Planning and Organising Effective Procedures for Taking Evidence
Released to coincide with the new IBA rules on evidence, *The Guide to Evidence in International Arbitration* steers a course through what can otherwise be one of the most divisive topics in international arbitration. The Guide to Evidence in International Arbitration fills a gap in the literature by bringing together law and practice and providing a holistic view of the issues surrounding evidence in international arbitration, from strategic, cultural and ethical questions to what to do in certain settings. Along the way it offers various proposals for improvements to the received approach.
Planning and Organising Effective Procedures for Taking Evidence

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PROCEDURAL FLEXIBILITY AS A TOOL FOR TAILOR-MADE EVIDENCE PLANNING

If one were asked to point out the main benefit of international arbitration, procedural flexibility would be a likely first choice. It derives from the commonly recognised rule of party autonomy,[2] being a source of far-reaching flexibility of international arbitration.[3] This flexibility manifests on several levels, starting from choosing the rules and language of arbitration, through appointment of arbitrators, and ending with establishing rules for taking evidence. As opposed to cases pending before the general courts, parties to arbitration have great influence on the shape and scope of evidentiary proceedings, which enables them to manage the dispute in an effective manner and to tailor the proceedings to the needs of their specific matter.[4]

The procedure followed in evidence planning can be crucial; accordingly, it should take into account the overall strategy of the proceedings. Although it is impossible – for obvious reasons – to collect comprehensive and reliable statistics in relation to private international arbitrations, it is reasonable to assume that the eventual outcomes in the majority of international arbitrations (possibly 60 per cent to 70 per cent) usually turn on the facts rather than on application of the relevant principles of law.[5] For instance, claims concerning faulty construction or manufacture, misrepresentation, or defences of force majeure are fundamentally dependent on the factual findings of the tribunal. This also applies, to some extent, to some jurisdictional questions, such as claims to extend an arbitral agreement to non-signatories via a group of companies and piercing the corporate veil theory.[6] The choice of applicable law can also be heavily dependent on the facts, particularly if a closest connection test is being applied. In other words, decisive preliminary legal issues are often dependent on certain facts to be properly proved by the parties.[7]

The parties are well advised, therefore, to make judicious use of their powers in evidence planning. A party that relies solely on the arbitral tribunal’s suggestions in this area deprives itself of a very powerful tool, one that is unique to arbitration (as opposed to proceedings before the common courts).

Evidence planning should not be understood solely as ‘having evidence in proper order’. Order by itself is not a value, although it can certainly help to achieve the goal of ultimately winning the arbitration game. In other words, the evidence must be planned in such a way as to persuade the tribunal about the party’s version of the story. More important is the probable attitude of the arbitrators to a particular sort of evidence and psychological appraisal thereof.

SOURCES OF PROCEDURAL RULES GOVERNING EVIDENCE

As a rule, the arbitration agreement itself is silent when it comes to procedural rules to govern evidence-taking in the arbitration. National arbitration laws likewise offer little in the way of hard-and-fast rules on how to conduct the proceedings; they tend to limit themselves to fixing the most elementary ground rules, such as due process.[8] The question is, where the procedural rules for the concrete arbitration originate. As the will of the parties to arbitration is of superior nature, the rules will certainly be included in Procedural Order No. 1 (PO1) or Terms of Reference (ToR) (or both).

A PO1 is a fundamental document in each arbitration case and usually follows soon after the formation of the tribunal. It constitutes one of the main instruments available to arbitrators for effectively managing the proceedings and ensuring that the parties adhere to the agreed timeline. The scope of a PO1 might address issues such as types of documents to be
tendered, timetable for pleadings and schedule of hearings, if any. Procedural orders are not designed to deal with substantive issues and they do not address issues of fact or law. Their degree of specificity may vary, depending on the will of the arbitration panel.

