

Chapter 4

Importance and Impact of the First PRT, the IBA Evidence Rules

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1. INTRODUCTION

The 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (hereinafter: IBA Evidence Rules) are the successor to the very first para-regulatory text (hereinafter: PRT) dealing with procedural aspects in international commercial arbitration. They thus represent the starting point of the current trend towards codified standards for numerous aspects of arbitral proceedings in international settings. The role they have played in the development of standardized arbitral practices justifies taking a closer look at their importance and impact.

This contribution presents the historical development of the IBA Evidence Rules as well as their scope of application. It also examines their actual application by parties and arbitrators. It finally shows how the IBA Evidence Rules could represent a step in a more general evolution towards an international *lex evidentiæ*.

2. HISTORICAL DEVELOPMENT

2.1 The Starting Point: the 1983 Supplementary Rules

The IBA Evidence Rules as we know them today have their origin in the 1983 Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration¹ (hereinafter “the 1983 Supplementary Rules”). The 1983 Supplementary Rules were the very first PRT addressing procedural aspects in international arbitrations.

What were the underlying reasons for the IBA to issue such Rules in the early eighties?

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¹ Arbitration International, Vol. 1, No. 2 (1985), pp. 124-128.

First, during the late seventies, powerful American law firms operating at a global level succeeded in imposing procedural devices from US State court proceedings in international arbitration, in particular document production, discovery and written witness statements.² International arbitration thus became a kind of “offshore U.S. litigation”.³ Of course, counsel in arbitration with an Anglo-American background felt at ease with these practices. Continental European lawyers however felt at a competitive disadvantage when they were confronted in an international arbitration with Common Law counsel, familiar with document production and cross-examination techniques.⁴

Second, it is true that other efforts had previously been made from time to time before the early eighties to develop a uniform arbitration law and uniform rules for application in international arbitration, such as the Rules on Commercial Arbitration of the International Law Association in 1950, the Uniform Law on Arbitration in Respect of Relations of Private Law by UNIDROIT in 1935 (revised in 1954 and amended by the Legal Committee of the Consultative Assembly of the Council of Europe in 1957), the European Convention on International Commercial Arbitration of 1961, the ECE Rules for International Commercial Arbitration by the United Nations Economic Commission for Europe in 1966, and the UNCITRAL Arbitration Rules in 1976.⁵ However, these Rules as well as the draft of the then proposed UNCITRAL Model Law on International Commercial Arbitration⁶ ducked the difficult issues to a large extent, by leaving to the agreement of the parties the actual procedure to be followed and, failing such agreement, to the discretion of the arbitrators.⁷ This is why

² E. HELMER, *International Commercial Arbitration: Americanized, «Civilized», or Harmonized?*, Ohio State Journal on Dispute Resolution, Vol. 19 (2003), p. 45.

³ Y. DEZALAY/B. GARTH, *Dealing in virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago/London 1996, p. 53; C. MÜLLER, *Développements futurs de l'arbitrage*, in: A. Bonomi/D. Bochatay (eds.), *Arbitrage interne et international*, Genève 2012, p. 146.

⁴ H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Huntington 2010, p. 517.

⁵ D. W. SHENTON, *International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, in: P. Sanders (ed.), *Yearbook Commercial Arbitration* (1985), p. 144.

⁶ Draft text of a model law on international commercial arbitration as adopted by the Working Group (A/CN.9/246-Annex), in: *Yearbook of the United Nations Commission on International Trade Law*, 1984, Volume XV, p. 212 et seq.

⁷ D. W. SHENTON, *International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, in: P. Sanders (ed.), *Yearbook Commercial Arbitration* (1985), p. 145.

the IBA decided to address the real “nitty-gritty” of the mechanics of presenting or receiving evidence in commercial arbitration.

The IBA tried to go through the sort of negotiations that would be carried out in practice if lawyers and arbitrators from Common Law and Civil Law systems actually had to sit down together and agree upon a procedure for an actual arbitration between parties from a Civil Law and a Common Law country. The goal was thus to provide a neutral set of procedures for the presentation of witness and documentary evidence that would be equally fair and familiar to both Civil Law and Common Law parties.⁸ The biggest problem that the IBA butted up against was of course the difference between the Common Law adversarial approach to the laying out of a case for judicial consideration and the Civil Law’s inquisitorial system.⁹ This fundamental difference is particularly evident with regard to the taking of evidence. There are in fact at least five procedural areas in which significant differences exist between the Common Law and the Civil Law approach: (i) discovery (in particular pretrial discovery, which is unknown in the Civil Law system), (ii) the way documents are used at hearings (in the Common Law system, documents are more often authenticated and explained by live witnesses than in the Civil Law system), (iii) witness testimony (lawyers rather than judges ask most of the questions in Common Law jurisdictions), (iv) experts (Continental tend to expect that the arbitral tribunal will appoint experts, while Americans usually insist on each side presenting its own experts), (v) legal argument (the Common Law tradition relies more on cases while the Continental practice has been to cite leading legal scholars).¹⁰ The first four of these main areas of differences are connected to the taking of evidence, which explains why procedural guidelines were first established in this field.

The 1983 Supplementary Rules were drafted by the Committee D of the IBA/SBL¹¹ comprising some 380 lawyers from most countries of the world.¹² This non-governmental group of arbitration practitioners was the body *par excellence* to draft such rules, as it was and still is,

⁸ D. W. SHENTON, *International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, in: P. Sanders (ed.), *Yearbook Commercial Arbitration* (1985), pp. 145 et seq..

⁹ D. W. SHENTON, *International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, in: P. Sanders (ed.), *Yearbook Commercial Arbitration* (1985), pp. 145 et seq.

¹⁰ W. W. PARK, *Arbitration of International Business Disputes*, Oxford 2006, p. 57, with further references.

¹¹ Section on Business Law.

¹² D. W. SHENTON, *International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*, in: P. Sanders (ed.), *Yearbook Commercial Arbitration* (1985), pp. 145.

constituted of experienced international arbitrators from all over the world.¹³ The 1983 Supplementary Rules were thus procedural guidelines representing what might be called “soft law”, contrast to the harder norms imposed by arbitration statutes and treaties, as well as the procedural framework adopted by the parties through choice of pre-established arbitration rules.¹⁴

However, the 1983 Supplementary Rules were less successful than had been hoped.¹⁵ Even though the 1983 Supplementary Rules are said to have been frequently discussed at arbitration conferences as an example of the harmonization procedures that can occur in international arbitration,¹⁶ they seem to have been rarely applied in practice. Some consider that the time was simply not yet ripe for such an endeavor.¹⁷ Others remark, however, that the 1983 Supplementary Rules ultimately adopted a Common Law approach to arbitration.¹⁸ It was in part because of this perception that the 1983 Supplementary Rules did not gain widespread acceptance.¹⁹

The 1983 Supplementary Rules were followed by the Standard Rules of Evidence, created by the Mediterranean and Middle East Institute of Arbitration in 1987. According to one of their drafters, the Standard Rules of Evidence—contrary to the 1983 Supplementary Rules—took inspiration from both Civil and Common Law traditions.²⁰ Even though the Standard Rules took indeed a somewhat

¹³ According to the Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration (available at <http://www.ibanet.org> [10.09.2012]), the IBA’s Arbitration Committee had more than 2,500 arbitration practitioners from 90 countries around the world in 2010.

¹⁴ W. W. PARK, *Arbitration of International Business Disputes*, Oxford 2006, p. 46.

¹⁵ P. A. KARRER, a member of the Working Party for the 1999 Rules, is not aware “that this pioneering text was much used for any purpose” and stated that some members of this Working Party asked themselves “[w]hy not drop this flop?” (P. A. KARRER, *Law, Para-Regulatory Texts and People in International Arbitration: Predictability or Fureur Réglementaire?*, in: S. M. Kröll/L. A. Mistelis et al. (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Alphen aan den Rijn 2011, p. 290). See also J. M. BARKETT/J. PAULSSON/M. KLEIN, *The Myth of Cultural Clash in International Commercial Arbitration*, FIU Law Review 2009, IV.

¹⁶ IBA Review Subcommittee 2010, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration (available at <http://www.ibanet.org> [10.09.2012]).

¹⁷ H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Huntington 2010, p. 518.

¹⁸ See, e.g., M. RUBINO-SAMMARTANO, *International Arbitration Law*, Deventer/Boston 1990, p. 375.

¹⁹ G. B. BORN, *International Commercial Arbitration*, Vol. II, Austin/Boston/Chicago/New York/The Netherlands 2009, p. 1793.

²⁰ M. RUBINO-SAMMARTANO, *International Arbitration Law*, Deventer/Boston 1990, p. 375.

more limited approach to discovery than the 1983 Supplementary Rules, they were seldom used and remained relatively unknown in international arbitration.²¹

2.2 Truly International Standards: The 1999 IBA Evidence Rules

The nature of international arbitration underwent profound changes between 1983 and 1999. New procedures were developed. Different norms as to appropriate procedures took root. Moreover, many regions of the world, formerly hostile to international arbitration finally embraced it. Many newcomers therefore needed guidance on the presentation of evidence.²² This is why, 16 years later, the IBA revised the 1983 Supplementary Rules and adopted the 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration²³ (hereinafter: the 1999 IBA Evidence Rules). The 1999 IBA Evidence Rules reflected perceived best practices that had emerged in international commercial arbitration. They contained procedures initially developed in Civil Law systems, in Common Law systems and even in international arbitration processes themselves.²⁴ The focus thus shifted from overcoming the Common Law/Civil Law divide in civil procedure to developing truly international standards. Some features of the 1999 IBA Evidence Rules, such as document production requests (Article 3), written witness statements (Article 4.4) and witness conferencing (Article 8.2) were new and autonomous.²⁵ Such truly international devices could also serve as examples for the revision of State codes or rules of civil procedure.²⁶

²¹ G. B. BORN, *International Commercial Arbitration*, Vol. II, Austin/Boston/Chicago/New York/The Netherlands 2009, p. 1793.

²² H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Hungtington 2010, p. 521.

²³ For an insider's story about the starting point of the 1999 revision, see P. A. KARRER, *Law, Para-Regulatory Texts and People in International Arbitration: Predictability or Fureur Réglementaire?*, in: S. M. Kröll/L. A. Mistelis et al. (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Kluwer Law 2011, pp. 290 et seq.

²⁴ IBA Review Subcommittee 2010, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration* (available at <http://www.ibanet.org> [10.09.2012]), p. 3.

²⁵ P. A. KARRER, *Internationalization of Civil Procedure – Beyond the IBA Rules of Evidence*, in: N. P. Vogt (ed.), *Reflections on the International Practice of Law, Liber Amicorum for the 35th Anniversary of Bär & Karrer*, Basel/Geneva/Munich 2004, p. 130.

²⁶ T. MÜLLER, *IBA Rules of Evidence – ein Brückenschlag zwischen Common Law und Civil Law in internationalen Schiedsverfahren*, in: K. Spühler (ed.), *Internationales Zivilprozess-*

The importance of the 1999 IBA Evidence Rules may be evidenced by the fact that most of the revision, as well as rulemaking efforts relating to evidentiary issues which were launched during the first decade of this century, directly address or discuss the 1999 IBA Evidence Rules, particularly regarding so-called e-discovery. They have included, in reverse chronological order, the ICC²⁷ Task Force on Production of Electronic Documents in Arbitration,²⁸ the 2009 CPR²⁹ Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration,³⁰ the 2008 CI Arb³¹ Protocol of E-Disclosure in Arbitration,³² the 2008 CI Arb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration,³³ and the 2008 ICDR³⁴ Guidelines for Arbitrators Concerning Exchanges of Information.³⁵ They have also included the 2007 ICC Commission Report on Techniques for Controlling Time and Costs in Arbitration,³⁶ the 2006 Amendments to the U.S. Federal Rules of Civil Procedure (relating to e-discovery),³⁷ and the Sedona Conference Working Group on E-Document Retention and Production.³⁸ All these revisions and

und Verfahrensrecht II, Zurich 2003, p. 70.

²⁷ International Chamber of Commerce (Paris).

²⁸ http://www.iccdri.com/CODE/LevelThree.asp?tocxml=Itoc_CommReportsAll.xml&page=Commission%20Reports&L1=Commission%20Reports&L2=&tocxml=DoubleToc.xml&contentxml=arbSingle.xml&Locator=9&contentxml=CR_0043.xml&AUTH=&nb=0 (10.09.2012).

²⁹ International Institute for Conflict Prevention & Resolution (New York).

³⁰ Available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/CPR%20Protocol%20on%20Disclosure%20of%20Documents%20and%20Witnesses.pdf> (10.09.2012).

³¹ Chartered Institute of Arbitrators (London).

³² Available at <http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf> (10.09.2012).

³³ Available at <http://www.ciarb.org/information-and-resources/The%20use%20of%20party-appointed%20experts.pdf> (10.09.2012).

³⁴ International Centre for Dispute Resolution (New York).

³⁵ Available at http://www.google.ch/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&cad=rja&ved=0CCsQFjAB&url=http%3A%2F%2Fwww.adr.org%2Fcs%2Fidcplg%3FIdcService%3DGET_FILE%26dDocName%3DADRSTG_002579%26RevisionSelectionMethod%3DLatestReleased&ei=jSY3UMKIL4jtsbjpIHODA&usq=AFQjCNFUHrfpXr8eWwV6eKm3r8mWlyO6KA (10.09.2012).

