Rules of Evidence Review Subcommittee (of which Essam Al Tamimi of this firm is a member).

Since the Rules are widely used in arbitrations in the Middle East, it is important for those involved in arbitrations to be aware that a number of significant changes have been implemented in the May 2010 version. A number of these changes are highlighted and discussed below.

Title
The title of the previous Rules was "The IBA Rules on the Taking of Evidence in International Commercial Arbitration", but that title has now been revised to remove the word "commercial". A small change perhaps, but an acknowledgment that these Rules, though originally intended for commercial arbitration, have been and continue to be used in a wide variety of disputes. The title of the Rules now reflects the intention that they are to be used in all manner of arbitrations.

Preamble
The preamble contains general statements as to how the Rules are intended to operate. Although broadly the same as the previous version, the new preamble now states that the taking of evidence

shall be conducted in accordance with the principle that the parties “shall act in good faith”. The principle is also reflected in a new paragraph in Article 9 which states that if the Tribunal determines that a party has failed to conduct itself in good faith then this may be taken into account when costs are decided (Article 9.7).

It is not however clear how this positive obligation to act in good faith will be interpreted in practice. For example, although the parties are not obligated to disclose material harmful to their case unless requested, it could be argued that withholding such material is a failure to act in good faith. As with all other aspects of the arbitral process, the parties will need to trust that the Tribunal (which they have chosen) will interpret the Rules and this duty appropriately.

The inclusion of this explicit duty is also helpful in stressing to the parties that they are not to abuse the relative informality and privacy of an arbitral hearing by taking anything less than a good faith approach to the taking of evidence.

Confidentiality of Documents
Another important advantage that arbitration has over litigation is that, generally speaking, the parties will agree that documents disclosed during the arbitration will remain confidential and are only to be used in connection with that arbitration.

Parties need to be aware however that the revised Rules explicitly state that this confidentiality will not apply where “disclosure may be required of a Party to fulfill a legal duty, protect or pursue a legal right or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority” (Article 3.13).

This means that a party will likely be deemed to have waived confidentiality for the purposes of those exceptions should the issue be raised before a court. The reference to “bona fide judicial proceedings” is helpful in that it prevents a mischievous party from bringing proceedings in public with the sole aim of breaching confidentiality, but parties will nonetheless want to take care that when they agree to use the IBA Rules on Evidence they are not giving up their right to keep documents confidential any more than they are compelled to under national laws. This may require amending Article 3.13.

Expert Witnesses
Parties will sometimes instruct experts to give evidence on technical issues. Although the party will have paid the expert for his evidence, it is important that the expert remain neutral, as biased evidence is of little assistance to the Tribunal.

In the previous version of the Rules an expert was obliged to declare any present or past relationships he may have with the parties. The revised rules go further and add that the expert must declare any present or past relationships with the parties’ legal advisors and the Tribunal. The expert must also describe the instructions he has received and state that he is independent of the parties, their legal advisors and the Tribunal, regardless of who has instructed him (Article 5.2).

It is hoped that these additional requirements will go some way in ensuring that experts remain independent, and that they do not develop longstanding relationships with particular law firms or companies that may impair their ability to remain neutral.

Witness Conferencing
The rules regarding the evidentiary hearing have been amended in a number of ways, but an interesting development is the explicit reference to the use of “witness conferencing” (Article 8.3(g)).

Witness conferencing is where witnesses who speak to a particular issue are questioned at the same time and in confrontation with each other. This can apply both to expert witnesses and

witnesses of fact. This has the benefit of allowing the Tribunal to explore a particular issue whilst directly comparing the conflicting witness evidence. It can be a very effective tool, and one that would not readily be available in court. By explicitly endorsing this method it is hoped that it will become more prevalent.

Privilege

The previous rules acknowledged that there are times when evidence is to be excluded due to legal privilege. However since lawyers from different backgrounds differ as to the circumstances in which legal privilege applies, the revised rules now helpfully set out a list of six factors that the Tribunal may take into account when deciding on this issue (Article 9.3).

One of these factors is the expectations that the parties and their advisors had at the time privilege is said to have arisen (Article 9.3(c)). This general provision will give parties greater confidence that they will not be expected to disclose material which they would expect to be privileged under the legal and ethical rules of their home jurisdictions. This is important since if a party fails to comply with an order from the Tribunal to disclose a document, the Tribunal may make adverse inferences (Article 9.5) and may also conclude that the party has failed in its duty to act in good faith, which would likely have adverse costs consequences (Article 9.7).

Conclusion

The above discussion merely highlights some of the more important changes that have been incorporated in the May 2010 version of the IBA Rules of Evidence. By revising them the IBA has achieved its aim of keeping the Rules modern and practical, ensuring that they will continue to be used in arbitrations for many years to come.

Footnote

[1] www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx