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Submitting Evidence in an International Arbitration: The Common Lawyer's Guide

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I. Introduction

National courts operate with a sophisticated set of rules governing what evidence can and cannot be introduced in court proceedings. However, unless the parties in an international arbitration agree to follow a particular set of evidentiary rules, they are generally inapplicable. Usually the applicable 'rule' in an international arbitration is that the tribunal has broad discretion to determine what evidence it should hear. The tribunal admits most or all of the evidence offered by the parties and then determines what weight, if any, should be given to particular pieces of evidence. Because of this practice, we submit that the critical challenge for the advocate in an international arbitration is to develop a strategy for presenting and submitting evidence that will persuade the members of the tribunal – recognizing that the art of persuasion in this context often involves the complicated process of presenting the evidence in a way that will appeal to arbitrators from several different cultures and legal traditions.

In pragmatic terms, the strategic advocate needs to realize and balance the interplay between a variety of factors that arise in an international arbitration. The advocate must remember that the various international arbitration rules generally do not provide clear guidelines for the presentation of evidence and give the arbitral tribunal broad discretion in conducting the proceedings and determining admissibility. Moreover, although witness testimony can at times be powerfully persuasive, civil and common law lawyers have markedly different approaches to the credibility of written versus oral testimony.

Part II of this article discusses the various methods for presenting evidence. Part III discusses current issues regarding admissibility, and Part IV discusses the challenges regarding the burden of proof in an international arbitration. Lastly, Part V discusses the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration ("IBA Rules"), which are becoming a significant reference point, if not adopted in full, in most international arbitrations. In the end, however, it is the advocate who must mold the strategic game plan to the arbitration at hand to obtain the best results.

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II. Presenting Evidence: Generally

Most international arbitration rules contain general provisions on the submission of evidence and how the arbitral tribunal may establish the facts of the case.[1] The rules, however, focus primarily on the broad discretion of the arbitrators to conduct the arbitration proceedings and do not establish clear guidelines for the presentation of evidence.

Absent a specific agreement between the parties, the arbitrators are usually free to establish, among other things, practical details concerning written submissions and evidence (number of copies, numbering of items of evidence, references to documents), time limits for submission of documentary evidence, consequences of late submission, whether assertions about the origin and receipt of documents and the correctness of photocopies are assumed to be accurate, how to respond to a request of a party that the other party produce documentary evidence, arrangements if physical evidence is submitted and if an on-site inspection is necessary, the manner of taking evidence witness, whether the parties may present expert opinions and/or whether to appoint experts, whether to hold hearings, the order in which the parties will present their arguments and the length of hearings.[2]

When procedural issues arise between common law counsel and civil law counsel, the dispute rarely results from the differences between legal background alone. Rather, the cause of such disputes is likely the result of different tactical evaluations of the case.[3] Counsel generally makes decisions regarding submitting evidence in two phases: (1) deciding what is best for their case and most damaging to the opposing party; and (2) deciding what is likely to be acceptable to the tribunal in a particular case.[4]

In practice, within the framework of the international arbitration rules, the presentation of evidence in international arbitrations falls within three general categories: (1) submission of documentary evidence with statements of claims, replies or other briefs; (2) witness statements; and (3) oral testimony. Each is discussed below.

A. Documentary evidence

When submitting statements of claims or memorials accompanied by exhibits, parties submit the documents relied upon in their written submissions into 'evidence,' without the criteria of admissibility that is all too familiar to lawyers practicing in common law jurisdictions. Some cases may be decided solely on the written submissions and

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[1] *See generally* American Arbitration Association (AAA) International Arbitration Rules, arts. 16–22; International Chamber of Commerce (ICC) Rules of Arbitration, 1998, arts. 20, 21. 36 I.L.M. 1604 (1997); International Centre for Settlement of Investment Disputes (ICSID) Rules for Procedure for Arbitration Proceedings, arts. 33–37; London Court of International Arbitration (LCIA) Arbitration Rules 1998, arts. 19–22. 37 I.L.M. 669 (1998); Rules of Arbitration of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (Vienna Rules) art. 14.

[2] *See* UNCITRAL Draft Notes on Organizing Arbitral Proceedings (1995).

[3] Paul D. Friedland, *A Standard Procedure for Presenting Evidence in International Arbitration,* 11 Mealey's Int. Arb. Rep. 4 (1996).