³⁶ Available at http://www.iccdri.com/CODE/LevelThree.asp?tocxml=Itoc_CommReportsAll.xml&page=Commission%20Reports&L1=Commission%20Reports&L2=&tocxml=DoubleToc.xml&contentxml=arbSingle.xml&Locator=9&contentxml=CR_0033.xml&AUTH=&nb=0 (10.09.2012).

³⁷ Available at <http://www.fiosinc.com/case-law-rules/e-discovery-federal-rules-civil-procedure-frcp.aspx> (10.09.2012).

³⁸ Available at <https://www.google.ch/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=4&ved=0CDYQFjAD&url=https%3A%2F%2Fthesedonaconference.org%2Fsystem%2Ffiles%2Fsites%2Fsedona.civicaactions.net%2Ffiles%2Fprivate%2Fdrupal%2Ffiles>

rulemaking efforts present themselves, at least in part in terms of the existing cross-border landscape and framework established by the 1999 IBA Evidence Rules.³⁹

Interestingly enough, the 1999 IBA Evidence Rules kept a certain Common Law orientation, by permitting a reasonable measure of document “discovery” (Article 3) and expressly authorizing counsel involvement in the preparation of witness testimony (Article 4.3).⁴⁰ However, the “discovery” introduced by Article 3 of the 1999 IBA Evidence Rules (and further developed by Article 3 of the 2010 IBA Evidence Rules) perfectly illustrates the fair compromise struck between Common Law and Civil Law evidentiary devices: Today, most international arbitrations have a more or less extensive phase of document production requests. Before US State courts, discovery has traditionally accounted for the bulk of litigation-related costs. This is why the importation of discovery into arbitration is particularly noteworthy. Many Civil Law practitioners are of the opinion that Article 3 of the 1999 and 2010 IBA Evidence Rules reflects US-style discovery, which is not true. In fact, the possibilities offered under Rules 26 et seq. of the US Federal Rules of Civil Procedure go far beyond the document production procedure of Article 3 of the 1999 and 2010 IBA Evidence Rules. Some components of US-style discovery, such as depositions⁴¹ and interrogatories,⁴² have not found their way into international arbitration at all. Therefore, even for evidentiary devices coming from the Common Law world, the IBA Evidence Rules constitute a fair compromise between the two great legal traditions.

This is probably the reason why the 1999 IBA Evidence Rules have gained increasing acceptance among users from all jurisdictions. However, when the 1999 IBA Evidence Rules were first published and applied by arbitral tribunals at the end of the last century, they were often misused. At that time, many arbitrators were unsure exactly how to use them. During the first decade of this century, the application of the 1999 IBA Evidence Rules has been the subject of many seminars

%2Fpublications%2Fretguide200409.pdf&ei=Kck3UMbGCc3VsgbL0IGICg&usg=AFQjCNGqdhOoaR6shotqvtJUYWxWnMoEw (10.09.2012).

³⁹ R. KREINDLER, *Possible Future Revisions to the IBA Rules on the Taking of Evidence in International Commercial Arbitration*, in: Böckstiegel/Berger/Bredow (eds.), *The Taking of Evidence in International Commercial Arbitration*, Schriftenreihe der Deutschen Institution für Schiedsgerichtsbarkeit, Band 26, p. 86.

⁴⁰ G. B. BORN, *International Commercial Arbitration*, Vol. II, Austin/Boston/Chicago/New York/The Netherlands 2009, p. 1793.

⁴¹ Rules 30 to 32 of the US Federal Rules of Civil Procedure, available at <http://www.law.cornell.edu/rules/frcp/> (30.08.2012).

⁴² Rule 33 of the US Federal Rules of Civil Procedure, available at <http://www.law.cornell.edu/rules/frcp/> (30.08.2012).

and practices have evolved over this period of time. These discussions have finally led to a relatively uniform approach to the 1999 IBA Evidence Rules.⁴³

2.3 Further Improvements: The 2010 IBA Evidence Rules

On 29 May 2010, the IBA Council adopted a new version of the IBA Evidence Rules.⁴⁴ The Subcommittee in charge of the revision consisted of 17 members, selected for their experience, expertise in the relevant area and for the breadth of their cross-cultural knowledge and representativeness. An Advisors' group, consisting of the members of the 1999 Working Party, assisted the Subcommittee. An Observers' group, consisting of selected leading arbitration institutions and organizations also assisted the Subcommittee. The Rules were thus drafted and revised by highly qualified and experienced people. Since they have been adopted by the IBA, they have acquired an aura of respectability which makes it difficult for a party to oppose their usage.⁴⁵ As their predecessors, the 2010 IBA Evidence Rules are thus not the product of self appointed regulators under the pretext of "educating inexperienced arbitrators" like some other PRTs. The Subcommittee had a limited mandate and respected the maxim: "If it is not broken, do not fix it". This means that the basic structure of the rules and the general goal to harmonize different legal cultures were not modified by the revision.

