

# EVIDENCE IN ARBITRATION

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**Paper presented to AMTAC Seminar, *Flexibility and a Fair Go*, Australian Arbitration Week 2019**

## **Introduction**

1. One of the advantages in arbitration is seen to be its flexibility to adopt practices that more readily facilitate the expeditious and economical resolution of disputes, without the need to be bound by many of the procedural rules that accompany trials of cases in courts.
2. Correspondingly, one of the criticisms of some arbitrations is that they are, to all intents and purposes, just like litigation in court, but with a judge (the arbitrator) paid for out of the parties' pockets rather than the taxpayers' pockets.
3. A focal point of this criticism is often the question of the application or otherwise of "the rules of evidence".
4. Hence, many arbitration regimes permit the parties to either opt in or out of the application of the "rules of evidence". But in making that choice, what are the parties getting into?
5. This paper will examine:
  - (a) What are the "rules of evidence" that are referred to?
  - (b) Do they include the principles that apply to proof of certain things, such as principles prohibiting the admission of evidence as to the negotiations for a contract to construe the contract?
  - (c) If the parties opt out of the application of the rules of evidence, what guides the admission or rejection of evidence in an arbitration? Is it all just a question of weight?
  - (d) Will that affect the onus, for example on a claimant to "prove" its case? Does it affect the standard of proof required?

- (e) How does the requirement of fairness impact upon the admissibility of evidence and standard of proof?
- (f) What practical steps can be taken by arbitrators and parties to minimise problems arising out of questions of evidence?

### **The Rules of Evidence**

6. The term, “rules of evidence” is an imprecise one, with no fixed meaning applicable across all forms of legal proceedings. It most commonly is taken to mean the law of evidence developed predominantly by the common law courts, which largely consist of a series of exclusionary rules. The rules so developed were well understood and reasonably clear.<sup>1</sup>
7. They relate to procedural matters, including questions of disclosure and production of evidence, competency and compellability of witnesses, modes of proof and admissibility of evidence, among other related things. As the report of the Law Reform Commission described the scope of the subject:<sup>2</sup>

In broad terms, the laws of evidence regulate who may give evidence and who may be required to do so, the manner in which evidence is given, what evidence may be received or excluded, how evidence is to be handled and considered once received, and what conclusions shall or may be drawn from it. They also specify the strength of a party's case that is required before that party can succeed. For the purpose of the reference a more precise definition is needed and was developed in the Interim Report. The topics included in the definition were:

- (a) *Witnesses* - their competence and compellability; their sworn and unsworn evidence; the manner in which witnesses may be questioned.
  - (b) *Rules controlling the admissibility of evidence* - the requirement of relevance; the admissibility of various categories of evidence - evidence of the contents of documents, hearsay, opinion, admissions by a party and confessions of suspects, convictions as evidence of the facts on which they are based, eye-witness identification, character, prior conduct of a person, privileges protecting confidential communication, evidence that should be excluded in the public interest; and residuary discretions to exclude evidence.
  - (c) *Aspects of proof* - matters of which proof is not required; authentication of documents and things; the standard of proof to be met by the party carrying the legal burden of proof; rules about corroborating evidence. Ancillary areas were also considered.
8. Rules of evidence are in modern times to be found in decisions of courts of common law and equity, rules of court, legislation constituting and regulating particular courts and tribunals, as well as in the evidence acts of the various

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<sup>1</sup> *Danhhoa v R* (2003) 217 CLR 1, [89]

<sup>2</sup> *Report of the Law Reform Commission into the Law of Evidence*, ALRC 38 (tabled 5 June 1987)

jurisdictions. Some of the legislative provisions as they relate to the conduct of arbitral proceedings are discussed below.