It is in the PO1 that the most important regulations regarding evidence are often found. A typical element of a PO1 is the enumeration of the procedural rules applicable in the arbitration proceedings, which will determine its form, or the indication of a public document (soft law) containing these types of rules, such as the International Bar Association’s Rules on the Taking of Evidence (the IBA Rules), the Rules on the Efficient Conduct of Proceedings in International Arbitration (the Prague Rules) or the United Nations Commission on International Trade Law’s (UNCITRAL) Notes on Organizing Arbitral Proceedings. This enumeration (or the adoption of already enumerated rules) has an organising character and is important from the perspective of the regulation of evidentiary proceedings in arbitration, as it prioritises the applicable rules of evidence.

An important role of the PO1 is to pinpoint the moment after which it is possible to disregard late documents or other means of evidence. Usually, after this point has passed, the tribunal shall not consider any evidence that has not been introduced as part of written submissions of the parties, unless the tribunal grants leave based on exceptional circumstances. Should this leave be granted to one side, the other side shall have an opportunity to comment and submit counterevidence. The fact that the tribunal may reject additional evidence after the timetable deadlines have passed does not manifest a limitation of the right to be heard, as it is counterbalanced by another principle – the speed and efficiency of the arbitral proceedings.

In arbitrations conducted under the Rules of the International Chamber of Commerce, inter alia, issues concerning the taking of evidence may be included in the ToR. Its basic function, though, is not to organise procedural issues (since that is what the PO1 does), but to clarify the substantive issues that need to be addressed and decided in the arbitration, as well as to ensure that all claims and counterclaims have been properly raised by the parties. ToR also confirm essential points of procedure, such as the place of arbitration, the language of the arbitration, the applicable law on the merits, the applicable rules of procedure and the methods for taking evidence.

What distinguishes a PO1 from ToR is that a PO1 is most often signed only by the tribunal, whereas ToR is signed by the parties and the tribunal. For these reasons, while provisions incorporated into ToR can, in principle, only be amended by a further agreement between the parties, a PO1 issued by the arbitral tribunal does not require explicit consent of the parties to be amended. The preclusive effect of ToR means that procedural issues, including all that concerns the taking of evidence (e.g., relating to the rules on the presentation of documentary evidence or to the presentation of witness statements and expert opinions), are more conveniently described in the PO1, thus leaving the ToR mostly for substantive aspects of the proceedings.

As stated above, one of main issues to be considered by the parties is the choice of basis of evidentiary rules. The most common, and probably the most useful, are the IBA Rules. The parties can explicitly include the IBA Rules in their arbitration agreement or opt for the IBA Rules ad hoc once the dispute arises, at their own motion or as proposed by the arbitrators. Further, the arbitral tribunal remains free to look for guidance to the IBA Rules even without an explicit authorisation to do so.
Evidence planning is described in Article 2 of the IBA Rules and mainly focuses on:

- a mandatory consultation between the tribunal and parties at the earliest appropriate time in the proceedings, with the objective of agreeing on an efficient, economical and fair process for the taking of evidence;
- a framework for discussing evidentiary issues. Article 2.1 sets out a non-exhaustive list of evidentiary matters that the tribunal and the parties may wish to consider during the mandatory consultation; and
- an encouragement (but not a requirement) of the tribunal to identify to the parties, as soon as it considers it to be appropriate, any issues (1) that the tribunal may regard as relevant to the case and material to its outcome, and (2) for which a preliminary determination may be appropriate.\[19\]

The IBA Rules place a strong emphasis on scheduling evidence and discussing issues such as the scope, timing and manner of the taking of evidence, including (to the extent applicable), for example, the requirements, procedure and format applicable to the production of documents, the level of confidentiality protection to be afforded to evidence in the arbitration or – added in December 2020\[20\] – the treatment of any issues of cybersecurity and data protection. The list of topics is not exhaustive. For instance, one additional point that may benefit from early consultation is the manner in which issues of ‘foreign law’ are to be dealt with in the arbitration – if the dispute involves interpretation of substantive law that is foreign to the tribunal, or at least some of its members, whether this issue should be resolved by legal experts opinions submitted by party-appointed experts who may also be examined at the hearing, or whether the parties shall file written submissions with their interpretation of substantive law.\[21\]

**VARIETY OF EVIDENCE – SELECTED ASPECTS**

Owing to its flexibility, international arbitration offers a full range of evidence types by way of which the parties may prove their statements.

The most common evidence invoked by parties in both domestic and international arbitration proceedings is still evidence from documents. Documents are valued and presented in arbitration in a way that differs substantially before the common courts. In the first place, mainly because of the broad definition of ‘document’ in the IBA Rules,\[22\] arbitrators are not restricted by whether a document is of an official nature.\[23\] The documents do not have to be submitted in the form of certified copies (which might be required in some situations before common courts) and, as a rule, the parties are not required to provide arbitrators with sworn translations. On the other hand, the parties must specify all legal sources invoked in their pleadings, which is not required by common courts, which apply the *iura novit curia* principle to the broadest extent.

Proper organisation of document submission might be of great importance, especially in complicated cases of a technical nature (including construction disputes). There is no ‘standard’ procedure for submitting documents in 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.\[24\] Both parties should follow the rules usually established in the PO1, indicating how the documents should be numbered, whether they should have a searchable format (if possible), or whether they should be on paper or in electronic form. Following the simple ground rules set at the beginning and
organising documents in a transparent manner may certainly influence arbitrators’ attitude, enable them to rely easily on documents and observe exactly those facts that the submitting party wishes to emphasise.\[22\]

Irrespective of the kind of documentary evidence submitted or produced by the parties in the course of arbitral proceedings, at some point the documents’ power ends. Arbitral tribunals are generally willing to accept other evidence, including hearing the witnesses.\[26\] A vivid, live testimony can influence the arbitrators, independently of the reams of documents already perused by them.\[27\] Two issues may be particularly important here: preparation and dynamics. If written statements are properly prepared and witnesses know what they may expect in the course of the hearing, they may change the conduct of the proceedings and, possibly, their outcome. Furthermore, generally, a witness who has already been heard may remain in the room after giving their testimony. Therefore, it might be worth ensuring in the procedural rules that a witness already heard be permitted to support the counsel in interrogating another witness.

In many international disputes, evidence from expert opinion turns out to be crucial.\[28\] In one case conducted with the involvement of Gessel, an interesting issue arose at the nexus of evidence from witness statements and evidence from a party-appointed expert. In the course of the proceedings, both parties submitted private opinions. Experts appointed by the claimant were cross-examined during the hearing. Afterwards, the sole arbitrator appointed an independent expert, who prepared an opinion and was to be heard by the parties as well. Owing to the highly specific and technical nature of the dispute, the claimant formally requested permission to have the expert questioned by his private experts also (acting, if necessary, on the basis of relevant powers of attorney). The third expert opinion obviously discussed the findings of the party-appointed experts. After discussion with the parties, the sole arbitrator allowed the private experts to ask questions, but solely in the capacity of private experts (rather than attorneys). To avoid additional bad blood between the parties in the course of the proceedings, these types of issues should also be addressed in the PO1, especially in highly ‘expert’ cases.

The similar institution, known as witnesses’ or experts’ conferencing, by which all experts or given witnesses are interrogated simultaneously, could also be foreseen at the outset of the proceedings. If not, at the later stage, it is usually discussed while the agenda of the hearing is put together, or the need may arise at the hearing itself.

Some evidence presented by the parties might evade unambiguous classification. This pertains mainly to aids used in the course of the hearings. Although some of them are relatively non-controversial (such as PowerPoint presentations, which are used widely for the purpose of opening and closing statements), others can be problematic. Looking back on the authors’ firm’s own field experience, we might cite a construction dispute in which one of the parties prepared a model to illustrate the structure and design of a certain installation (defects of which were at the core of the dispute). The arbitral tribunal did not treat this as new evidence and admitted the model’s use during the opening statement. This decision enabled the tribunal to develop a better grasp of the technical issues at hand, especially in light of the fact that an in situ visit was not a viable option.

**FINDING OF EVIDENCE**
Another issue to be considered when planning the procedure for taking evidence in any international arbitration is the fact that relevant evidence may be in the possession of either the opposing party or a third party.

The most common way of getting such evidence into the arbitration is the procedure of document production, which might be simply defined as a procedural device enabling a party to obtain documents from the opposing party. As document production can discover written evidence that would otherwise not be available, it is sometimes the key to winning a case. The exact manner of going about document production is also important, taking into account that awards are sometimes set aside on grounds relating to document production orders – also depending on the particular legal system's approach to document production. In many civil law countries, the general prohibition of 'fishing expedition' constitutes a fundamental principle of procedural law. On the other hand, in common law jurisdictions, relatively extensive document production – 'casting the net wide', to employ another fishing analogy – is considered an essential requirement for a fair proceeding. Therefore, the issue arises as to whether a tribunal's strict limits on document production, or its willingness to contemplate a fishing expedition, would result in a challenge of the final award because of the violation of public policy.

On this ground, an interesting judgment of the Higher Regional Court of Frankfurt might be invoked. The dispute arose out of a failed M&A transaction. The US purchaser claimed that the German seller had been manipulating the internal debts and initiated arbitration proceedings to claim damages. In the PO1, the parties agreed to submit all documents that the party-appointed experts had taken into consideration. The claimant submitted two expert reports accompanied by only 110 of 1,200 documents that were taken into consideration by those experts. Although the respondent requested the remaining documents be produced, the tribunal rejected the request, holding that it was the tribunal's exclusive discretion to order document production. In the end, the tribunal decided in favour of the claimants on the merits, and the respondent challenged the award before the Higher Regional Court of Frankfurt in June 2010. The court set aside the award by stating that it is within the discretion of the arbitral tribunal to order document production only when the parties' agreements do not restrict this discretion. In the present case, however, the arbitral tribunal was bound by the parties' agreement.

Various arbitral rules empower tribunals to order parties to produce documents within their control. The real problem is documents in the possession of third parties – the arbitral rules cannot be applied to non-signatories of the arbitration clause without their consent. Crucial evidence may be held by the parties' advisers, former employees, subcontractors and the like, and also by companies in a party's corporate group. The tribunal will generally lack authority to compel testimony of witnesses or the production of documents from third parties who are not involved directly in the arbitration. At the same time, a third party's testimony or documentary evidence may be highly relevant, or even indispensable, to resolving the dispute fairly and efficiently.

It is generally accepted that the arbitral tribunals' power to compel disclosure is not limited to documents within the physical possession of a party, but also extend to documents within that party's possession, custody or control. Therefore, it is permissible for the tribunal to order a party to disclose documents held by that party's agents or advisers. The situation with documents held by affiliated companies of a party within the same corporate group is more controversial. The tribunal may, under Article 3.10 of the IBA Rules, request a party
to use its best efforts to take any step that it considers appropriate to obtain documents from any person or organisation.\[^{[38]}\]

Tribunals may also request the attendance of a witness. If a party wishes to present evidence from a person who will not appear voluntarily at its request, the party may ask the tribunal to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the tribunal to take such steps itself.\[^{[39]}\]

Although ordinary instruments that can motivate reluctant parties to provide a tribunal with evidence (i.e., adverse inferences and adverse costs orders)\[^{[40]}\] are not available, various national laws contain provisions allowing arbitral tribunals and parties to seek assistance of the courts in obtaining evidence, including evidence in the possession of third parties. The legislative provisions in this respect are similar to those providing for judicial assistance in granting provisional relief.\[^{[41]}\]

In the case of tribunals seated within national territory (as opposed to foreign-seated arbitrations), Article 27 of the UNCITRAL Model Law envisages that a tribunal, or a party 'with the approval of the arbitral tribunal', may seek judicial assistance in taking evidence (a party itself – acting without the tribunal's approval – is not permitted to seek judicial assistance in taking evidence). The arbitrators retain control over applications for judicial assistance.\[^{[42]}\] This will also be the case under the Swiss Law on Private International Law and the Swedish Arbitration Act.\[^{[43]}\] A different approach to court-ordered discovery is adopted under the US Federal Arbitration Act (FAA). Section 7 of the FAA provides for judicial assistance in taking evidence at the request of one of the parties to the arbitration, and not only arbitrators. However, applying the FAA, a number of US courts have held that Section 7 permits court-ordered discovery at the request of a party only in 'exceptional circumstances'.\[^{[44]}\]

It is common for parties to arbitration agreements to choose the place of arbitration for its neutrality. Due regard shall be given to the applicable law, which can be decisive for obtaining evidence needed to prove the parties’ case. In international arbitration, not only may the parties come from different countries, but evidence will often be located in various jurisdictions, and the taking of evidence will often involve a mixture of common law and civil law procedures. The ways in which tribunals with their seat outside the jurisdiction where the respective evidence is sought can obtain evidence vary significantly among jurisdictions.\[^{[45]}\]

Some arbitration legislation provides for judicial assistance only to arbitrations seated locally, not to 'foreign' arbitrations.\[^{[46]}\] Other jurisdictions adopt a more liberal approach, the least restrictive probably being that of the United States.\[^{[47]}\] Orders for discovery in aid of foreign arbitration are made not only on the basis of Section 7 of the FAA but also applying Section 1782 of Title 28 of the US Code, which grants US courts the power to order discovery 'for use in a proceeding in a foreign or international tribunal'. Some controversy arises as to the applicability of Section 1782 in the context of international arbitration since this provision was designed primarily to provide US judicial assistance in connection with foreign judicial proceedings. Despite the fact that a number of US courts have permitted use of Section 1782 in connection with 'foreign' arbitrations seated outside the United States,\[^{[48]}\] it remains open to doubt whether a US court would assist in the taking of evidence on this basis, so in-depth analysis of US case law is called for before initiating an evidence request in the United States.\[^{[49]}\]
Under the UK Arbitration Act 1996, court assistance may be granted directly to foreign arbitral tribunals even if the seat of arbitration is outside English territory or has not yet been determined, either with the approval of the arbitral tribunal or autonomously by the parties. Wide discretion is enjoyed by the English courts in this regard, since they can deny assistance on the basis that it appears ‘inappropriate’.¹⁵⁰

The French Code for Civil Procedure applies irrespective of the applicable law, the place of arbitration or the nationality of the parties, as long as ‘international trade interests are at stake’.¹⁵¹

Judicial assistance in obtaining disclosure is available only when provided for by national law, and it is sought infrequently.¹⁵² The unattractiveness of this option is mainly the delays that arise from applications to national courts. Requesting assistance from the state courts outside the place of arbitration may delay the proceedings by as much as six months, or even a year.¹⁵³ One may also question whether an intervention of a national court is appropriate in the context of arbitration, and whether it does not constitute undue interference with the arbitration process.¹⁵⁴

However, it is sometimes suggested that the prospect of third parties’ voluntary cooperation with arbitral tribunals should not be downplayed. It might be the case that a simple request from the tribunal will enjoy a certain level of success, received as it is from a neutral entity rather than from any of the conflicted parties.¹⁵⁵

The arbitration tribunals, retaining significant discretion in the assessment and weighing of the evidence, will admit almost any evidence submitted to them in support of the parties’ respective positions. This does not include situations where principles of legal privilege apply, including confidentiality. In principle, arbitral tribunals almost uniformly recognise the parties’ right to rely on evidentiary privileges, giving effect to the parties’ legal rights under applicable law. Due regard must be given to this issue when planning procedures for taking evidence.

Privileges can include traditional testimonial privileges or rules of confidentiality (such as attorney–client privileges, doctor–patient privileges or state secrets), as well as admissibility of settlement communications and communications between counsel.¹⁵⁶ Articles 9.2 and 9.3 of the IBA Rules lay down the limitations on admissible evidence, whether oral or written. These limitations also apply to the production of documents pursuant to Article 3 and inspections pursuant to Article 7.

Article 9.2(b) of the IBA Rules provides protection for documents and other evidence that may be covered by certain privileges under the applicable law. Additional non-binding guidance on determining the applicable privileges is provided in Article 9.4. Although the standard to be applied is left to the discretion of the arbitral tribunal, it is desirable that the tribunal takes into account the elements set forth in Article 9.4, in particular if the parties are subject to different legal or ethical rules.¹⁵⁷

Article 9.2(e) of the IBA Rules concerns commercial and technical confidentiality. It may be applied if there are compelling reasons to preserve confidentiality of the documents and a party has legitimate grounds for objecting to the disclosure. One example is when parties to the dispute are competitors and may have legitimate concerns about disclosing commercial terms of their agreements with customers or partners, know-how, trade secrets, product formulae or specifications, business plans and the like.¹⁵⁸ However, under Article 9.5, the tribunal may order appropriate measures to preserve confidentiality of the evidence instead of excluding the entirety of a document.
Arbitral tribunals may address confidentiality concerns by ordering that confidential information be redacted or that non-confidential summaries be provided. One concern with such a direction is whether documents produced – one is almost tempted to say doctored – in this way will fulfill the same evidentiary function as the confidential material that has been excluded. Other approaches, such as limiting access 'for the tribunal only', or even 'for the tribunal chair only', are technically possible but may give grounds to challenges in terms of the parties’ right to be fully heard. \[59\]

In general, any person is permitted to testify as a witness in arbitration proceedings. However, some legal systems, including those in France and Germany, do enforce a bar against a party (or a party's legal representative) appearing as a witness. This rule is occasionally applied in international arbitration. \[60\]

According to Article 4.2 of the IBA Rules, 'any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative'. Therefore, under Article 8.5, the arbitral tribunal may ask a party witness to affirm, 'in a manner determined appropriate by the Arbitral Tribunal', some commitment to tell the truth. The arbitral tribunal may also consider the identity of a witness, and their affiliation with any party, as one of many factors that may or may not affect the weight to be given to the evidence given. \[61\]

It is assumed that an arbitral tribunal has the power to order a party to produce persons within its control (i.e., corporate officers, directors, or senior employees) for examination at an evidentiary hearing. This authority should, in principle, be no different from its power to compel the production of documents. \[62\]

Another issue to consider while planning the evidence-taking is the use of evidence from prior processes in its two aspects: (1) the general admissibility question, which deals with potential confidentiality issues; and (2) the probative value of the evidence obtained. \[63\]

There may be a number of proceedings between the same, or similar, parties, turning on similar issues. In these circumstances, issues to consider include admissibility, weight and the probative or binding nature to be given to evidence from one forum, and submitted to another. The situation will vary substantially depending on the type of the proceedings; that is to say whether the material evidence originates from an arbitral proceedings or from local or international proceedings conducted before a state court.