[4] *Id.*

accompanying exhibits, unless one of the parties requests a hearing or the arbitral tribunal, on its own motion, decides to conduct a hearing.[5]

There is no standard procedure for submitting documents into evidence. Therefore, unless the arbitrators have ordered a particular method for submitting documents, counsel are free to make submissions in whatever form they find most effective. After the various rounds of submissions are completed, the parties should consider submitting jointly a single set of documentary evidence whose authenticity is not disputed, in an effort to avoid duplicate submissions. It is also becoming common in cases with voluminous documents for the parties to submit documents on CD-ROM or other electronic media. It is therefore important for the international advocate to understand the established procedure for submitting evidence to the tribunal early on in the proceeding.

A word of caution to counsel who try to hold some damaging documents back: parties in an international arbitration very often submit requests for production of documents.[6] Thus, even if joint production is agreed to or ordered, a party may try to request additional production of documents. Timing then is more of an issue of strategy of production rather than a temporal question for the tribunal. Essentially, one can of course agree to submit documents in joint form and at the same time hold some documents back that the other party may find useful yet never access. The non-disclosure of documentary evidence then cannot be safely undertaken when considering that the above provision in the arbitral rules may just delay the inevitable that will require production anyway, thus leading to the possibility that a strategy of non-disclosure will backfire and make the party appear to have been evasive when finally producing the requested documents.

B. Witness statements

1. *Types of Witness Statements*

A common practice in international arbitrations is to convert oral testimony into written statements filed prior to the hearing.[7] In some cases, written statements entirely replace oral testimony, if the opposing party concludes that cross-examination would not be productive. This practice may save time, but the arbitrators lose the opportunity to judge the credibility and demeanor of the witness.

These written witness statements are often presented in one of two ways, and the chosen form will be that which works best strategically for the party involved or the arbitrators' determination. The first is a summary of the witness' testimony giving simple facts and descriptions with no elaborations. The second is a well-detailed account of the

[5] *See, e.g.*, ICC Rules, art. 20.
[6] *See* IBA Rules on the Taking of Evidence in International Commercial Arbitration, art. 3(2).
[7] *See, e.g.*, AAA Rules, art. 20(5) ("Evidence of witnesses may also be presented in the form of written statements signed by them").

witness' testimony that generally saves time at a hearing because the witness merely affirms the statement and possible cross-examinations can then commence.[8]

IBA Rules, Article 4, Witnesses of Fact, gives a basic guideline to the information that must be included with the statements. The rule requires, as basic elements, the full name and address of the witness, his or her present and past relationship with any of the parties, a description of his or her background, qualifications, training and experience, if such a description may be relevant and material to the dispute or to the contents of the statement, and affirmation of the truth of the statement and his or her signature. Most importantly though, the rule requires a full and detailed description of the facts, and the source of the witness's information as to those facts, sufficient to serve as that witness's evidence in the matter in the dispute.[9]

Regardless of strategy or the requirements of the arbitration rules, if any party intends to rely upon the testimony of a party-appointed expert, arbitrators generally require the experts to submit a written report in advance of the hearings that details the expert's opinion and the basis for such opinion.[10] In an international arbitration, as opposed to common law litigation, the party's first encounter with the expert witness will be at the hearing, rather than a deposition at counsel's office. Thus, the international advocate must bear this in mind when choosing an expert and when reviewing the expert's statement.

2. *Time for Submission*

Arbitrators sometimes require that parties produce witness statements at the time of the submission of the parties' documentary evidence and memorials. Some claimants believe that giving prior notice of the contents of the testimony of witnesses gives the respondent an unfair advantage in the preparation of the testimony of the respondent's witnesses. It is therefore frequently agreed or ordered that exchanges of written witness testimony be simultaneous rather than consecutive.

3. *Witness Production Requirement*

Most parties agree to the submission of written statements by a witness on the condition that the witness be available for questioning at the request of the party against whom the witness testifies. It is important to reserve the right of oral examination on significant or controversial evidence. Arbitrators usually impose as a condition of admission of written witness testimony that the witness be made available for questioning during the hearing upon the demand of the other party. Arbitrators usually have discretion

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[8] Rufus V. Rhoades & Daniel M. Kolkey, Practitioner's Handbook on International Arbitration and Mediation, § 5.08 (2002) [hereinafter Practitioner's Handbook).

[9] IBA Rules of Evidence, art. 4.

[10] Practitioner's Handbook, § 5.08.

to determine whether a written statement of a witness will be admitted in evidence even though the witness is unable or unwilling to appear. Even when such a statement is admitted, the arbitrators may conclude that the witness statement's reliability is diminished because the arbitrators and the adverse party were unable to question the witness on the statement.

4. *Form of Witness Statements*

The form of written statements may be subject to an agreement or a procedural order. Practitioners from common law countries expect written testimony to be submitted in the form of an affidavit under oath. In other jurisdictions, sworn statements are not common. A solution is reflected in Article 4 of the IBA Rules, which provides that the parties agree that such evidence may be submitted with a simple signed declaration to the effect that the statement is true to the best of the witness's belief and knowledge.

C. Oral testimony: fact and expert witnesses

The conduct of a hearing depends on the arbitrators. As stated in the AAA Rules, "the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."[11] Typically, some cross-examination will be permitted at the hearing, but arbitrators may also interrogate witnesses themselves or take other steps to restrict the length or scope of cross-examination. The legal background of the arbitrator will most affect the process.

Whether oral evidence is permitted in an international arbitration depends upon two things: perceived credibility and costs. One of the striking differences between the common law system and the civil law system is in the use, or lack, of oral testimony from fact and expert witnesses. Many civil systems will not give significant weight to witness' oral evidence that courts and arbitral tribunals in common law systems readily hear.[12] Therefore, those participating in an international arbitration must recognize that it is important to inquire into the philosophy of the arbitrator regarding the credibility of oral testimony. If the parties can agree on a framework, the arbitrators will generally follow their plan.[13]

The trend toward the payment of the arbitrators in a lump sum gives the parties the certainty they need, and it encourages the tribunal to guide the proceedings and ensure a quick decision. However, the set of circumstances that lead to these benefits can also have negative consequences. If the parties do not agree on the extent of oral evidence to be presented, the arbitrators will select the approach. Sometimes, the arbitrators may

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[11] AAA Rules, art. 16(1). *See also* ICC Rules, art. 21(3) ("The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present.").

[12] Practitioner's Handbook, § 6.03(5).

[13] *Id.*

choose the quickest method, which may exclude oral testimony unless there is a clear preference in the relevant procedural law of the arbitration.[14]

In many civil law jurisdictions, the arbitrators may not give significant weight to the expert's testimony because the arbitrators may view the retention and payment of an expert by a party as tainted. Thus, the parties must bear in mind that expert evidence has just as much uncertainty as that of factual witnesses. The arbitrators determine the manner in which the expert is permitted to present his opinion. Initially, the expert may be requested to submit his report to the arbitrators, to be followed by a rebuttal report responding to the other side's expert.[15]

III. Admissibility

A. Discretionary admissibility

Arbitration rules grant the arbitrator broad discretion regarding the admission of evidence. For example, International Centre for Settlement of Investment Disputes (ICSID) Rule 34(1) provides that the tribunal "shall be the judge of the admissibility of any evidence adduced and its probative value." AAA Rule 20(6) provides that the "tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered by any party." Article 25(6) of the UNCITRAL Rules provides that once a party offers evidence to prove the facts it relies on, the tribunal is required to "determine the admissibility, relevance, materiality, and weight of the evidence offered," but provides no guidance as to evidentiary standards.[16]

B. Standards for admissibility

Experience shows that arbitrators are extremely reluctant to limit the evidence that can be submitted and normally err toward permitting parties to present evidence, including the introduction of materials of questionable relevance. Arbitrators are governed by the concern that their award will be overturned under the New York Convention, which states that a national court may refuse to recognize or enforce a foreign arbitral award if a party was "otherwise unable to present his case." [17]

IV. Burden of Proof

The degree or level of proof that must be achieved in practice in an international arbitration is not capable of precise definition, but it may be safely assumed that it is close

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[14] *Id.*
[15] *Id.*
[16] Andreas Reiner, *The Standards and Burden of Proof in International Arbitration*, 10 Arb. Int. 3 (1994).
[17] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, art. V(1)(b), 330 U.N.T.S. 38.

to the balance of probabilities. None of the international arbitration rules contains a provision on burden of proof except the AAA International Arbitration Rules and the UNCITRAL Rules. Article 19 of the AAA International Rules and Article 24(1) of the UNCITRAL Rules provide that each party has the burden of proving the facts relied on to support its claim or defense. The only exceptions relate to propositions that are so obvious, or notorious, that proof is not required.[18] Furthermore, national arbitration laws and international arbitration conventions address the burden of proof only indirectly. By indicating the reasons for the setting aside of awards and for the refusal to recognize or to enforce awards, these laws and conventions may determine the arbitrators' powers concerning the burden of proof.[19]

Nearly all arbitrators operate with the general principle that the parties are obligated to present evidence that they deem sufficient to prove their claims.[20] As stated by a former president of the Iran-United States Claims Tribunal, "the burden of proof is that you have to convince me."[21]

One can distinguish three basic standards of proof generally applied in international arbitrations. A general, underlying standard, an elevated burden of proof, and a very low standard or insufficient explanation of the reasoning.[22] Regarding the first, a general standard is one that is better explained to common law lawyers as a balance of probabilities, i.e., the evidence must be something more likely true than not true but not so high as required for criminal convictions.[23] Civil lawyers, in contrast, are more accustomed to what may be a higher burden of proof referring to the inner conviction of the judge. In any event, the strategic mind of the counsel must remember that in all cases, the real general standard is and must be a test of preponderance of evidence.[24]

Certain matters, however, do in fact require a higher standard of proof that will certainly change the advocate's approach. Both common law and civil law systems recognize elevated standards of proof for bribery and other types of fraud.[25]

The lower standard of proof is applied generally when establishing damages. Many times, arbitrators ignore the substantive law they find applicable and refer instead to non-legal equitable standards. In some unpublished International Chamber of Commerce (ICC) awards, for example, the tribunal simply decided to award damages at "rounded" figures it came up with or simply cut in half actual damages for the sake of equity without giving reasons.[26] Thus, the lesson to be learned is that counsel must always ensure that their calculations and methods of calculation are near to infallible, at least to cause the

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[18] *Id.*
[19] *Id.*
[20] *See* BIN CHENG, GENERAL PRINCIPLES OF LAW APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 303 (1987).
[21] Jamison M. Selby, *Fact-Finding Before the Iran-United States Claims Tribunal: The View from the Trenches, in* FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS: ELEVENTH SOKOL COLLOQUIUM 135, 144 (Richard B. Lillich ed., 1992).
[22] Reiner, *supra* note 16.
[23] *Id.*
[24] *Id.*
[25] *See, e.g.,* ICC award 4145 (requiring clear and convincing evidence to establish a claim of bribery).
[26] Reiner, *supra* note 16.

arbitrators to think about their decision, if not only to preserve an argument during an enforcement proceeding that there was a lack of due process in presenting the case.[27]

V. IBA Rules: A Model Guide?

The IBA Rules, adopted in June 1999, represent a compromise of the civil and common law system in terms of evidence practices and fill a significant gap in standards for taking evidence in international commercial arbitration. The Preamble to the IBA Rules describes why such rules became necessary:

> These IBA Rules on the Taking of Evidence in International Commercial Arbitration … are intended to govern in an efficient and economical manner the taking of evidence in international commercial arbitrations, particularly those between parties from different legal traditions. They are designed to supplement the legal provisions and the institutional or *ad hoc* rules according to which the Parties are conducting their arbitration.[28]

The IBA Rules give parties an option, which the parties may adopt in part or in whole, within the arbitration clause or by agreement after the dispute has arisen.[29] The IBA Rules operate under the premise that "[t]he taking of evidence shall be conducted on the principle that each Party shall be entitled to know, reasonably in advance of any Evidentiary Hearing, the evidence on which the other Parties rely."[30]

Below is a highlight of some of the key sections of the IBA Rules setting forth the procedures for the presentation of documentary evidence and witness and expert testimony, the evidentiary hearing and criteria for the admissibility and assessment of evidence.