### **Evidence Acts**

9. The *Evidence Act 1995* (Cth) applies to all proceedings in Australian courts. The term “Australian court” includes:
  - (d) a judge, justice or arbitrator under an Australian law; or
  - (e) a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or
  - (f) a person or body that, in exercising a function under an Australian law, is required to apply the laws of evidence.
10. Similar provision to that seen in paragraph (f) of the definition is found in the Evidence Acts of NSW and Victoria.<sup>3</sup>
11. The *Evidence Act 1906* (WA) applies to all legal proceedings in Western Australia, which includes an arbitration.<sup>4</sup>
12. In Queensland, the *Evidence Act 1977* (Qld) includes “an arbitration” in the definition of “proceeding” in the Dictionary. Likewise, an arbitrator is included in the definition of “court” for most provisions of the act. Importantly, that does not include the provisions relating to the admissibility of books of account or as to admissibility of evidence of convictions.<sup>5</sup>

### **Arbitration Legislation**

13. The *International Arbitration Act 1974* (Cth) gives effect to the UNCITRAL Model Law.<sup>6</sup>
14. The Model Law provides in Article 18:

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<sup>3</sup> *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic)

<sup>4</sup> *Evidence Act 1906* (WA), s.3 (definition of “legal proceeding”); s. 4

<sup>5</sup> *Evidence Act 1977* (Qld), Part 5, Divisions 5 and 6

<sup>6</sup> See also the legislation in the States and Northern Territory: *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2012* (WA); There is no equivalent legislation enacted in Australian Capital Territory.

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.<sup>7</sup>

15. This potentially open-ended accommodation to the party to present its case is modified somewhat in respect of international arbitrations to which the IAA applies. That is done by section 18C of the IAA, which provides:

For the purposes of Article 18 of the Model Law, a party to arbitral proceedings is taken to have been given a full opportunity to present the party's case if the party is given a reasonable opportunity to present the party's case.

16. So far as questions of evidence are concerned, Article 19 of the Model Law provides:

- (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

(emphasis added)

17. Section 23J of the IAA provides:

- (1) An arbitral tribunal may, at any time before the award is issued by which a dispute that is arbitrated by the tribunal is finally decided, make an order:
  - (a) allowing the tribunal or a person specified in the order to inspect, photograph, observe or conduct experiments on evidence that is in the possession of a party to the arbitral proceedings and that may be relevant to those proceedings (the relevant evidence); and
  - (b) allowing a sample of the relevant evidence to be taken by the tribunal or a person specified in the order.
- (2) The tribunal may only specify a person in the order if the person is:
  - (a) a party to the proceedings; or
  - (b) an expert appointed by the tribunal under Article 26 of the Model Law; or
  - (c) an expert appointed by a party to the proceedings with the permission of the tribunal.

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<sup>7</sup> The Model Law unfortunately has not adopted gender-neutral language

- (3) The provisions of the Model Law apply in relation to an order under this section in the same way as they would apply to an interim measure under the Model Law.

18. In interpreting the Model Law, it is important to have in mind Article 2A, which provides:

- (1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
- (2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

19. Article 26 provides:

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
  - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
  - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

### **Dispensing with the Rules of Evidence**

20. The Law Reform Commission, when it prepared its landmark review of the law of evidence, was examining the application of the law of evidence specifically in federal courts. However, in its interim report, the Commission commented upon the practice of dispensing with the rules of evidence in particular contexts:<sup>8</sup>

- 17. The trend of dispensing with rules of evidence before tribunals reflects dissatisfaction with the rules of evidence—in particular their rigidity and technicality and the cost they can cause. It does not necessarily mean, however, that appropriate rules of evidence would not be preferable. In addition, there are sometimes other reasons for dispensing with the rules of evidence. The issue before such tribunals often concerns an appropriate administrative decision. There is much to be said for the tribunal approaching the issue like an administrator. Also the dispensation from the rules of evidence may reflect a desire to create an inquiry procedure rather than an

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<sup>8</sup> ALRC 26. Footnotes omitted.

adversary procedure—which may be indicated, for example, by the formula ‘the tribunal shall inform itself in such manner as it thinks fit’.

18. It should not be assumed that these approaches are satisfactory. We often find tribunals which are not bound by the rules of evidence referring to them for guidance on the admission and handling of evidence. This cannot be explained solely on the basis that there are legally trained people involved. All tribunals have to develop an order for proceedings. All tribunals will properly attempt to limit themselves to relevant material. Further, the exclusionary rules, for all their deficiencies, attempt to ensure that time is not wasted on peripheral matters or on evidence not worth considering or which may create more problems than it is worth. In their insistence on direct and original evidence they also help the system to provide a fair hearing—the party against whom the evidence is led can test and examine that evidence. A person confronted in a tribunal not bound by the rules of evidence with significant hearsay evidence of which no notice is given and which cannot be tested is likely to experience a strong feeling of dissatisfaction. Considerable time can be wasted also by the presentation of evidence such as opinion evidence by persons lacking expertise sufficient to satisfy the rules relating to expert evidence. It is not surprising that tribunals ~will turn to the rules of evidence for guidance. Thus RK Todd, a Deputy President of the Administrative Appeals Tribunal, commented:

the principles of relevance, of first hand knowledge and of confinement of technical and opinion evidence to experts are, I suggest, principles which in appropriate cases will guide the Tribunal in a method of proof on which it should insist’.

Professor Campbell has made the point that there is nothing ‘inherently wrong in the law of evidence being used in this way, so long as the use which is made of it is discriminating and is attentive to the rationale for particular rules. Justice HV Evatt went further:

No tribunal can, without grave danger of injustice, set them [the laws of evidence] on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party. In other words, although rules of evidence, as such, do not bind, every attempt must be made to administer ‘substantial justice’.

Even if it were open to the Commission under the terms of reference, it would not be appropriate simply to abolish the rules of evidence because courts, like tribunals, must have the means of controlling proceedings if only to ensure that they do not become too protracted. In the absence of rules, practices would develop which, under the pressures of an adversary system, would themselves develop into rules and those rules would ossify, as happened in the development of the laws of evidence. Further, the absence of rules would create doubts and difficulties in preparing for hearings. A body of rules, provided it is satisfactory, can expedite hearings—because inadmissible evidence would not be offered and arguments would be reduced—and enhance the quality of the result and procedural fairness. ...

21. Some of the rules of evidence may be dispensed with in particular circumstances. Typically, in arbitration proceedings, if the parties agree, the rules of evidence, or some of them, may be dispensed with. That will usually depend upon the terms of the arbitration agreement, the terms of the procedural rules that apply to the arbitration and possibly also to the views of the arbitral tribunal.
22. Even in court proceedings, some or all of the rules may be dispensed with. For example, in proceedings to which the *Evidence Act 1995* (Cth) apply, the parties may agree that certain provisions of the legislation do not apply.<sup>9</sup>
23. Similarly, where facts are not seriously in dispute, or the application of certain provisions would cause unnecessary expense or delay, the court may order that some or all of those provisions will not apply to that evidence.<sup>10</sup>
24. Parties to contracts may agree in their contracts that certain matters may be proved in specific ways. For example, parties to building contracts may agree that a certificate by an architect will have a certain evidentiary effect. So too in finance contracts, where the certificate of a financial institution may prove the amount of an indebtedness.<sup>11</sup>
25. As can be seen, in international arbitrations and other arbitrations to which the Model Law applies, the parties are free to agree upon dispensing with the rules of evidence. The default position provided for by Article 19 is that in the absence of agreement, the arbitrator is given wide power to determine the admissibility, relevance, materiality and weight of any evidence.
26. Relevance is, of course, the paramount rule rendering evidence admissible and excluding evidence as inadmissible. Thus, the notion of relevance cannot be considered to be something separate from admissibility, but is the most important aspect of admissibility.
27. Determining relevance carries special challenges in arbitration. In court proceedings, rules of court and years of court decisions have established that relevance for a number of purposes, including that of admissibility of evidence, is to be determined by reference to the pleadings.
28. Even in arbitrations in which pleadings are exchanged, the position is much less clear. There may often be multiple documents articulating the scope of the dispute that comes before the arbitration tribunal. They may include notices of dispute and responses thereto under the applicable contracts,

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<sup>9</sup> *Evidence Act 1995* (Cth), s 190(1)

<sup>10</sup> *Evidence Act 1995* (Cth), s 190(3)

<sup>11</sup> *Dobbs v National Bank of Australasia Limited* (1935) 53 CLR 643, 651, 654

references to arbitration and arbitration responses, terms of reference, pleadings, statements of facts and contentions and the like.