When it comes to arbitral proceedings, the gateway issues are confidentiality of evidence and findings from other cases. Confidentiality may depend on the rules applicable in the prior case, although most would see arbitration as presumptively confidential. However, if information is already in the public domain, it will not be rendered confidential simply because it has been incorporated in an arbitration. On the other hand, if a domestic or international case is conducted in an open forum, confidentiality issues may be diminished, although there is no general access to all evidentiary material in most legal systems. \[64\]

In many cases criminal proceedings are running in tandem with the arbitral proceedings. The secrecy of criminal investigations may be raised in arbitration as a legal impediment to the production of evidence as well as in the context of the principle of equality of arms. Even if evidence gathered in criminal proceedings is admitted within arbitration, there might be some concerns as to its weight. One issue to consider is the value of such evidence if the defendants in the criminal proceedings did not appear as witnesses in the arbitration and
did not have the opportunity to comment, confirm or deny the evidence given in the criminal proceedings.\[65\]

**NEW TECHNOLOGIES AT THE SERVICE OF EVIDENTIARY PROCEEDINGS**

The covid-19 pandemic has significantly accelerated the embrace of technology in many different aspects. Legal services have not been spared – online hearings or filing submissions via the internet are now commonplace, including in international and domestic arbitration proceedings.

New technologies can undoubtedly contribute to the efficient handling of evidence. Even before the pandemic, technology was visible in arbitral proceedings. For instance, a PO1 often required that parties, in addition to hard copy, present documents in electronic and searchable form (i.e., OCR, PDF or Word) and with hyperlinks, to facilitate use of these documents and, thus, the proceedings as such.\[66\] In other proceedings, the PO1 envisaged that documents would be uploaded to an internet server, allowing them to be downloaded within a specific period and only by the parties or the tribunal.\[67\]

Moreover, it is expected that blockchain technology will play a role in evidentiary proceedings in the future and would allow arbitral tribunals and parties to collect, store and process a large amount of data (such as documents) in a more effective, scalable and secure way.\[68\] Hearings are not the only activity in the course of an arbitration that could be conducted online. On many occasions, the work of the arbitrators requires personal inspection of the subject matter of the dispute, such as a machine, factory or building. In the case of movables, this visual inspection could be replaced by analysis of a 3D model of the object in question, while in the case of real estate, a visit in person could be replaced by a virtual tour, as can currently be observed in many museums and schools.\[69\]

Artificial intelligence (AI) also has great potential in the field of taking evidence.\[70\] As part of an organisational conference, the parties could agree, for instance, that the selection of experts or counsel will be made through a specialist AI program (e.g., Arbitrator Intelligence Inc),\[71\] which will select the most competent person on the basis of the description of the case.

Another place to use AI is facilitation of procedural automation by translating, transcribing or summarising evidence. This technology is already being used, for example, by the UK High Court of Justice Chancery Division,\[72\] which in one case allowed the use of e-discovery technology – an AI tool based on predictive coding, employed for efficient document production and review. This procedure involved sorting documents according to their relevance, determined by parameters and criteria set forth in the protocol agreed by the parties as well as narrowing down from millions of documents.\[73\] As international arbitration (and, in particular, investment arbitration) often involves the need to analyse vast volumes of documents and data, it is quite likely that e-discovery or machine learning technology will be commonly deployed in the near future.

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**Endnotes**

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It should be borne in mind that the conduct of the oral part of the arbitration is not mandatory but may be subject to a request by the parties or a decision by the arbitral tribunal. The rules of many arbitration institutions (e.g., the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), the International Centre for Settlement of Investment Disputes (ICSID) or the United Nations Commission on International Trade Law (UNCITRAL)) permit proceedings to be conducted on a documents-only basis (this is known as documents-only arbitration); however, the rules of those institutions require the parties’ approval to such an approach (see G Pendell, R Bamforth and A Moudgil, ‘Doing arbitration differently: Documents-only arbitration during the COVID-19 pandemic and beyond’, at www.lexology.com/library/detail.aspx?g=6b969224-c412-404e-858f-81d3a3f22d76).


ICC Rules of Arbitration (ICC Rules), Article 23(1).

id., Article 23(2).

N J Kull, op. cit., p. 2331.

Based on a survey conducted in 2015, 77 per cent of the respondents had seen the IBA Rules used in practice, and another 12 per cent were familiar with this instrument but had not seen it used in practice. See ‘2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’, p. 35, Chart 31, at www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

The choice of rules is as much influenced by strategic considerations as it is by tradition and culture (R Harbst, op. cit., pp. 18 to 19).