> ***Article 3*** **Documents:**
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> 1. [E]ach Party shall submit to the Arbitral Tribunal … all documents available to it on which it relies … except for any documents that have already been submitted by another Party.
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> …
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> 9. The Arbitral Tribunal … may request a Party to produce … any documents that it believes to be relevant and material … A Party may object to such a request … [T]he Arbitral Tribunal shall decide whether to order the production of such documents. …
> 10. [T]he Parties may submit to the Arbitral Tribunal … any additional documents which they believe have become relevant … as a consequence of the issues raised in submitting [evidence].

Article 3 of the IBA Rules highlights the compromise struck between the common law and civil law systems because it allows for some discovery and additional submissions before a hearing or decision. Article 3(9) gives the tribunal wide discretion as to forcing a party to produce a document relevant to the proceedings. This form of discovery is quite unique where production of documents can continue up until and just before the

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[27] IBA Rules, art. 9 is a good example of what arbitrators generally consider with regard to burden of proof.
[28] IBA Rules, Preamble, ¶ 1.
[29] *Id.*, Preamble, ¶ 2.
[30] *Id.*, Preamble, ¶ 4.

conclusion of the arbitration; essentially allowing a smoking gun to appear at any time and without warning. Although a party is permitted to object to the tribunal's order, the tribunal still has the final say as to whether or not to compel production.

Also interesting for strategists is the ability to produce documents whenever they please, so long as it is within the time frame set by the tribunal. Essentially, a party can withhold documents, and thus the arguments that entail from such evidence, and choose a back and forth strategy of production, whereby one party submits a document and the other need only respond to those items mentioned in the document. Thus, counsel may use a harassing technique of peppering the opposing party with evidentiary documents and arguments within the allowed time frame.

Following from this is the idea of the last word, that a party should perhaps hold something back to have the last say on any or all matters prior to the close of document production. The common law tradition provides that the party that bears the burden of proof is the party that has the last word. The civil system has an equivalent counterpart: by submitting documents as exhibits accompanying memorials, the parties in an international arbitration effectively bypass the entire common law concept of introducing and receiving documents into evidence. Rules such as hearsay, authentication, and best evidence are not part of the international arbitration scheme.[31] Keeping this in mind, the IBA Rules allow for flexibility in the timing of when the final document is produced; the last word in the mind of the tribunal.[32]

When determining which rules of procedure for the hearing it wishes to adopt, and when making submissions pursuant to that procedure, each party must be cautious on the jurisdictional requirements and more importantly, the jurisdictional restrictions that may be met at the enforcement stage.[33] There will be differences between the common law and civil law approaches where, for example, the common law system may be unconcerned about a procedure which restricted the other party's capacity to present his substantive case because that party was in breach of a procedural order. However, many civil law jurisdictions will not follow this line of thought.[34]

At the hearing, counsel and parties are wise to remember that conducting themselves in an aggressive fashion will not be tolerated. This is usually a problem for common law counsel who are used to interruptions and heavy cross-examination. It is one thing to be a zealous advocate for one's client and another to be viewed as counsel who believes the dispute is between his party and the tribunal. Strategically, the international advocate must change his mindset when coming from the common law system in order to avoid giving the benefit of the doubt to the other side.[35]

To make the hearings flow as smoothly as possible, a format needs to be settled upon before the hearing begins. A template set of directions, available for modification, is the

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[31] Friedland, *supra* note 3.
[32] *See, e.g.,* IBA Rules, arts. 4, 5 and 8.
[33] Practitioner's Handbook, § 6.01(1).
[34] *Id.*
[35] *Id.*, § 6.01(3).

most efficient and convenient method of accomplishing this. The template is just that – only a template, which should be flexible enouch to accommodate party *decisions*.[36]

VI. Conclusion

The lack of guidance provided by institutional rules on international arbitration suggests that the parties should consider the benefit of adopting, in their arbitration agreement, procedures regarding the presentation of evidence. The lack of uniformity in approach also creates a strategic issue for the parties at each stage of the arbitration proceeding to utilize procedures for presenting evidence that will be most effective with the arbitral tribunal hearing the specific case.

In the long run, because any universal arbitral rules are unlikely to be adopted or followed, the arbitrator will likely have the final say in evidentiary procedures. It is thus counsel's duty to come up with a strategic scheme utilizing all of his or her knowledge about the nuances of legal approaches to international arbitration. Only when all of the open issues to presenting evidence in an international arbitration are balanced will the international advocate and client be satisfied with the outcome.

[36] *Id.*