29. Experience tells us that these multiple documents may not always be consistent. Some may take the form of narratives about the matters in dispute rather than precise pleading-like documents.
30. What this means is that determining relevance is not always easy. That can result in the tendency to let rather more in than is strictly relevant. That is particularly so in a setting where both the parties and the arbitration tribunal are not enthusiastic about interlocutory challenges in the interest of “getting on with it”. However, this can impact upon the time and cost involved in the arbitration, including by:
  - (a) Widening the scope of discovery;
  - (b) Expanding the scope of witness statements; and
  - (c) Lengthening the hearing.
31. Allowing the arbitral tribunal to determine the admissibility of evidence more generally has the attraction of flexibility. There is a great superficial attraction to the tribunal not being bound by what may be seen as the strictures of the rules of evidence.
32. But what measure is the tribunal to apply to rule upon admissibility? How are the parties to know what will and will not be admissible evidence? How do the parties properly prepare for the arbitration and, most importantly, for the hearing?
33. Arbitral tribunals must, of course, apply an overriding principle of fairness in the conduct of the arbitration. This includes in deciding upon questions of admissibility. As mentioned above, each of the parties is to be given a reasonable opportunity of presenting its case. This of course includes a reasonable opportunity of answering the case of the opponent where that is called for.
34. Let us take the example of hearsay evidence. It is perhaps the most significant of the exclusionary rules of evidence. It has of course been modified by the evidence statutes, but for present purposes it can be considered in its base form; that is that under the rules of evidence, hearsay is not admissible to prove the fact about which the hearsay statement is made.
35. If the rules of evidence were to be dispensed with in their entirety in an arbitration, such that the exclusionary rule does not apply, might that not, at least in some cases, mean that a party confronted with hearsay evidence tendered by their opponent, effectively is denied the opportunity (or a



reasonable opportunity) of responding to that evidence? That may not always be the result, but there is certainly potential for that to be the case.

36. Correspondingly, if the rules of evidence are not to apply in a particular arbitration and a party, in reliance upon that, tenders evidence that is then ruled inadmissible by the tribunal, might not that party have some basis to complain that they have not had a reasonable opportunity of presenting their case?
37. Similar comments may be made about questions of weight. If, for example, a tribunal not bound by the hearsay exclusionary rule admits hearsay evidence, but in accordance with common law practice affords it no or very little weight, might not the party adducing that evidence be entitled to feel aggrieved?
38. These questions may often be at their most acute in dealing with expert evidence. The IBA Rules have detailed provisions about expert evidence. They include, in Article 5 in relation to the contents of expert reports:
  2. The Expert Report shall contain:
    - (a) the full name and address of the Party- Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training and experience;
    - (b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
    - (c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;
    - (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
    - (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;
39. These paragraphs direct attention to some of the matters articulated in cases such as *Makita v Sprowles*<sup>12</sup> and *Dasreef v Hawchar*.<sup>13</sup> Although the requirement to demonstrate that the opinions expressed by an expert are based upon the specialised knowledge of the witness based on training, study or experience, was said by Heydon JA (as he then was) in *Sprowles* to go to

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<sup>12</sup> *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 733-744

<sup>13</sup> *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588

admissibility or at least to weight, the High Court made it clear in *Dasreef* that it is a condition of admissibility, not only a question of weight.<sup>14</sup>

40. While the IBA Rules set out those requirements, they do not in terms provide that an expert opinion not complying with those requirements will be inadmissible. In cases where the IBA Rules do not apply and expert report requirements may be applied less rigorously, there are potential problems with the admissibility of expert opinion not complying with the principles applied by the courts.
41. These are not mere trifles. Nor are they overly technical rules that represent some standard of perfection. They go to the core of the basis upon which such evidence has any real value. Merely because a person has some expertise in an area and expresses a view about some issue in relation to that area, does not make that view of any probative value.
42. Furthermore, these matters go to the question of affording each party a reasonable opportunity to present their case, or perhaps in the case of expert evidence, to test the case put forward by the opponent. Where an expert's reasoning has not been exposed, the opponent may find it very difficult to effectively test the opinion. That may be so even where there is competing expert opinion. Where the reasoning of the experts is not exposed, or where it is apparent that reasoning is not based upon an expert's specialised knowledge, how is a tribunal to effectively prefer one opinion over another?
43. These problems are not unique to arbitration. But they may be more difficult to resolve in a case where there is uncertainty as to the application of rules of evidence.

### **Rules of Evidence and Substantive Law**

44. There is, of course, a difference between the application of procedural law, including rules of evidence, and the application of substantive law. The substantive law applying to the arbitration will more often than not be that expressly provided for in the contract under which the dispute arises.
45. Of course, even in cases where the parties have agreed that the rules of evidence shall not apply, or where they have agreed that all procedural matters shall be in the hands of the arbitral tribunal, the substantive law will continue to apply.
46. Furthermore, there are some substantive legal rights that will continue to apply even if the rules of evidence don't apply, for example legal professional privilege and privilege against self-incrimination.

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<sup>14</sup> *Dasreef Pty Limited v Hawchar* (2011) 243 CLR 588, [42]

47. There is, however, an intersection between the substantive law that applies to the contract in question and the procedural law or rules applying to the arbitration as regards matters such as admissibility of evidence.
48. This substantive law, even though concerned with questions of admissibility of evidence in particular contexts, is not ordinarily considered to be part of the “rules of evidence”. The distinction may not always be clear, however.
49. The law of contract applies principles of construction that may provide for admissibility of certain evidence in specific contexts. For example, the substantive law of contract applicable in Australia would deny admissibility to evidence of negotiations to construe contractual provisions. It will generally admit of evidence of the factual background to the entry into of a contract, particularly as it may go to the commercial purposes of the contract.
50. The same substantive law of contract will permit evidence of post-contractual conduct to determine whether or not parties reached an agreement, but not to construe that agreement.
51. So, where parties agree that the “rules of evidence” shall not apply, are they intending to affect the rules of admissibility of evidence in relation to construction of the contract?
52. One of the dangers in arbitral proceedings is the admission of much more evidence than would ordinarily be admissible. This may also impact upon discovery processes. Plainly enough, the more certainty there is as to the admissibility rules that will be applied by the tribunal, the greater the chance that the parties will prepare their respective cases without vast amounts of inadmissible material and consequent wastage.
53. The challenge is, of course, to balance the desirability of flexibility and efficiency that can be the hallmarks of arbitration with the clear understanding of the rules that will apply to the presentation and admissibility of evidence, without imposing unnecessary cost burdens on the parties.
54. Some of the rules of the various arbitral institutions seek to address some of these issues.

### **ACICA Rules**

55. The rules of the Australian Centre for International Commercial Arbitration (“ACICA Rules”) provide in rule 31:

- 31 Evidence and Hearings

- 31.1 Each party shall have the burden of proving the facts relied upon to support its claim or defence.

- 31.2 The Arbitral Tribunal shall have regard to, but is not bound to apply, the International Bar Association Rules on the Taking of Evidence in International Arbitration in the version current at the commencement of the arbitration.
- 31.3 An agreement of the parties and the Rules (in that order) shall at all times prevail over an inconsistent provision in the International Bar Association Rules on the Taking of Evidence in International Arbitration.

### **The IBA Rules**

56. The *IBA Rules on the Taking of Evidence in International Arbitration* (“the IBA Rules”) were developed by a working party of the Arbitration Committee of the International Bar Association.<sup>15</sup>
57. The IBA Rules are expressed to be intended to supplement the “legal provisions and the institutional, ad hoc or other rules that apply to the conduct of the arbitration.”
58. Article 8(2) provides:

The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.2. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.

59. Article 9 provides:
1. The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.
  2. The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:
    - (a) lack of sufficient relevance to the case or materiality to its outcome;
    - (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
    - (c) unreasonable burden to produce the requested evidence;
    - (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred;

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<sup>15</sup> The rules were first promulgated in 1983 as the *IBA Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*. Those rules were replaced in 1999 by the present rules, the most recent revision of which was adopted by resolution of the IBA Council on 29 May 2010. It is able to be downloaded at <http://tinyurl.com/iba-Arbitration-Guidelines>.

- (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling;
  - (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or
  - (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.
3. In considering issues of legal impediment or privilege under Article 9.2(b), and insofar as permitted by any mandatory legal or ethical rules that are determined by it to be applicable, the Arbitral Tribunal may take into account:
- (a) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of providing or obtaining legal advice;
  - (b) any need to protect the confidentiality of a Document created or statement or oral communication made in connection with and for the purpose of settlement negotiations;
  - (c) the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen;
  - (d) any possible waiver of any applicable legal impediment or privilege by virtue of consent, earlier disclosure, affirmative use of the Document, statement, oral communication or advice contained therein, or otherwise; and
  - (e) the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules.
4. The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection.
5. If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.
6. If a Party fails without satisfactory explanation to make available any other relevant evidence, including testimony, sought by one Party to which the Party to whom the request was addressed has not objected in due time or fails to make available any evidence, including testimony, ordered by the Arbitral Tribunal to be produced, the Arbitral Tribunal may infer that such evidence would be adverse to the interests of that Party.
7. If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.

## ICC Rules

60. The International Chamber of Commerce *Rules of Arbitration* (“the ICC Rules”) <sup>16</sup> do not expressly call up the IBA Rules, but the IBA Rules are commonly adopted in ICC arbitrations. Article 25 of the ICC Rules provides:

- 1) The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.
- 2) After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.
- 3) The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.
- 4) The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.
- 5) At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.
- 6) The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

## The Prague Rules

61. The *Rules on Conduct of the Taking of Evidence in International Arbitration* (“The Prague Rules”) were developed by

62. In the Note from the Working Group that prefaces the Prague Rules, some of the rationale for developing those rules is articulated:

The drafters of the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) bridged a gap between the common law and civil law traditions of taking evidence. The IBA Rules were very successful in developing a nearly standardized procedure in international arbitration, at least for proceedings involving parties from different legal traditions and those with significant amounts at stake.

However, from a civil law perspective, the IBA Rules are still closer to the common law traditions, as they follow a more adversarial approach with document production, fact witnesses and party appointed experts. In addition, the party’s entitlement to cross-examine witnesses is almost being taken for granted.

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<sup>16</sup> <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#top>

In addition to that many arbitrators are reluctant to actively manage arbitration proceedings, including earlier determination of issues in dispute and the disposal of such issues, to avoid the risk of a challenge.

These factors contribute greatly to the costs of arbitration, while their efficiency is sometimes rather questionable. For example, most commentators admit that it is very rare, if ever, that document production brings a smoking gun to light. Likewise, many commentators express doubts as to the usefulness of fact witnesses and the impartiality of party-appointed experts. Many of these procedural features are not known or used to the same extent in non-common law jurisdictions, such as continental Europe, Latin America, Middle East and Asia.

In light of all of this, the drafters of the Prague Rules believe that developing the rules on taking evidence, which are based on the inquisitorial model of procedure and would enhance more active role of the tribunals, would contribute to increasing efficiency in international arbitration.

By adopting a more inquisitorial approach, the new rules will help the parties and tribunals to reduce the time and costs of arbitrations.

63. Rule 5.6 provides:

5.6 At the hearing, the examination of the fact witness shall be conducted under the direction and control of the Arbitral Tribunal. The Tribunal can reject a question posed to the witness if the Tribunal finds it not relevant or duplicative or for other reasons not material to the outcome of the case. The Arbitral Tribunal may also impose other restrictions, eg, regarding the time for examination or type of questions, as it deems appropriate.

**The EMAC Arbitration Rules**

64. The *EMAC Arbitration Rules* were adopted by the Board of the Emirates Maritime Arbitration Centre on 23 June 2016.

65. Articles 18 and 29 deal with the question of evidence in the following way:

Article 18

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given an equal and full opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.
2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.
3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by

witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

Article 29

1. Each party shall have the burden of proving the facts relied on to support its claim or defence.
2. Witnesses, including expert witnesses, who are presented by the parties to testify to the arbitral tribunal on any issue of fact or expertise may be any individual, notwithstanding that the individual is a party to the arbitration or in any way related to a party.
3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.
4. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