The revised IBA Rules were adopted on 17 December 2020; they supersede those of 1999 and 2010. See www.ibanet.org/resources.


The document is defined under the IBA Rules as ‘a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means’.

K Czech, op. cit.


Role of witness statements described by the IBA working group: see ‘Commentary on the New IBA Rules of Evidence’ by the Working Party, published in *Business Law International* (2000) pp. 14 to 34. If witness statements are used, the evidence that a witness plans to give orally at the hearing is known in advance. The other party thus can better prepare its own examination of the witness and select the issues and witnesses it will present. The tribunal is also in a better position to follow and put questions to these witnesses. Written witness statements may thus reduce the length of oral hearings.


Some practitioners consider document production as an essential element of justice, whereas some others view it as a waste of time and money.

32 R Marghitola, op. cit., p. 185 et seq. Back to section


34 Although the losing party appealed the decision before the German Federal Court of Justice, the Court considered the appeal inadmissible and rejected it. Back to section

35 R Bradshaw, ‘How to obtain evidence from third parties: A comparative view’, *Journal of International Arbitration* (2019), Vol. 36, Issue 5, p. 630. See also LCIA Arbitration Rules (1 October 2020), Article 22.1(v); ICC Rules of Arbitration (1 January 2021), Article 25(4); UNCITRAL Arbitration Rules (9 December 2021), Article 27(3); Singapore International Arbitration Centre Rules (1 August 2016), Article 27(f). Back to section


37 R Bradshaw, op. cit., pp. 631 to 632. Back to section

38 See IBA Rules, Article 3.10. Back to section

39 See id., Article 4.9. Back to section

40 See G B Born, ‘Disclosure and Evidence-Taking in International Arbitration’, *International Arbitration: Law and Practice* (2nd edition, Kluwer Law International, 2015), p. 195. In most jurisdictions, arbitrators lack the power to impose criminal or quasi-criminal sanctions (e.g., civil contempt, monetary fines) like those which may be imposed by a national court in domestic litigation. Nothing in the UNCITRAL Model Law or other leading common law or civil law arbitration legislation empowers arbitrators to impose fines or other penalties on either parties or non-parties to an arbitration; there are few exceptions to this approach (Belgium being most notable). On the contrary, commentary and awards frequently observe that arbitrators lack coercive authority. See also J D M Lew, L A Mistelis, et al., op. cit., p. 569. Back to section

41 G B Born, op. cit., p. 196. Back to section


L Raess, op. cit., p. 29.


L Raess, op. cit., p. 29 to 30.

G B Born, op. cit., p. 196.


C Dupeyron, op. cit., p. 467.

R Bradshaw, op. cit., pp. 637 to 638.

G B Born, op. cit., p. 194.

58 ibid. Back to section


61 Commentary on the revised text of the 2020 IBA Rules, op. cit. Back to section


63 J M Waincymer, op. cit., pp. 789 to 792. Back to section

64 ibid. Back to section


66 This arrangement was recommended, for example, via ICSID in an official draft of PO1: see https://icsid.worldbank.org/sites/default/files/Draft%20Procedural%20Order%20No%201.pdf. In practice, see Omega Engineering LLC and Mr. Oscar Rivera v. Republic of Panama (ICSID Case No. ARB/16/42), Procedural Order No. 1, p. 13.5. Back to section

67 For example, see Apotex Inc. v. The Government of the United States of America (ICSID Case No. UNCT/10/2), Procedural Order No. 1, pp. 34 to 37. Back to section


69 For example, see the virtual walk around the Harvard Law School, at https://college.harvard.edu/admissions/explore-harvard/virtual-tour. Back to section

71  https://arbitratorintelligence.com/.  

72  Pyrrho Investments Ltd v. MWB Property Ltd [2016] EWHC 256 (Ch).  