LHAG Insights

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IBA Rules: Managing Evidentiary Best Practices in Times of Social Distancing

The 2020 IBA Rules on the Taking of Evidence in International Arbitration (**2020 IBA Rules**), officially published in February 2021, were adopted on 17 December 2020 by the International Bar Association Council. Unless otherwise provided or agreed between contracting or arbitral parties, the 2020 IBA Rules will apply to all arbitrations in which parties have agreed to apply the IBA Rules after 17 December 2020.

The objective of the revision is to introduce changes intended to streamline and clarify the previous version of the IBA Rules, which have been in force since 2010, as well as to codify recent evidentiary best practices and address new, technology-driven challenges in the taking of evidence in international arbitration.

Salient Features of the 2020 IBA Rules

a. *Article 2 — Cybersecurity and data protection*

The pandemic hastened the uptake of technology in international arbitration. Correspondingly, the risk of cybersecurity and data protection breaches in international arbitration is real and would affect the integrity of the arbitral process. It is therefore necessary for the arbitral tribunal to consult parties on cybersecurity and data protection measures at the outset of the arbitral proceeding.

In this regard, arbitral parties are generally advised against using data sharing platforms which are not properly secured and set up specifically for the purpose of arbitration, e.g. Dropbox or Google Drive. These virtual data platforms are often unencrypted and can be vulnerable to hacking.[1]

[1] Further guidance and precautions relating to the sharing of documents and information over the cloud are provided in the Cyber Security Guidelines by the IBA's Presidential Task Force on Cyber Security (October 2018), ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020 Edition), CIArb Guidance Note on Remote Dispute Resolution Proceedings and the ICC Guidance Note on Possible Measures Aimed at Mitigating Effects of the COVID-19 Pandemic.

b. *Article 8 — Virtual evidentiary hearing*

Upon consultation with the parties, the arbitral tribunal may order that an evidentiary hearing be conducted remotely, with a remote hearing protocol established between the parties, to ensure a fair, efficient, and effective remote hearing. Apart from the usual technical checks, the parties are encouraged to consider and include in the protocol:

> *"(d) how Documents may be placed before a witness or the Arbitral Tribunal; and*
> *"(e) measures to ensure that witnesses giving oral testimony are not improperly influenced or distracted."*

Given the freshly chartered waters of remote hearings, it is of particular importance to have in place a set of procedural orders addressing the relevant process. Such procedural orders would assist in fostering proper coordination and cooperation among parties in resolving any hiccups that may arise from remote hearings and, ultimately, a smooth arbitration proceeding, thus upholding the underlying essence of arbitration, i.e. speed and parties' autonomy.

c. *Article 3 — Translation of documents*

The revision dictates that no translation is required to be provided with documents disclosed between the parties while foreign-language documents submitted to the arbitral tribunal are required to be translated. This default position is fair, efficient and cost-effective as, from our experience in international arbitration, parties do not submit to the tribunal majority of the documents that they receive through inter-party disclosure. Therefore, requiring a translation of all documents risks wasting significant costs.

Shifting the lens to Malaysia's economic landscape, the implementation of such changes is especially welcomed. For the first three-quarters of 2020, 38.8% of Malaysia's total investment was made up of foreign direct investments,[2] with China being the largest foreign investor in Malaysia.[3] With that, disputes will naturally arise from transactions flowing from such investments. Many of the documents relating to the transactions are often technical and in foreign languages, such as Mandarin, Korean and Japanese, which require specific expertise and extensive time to translate. In this regard, not having to translate documents which may not be used in an arbitral proceeding will certainly save parties considerable time and costs.

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[2] Esther Lee and Liew Jia Teng, "Cover Story: Decade-long slippery slope for private investment" *The Edge* (28 January 2021) https://www.theedgemarkets.com/article/cover-story-decadelong-slippery-slope-private-investment (accessed 20 February 2021)

[3] Malaysian Investment Development Authority, "China remains Malaysia's largest foreign investor in manufacturing sector — MITI" (Malaysian Investment Development Authority (20 October 2020) https://www.mida.gov.my/mida-news/china-remains-malaysias-largest-foreign-investor-in-manufacturing-sector-miti/ (accessed 20 February 2021)

d. Article 9 — Confidentiality and admissibility of evidence

Article 9.3 of the 2020 IBA Rules is a new provision added by the 2020 Review Task Force. It provides that the arbitral tribunal may, at the request of a party or on its own motion, exclude evidence obtained illegally. For example, if the national law specifically prohibits the recording of conversations without permission, recordings that were made under such circumstances would then be considered to have been obtained illegally and, therefore, the arbitral tribunal may exclude it from the evidence.

Such revision is not foreign as it is embedded in the governing legal principles of many jurisdictions. In fact, such revision is necessary as the credibility and authenticity of illegally obtained evidence are often compromised. An arbitral award tainted by illegality may be set aside and the court may refuse enforcement of such an award.

Conclusion

The 2020 IBA Rules do not contain major revisions. Rather, the changes — a number of which codify what had increasingly been accepted as best practices — focus on efficiencies and streamlined processes, including special provisions to minimise potential risks and difficulties through the increased use of technology.

The IBA Rules would be what is known as soft law, commonly adopted by parties and the arbitral tribunal as non-binding guidelines of evidentiary best practices in international arbitration. With the introduction of the Prague Rules, touted to be based primarily on civil law traditions and inquisitorial procedures, the new revisions to the IBA Rules are timely and indeed necessary to strengthen its position as the preferred procedural rules.

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