**Discussion**

66. Questions of dispute resolution are often the “poor cousins” of contract drafting. Parties and their lawyers spend significant periods of time on substantive contractual provisions and often leave questions of dispute resolution to an afterthought. So, in many contracts, such as infrastructure contracts, one sees quite elaborate provisions about notification of delays and claims for extensions of time and claims for variations. These provisions apply even to relatively small matters in terms of time and cost. But the same level of attention is not so often given to provisions for resolution of disputes by arbitration.
67. Often as well, drafters of contracts will include elaborate provisions for alternative dispute resolution to precede litigation or formal arbitration, for which a very abbreviated provision is made, perhaps providing for arbitration pursuant to some institutional rules.
68. Often enough, the provision does not even invoke any particular rules, but merely identifies the person (by position) who is to appoint the arbitral tribunal in the event the parties cannot agree on it.
69. Even where some particular institutional rules are invoked, it is very often done without any detailed consideration of the appropriateness of those rules or how they are to apply to specific matters. And, as can be seen, the institutional rules themselves leave open questions about the application of the rules of evidence, as least as concerns questions such as admissibility and weight of evidence.
70. These are not the only aspects of procedure that warrant more attention than is, in many cases at least, presently paid to them.



71. While it may be thought that applicable principles such as the entitlement to have a reasonable opportunity to present one's case, and the ability to seek to set aside an award for breach of the rules of natural justice, are sufficient protection to warrant retaining the relative informality and flexibility of not making prescriptive provision in relation to matters such as admissibility of evidence, that can be in many cases a "false economy".
72. Retaining flexibility and informality may be an appropriate choice in many cases, but it will not be in all cases. Even where it is, it makes more sense that that is a deliberate and informed choice, rather than one made by inattention to the detail.
73. Making such provision as discussed above need not be overly lengthy or detailed. But it is important enough that proper attention should be paid to it.
74. Where adequate provision is not made in the arbitration agreement, all is not lost. Generally, the parties may agree upon procedures to be adopted in the conduct of the arbitration, sometimes with the requirement that the arbitrator also agree. Of course, where the arbitrator is vested with the power to determine such matters, even without the consent of the parties, there remains the possibility of doing so in a careful and considered way early in the proceeding.
75. Generally, the earlier these matters are dealt with, the better. There is a temptation to let the proceeding develop somewhat before these matters are attended to, if they are at all. Parties might argue that it is better to let the issues become defined by reference to pleadings or the like before issues such as admissibility are dealt with.
76. While there is arguably a "chicken and egg" issue involved with the appropriate order of things, this can, however, inadvertently lead to a situation where it is too late to unscramble the egg.<sup>17</sup>
77. The best example may be in relation to issues as to the admissibility of evidence as to the negotiations leading to formation of the contract. By the time the pleadings (and perhaps particulars) are done, it may be very difficult and unnecessarily expensive, for pleadings to be struck out or rulings made about admissibility of evidence.
78. Would it not be a better solution, assuming that the arbitration agreement or applicable arbitration rules do not address the position, for the matter to be raised by the arbitrator at an early procedural hearing. That might be done by the arbitrator indicating that her or his view was that evidence of negotiations would not ordinarily be admissible and inviting submissions by any party that

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<sup>17</sup> Apologies for the extended and varied metaphor!

wished to contend otherwise. That would be designed to have the effect of “nipping” the potential problem “in the bud”.

79. Similar approaches could be and often are adopted in relation to other matters of procedure. Unfortunately, they rarely extend to the detail of questions of admissibility and weight of evidence. The more often might include questions of modes of proof, such as the taking of video evidence, the giving of notices requiring cross examination and the like.
80. A useful tool employed by arbitrators may be the issuing of a form of questionnaire or list of items to be discussed at the first or a subsequent preliminary conference. This is often done and can prove useful. It would not take a great deal of imagination to extend such a process to include questions of admissibility and weight of evidence.
81. It may seem trite to say that if the parties have a clear understanding of what evidence is admissible and how evidence will be treated, they can tailor their preparations accordingly. Equally importantly, they will not build up any false expectations of how those matters are to be dealt with. Arbitrators can assist this by addressing these matters early on if the parties have not done so. This also means promptly dealing with questions of admissibility.
82. This may be facilitated by encouraging disputes as to admissibility to be taken before hearing so that, if appropriate, they can be addressed with the need for adjournments or of shutting a party out of calling evidence that is put in inadmissible form. It also means arbitrators ruling on objections to admissibility as soon as possible, rather than adopting the expedient of provisionally admitting evidence and ruling on its admissibility only on the making of the award.

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19 November 2019