The most important changes in the 2010 IBA Evidence Rules may be summarized as follows:

Section 3 of the new Preamble expressly states the duty of the parties to act in good faith in the taking of evidence. This new duty is reflected in Article 9.7, which empowers the arbitral tribunal to take into account the failure of a party to conduct itself in good faith when assigning the costs of the arbitration. This gives the arbitrators an efficient leverage for the compliance with procedural orders, in particular for the production of documents.

Article 2 on the consultation on evidentiary issues is completely new. According to this provision, the arbitral tribunal shall consult the

⁴³ B. HANOTIAU, *Document Production in International Arbitration: A Tentative Definition of 'Best Practice'*, ICC Bulletin, 2006 Special Supplement, Document Production in International Arbitration, p. 114.

⁴⁴ Available at <http://www.ibanet.org> (10.09.2012).

⁴⁵ P. A. KARRER, *Law, Para-Regulatory Texts and People in International Arbitration: Predictability or Fureur Réglementaire?*, in: S. M. Kröll/L. A. Mistelis et al. (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Alphen ann den Rijn 2011, p. 294.

Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence. This is the expression of the “meet and consult” principle.⁴⁶ This maxim has been established in recent years in US court proceedings in order to reduce costs.

Various Articles have been adapted to the specific needs of the disclosure of documents in electronic form, the so-called e-disclosure: Article 3.3(a) for instance gives the option of identifying e-documents to be produced by specifying specified “search terms”. Article 3.12(b) provides that documents that a party maintains in electronic form shall be submitted or produced in the most convenient or economical form that is reasonably usable by the recipients. This is yet another expression of the endeavor to cut costs in evidentiary proceedings.

The problem of evidentiary privileges is another area of innovation. Article 9.2(b) protects documents and other evidentiary means which fall under a legal impediment or privilege. Article 9.3 contains non-mandatory guidelines for the assessment of such impediment or privilege. Subsection 3(a) of this provision aims once again at harmonizing Common Law and Civil Law traditions, in particular the Common Law “client-attorney privilege” and the Civil Law attorneys’ duty to respect confidentiality. Subsection 3(b) expresses a general understanding of privilege “without prejudice” in connection with settlement negotiations.

3. SCOPE OF APPLICATION OF THE 2010 IBA EVIDENCE RULES

3.1 Scope of Application as Defined by the 2010 IBA Evidence Rules

A first indication of how the 2010 IBA Evidence Rules define their own scope of application can be found in the title of the 2010 IBA Evidence Rules. The 2010 IBA Evidence Rules are the only PRT issued by the IBA called “Rules” and not “Guidelines”. However, even though “Rules” seem to have a more mandatory character than simple “Guidelines”, the choice of the title has no influence whatsoever on its applicability. The 2010 IBA Evidence Rules do in fact not reflect generally applicable standards but allow for much discretion and deviation (see below, chapter 4.5). The 2010 IBA Evidence Rules are

⁴⁶ G. VON SEGESSER, *The IBA Rules on the Taking of Evidence in International Arbitration*, ASA Bulletin No. 4 (2010), pp. 742 et seq.

thus more guidelines than the Guidelines on conflict of interests.⁴⁷ Furthermore, during the 2010 revision, the word “commercial” was deleted from the title and from paragraph 1 of the Preamble of the 2010 IBA Evidence Rules. Since 1999, not only “commercial” arbitrations but also investment treaty-based or investment-related arbitrations have made use of the IBA Evidence Rules directly or indirectly with respect to evidentiary issues. The former name of the 2010 IBA Evidence Rules has obviously not prevented tribunals and parties from applying them in non-commercial contexts. However, as the word “commercial” could have been seen as limitative or restrictive, it was deleted from the title.⁴⁸ The new title thus acknowledges the increasing importance of the 2010 IBA Evidence Rules also outside of traditional “commercial” arbitration. Investment-related arbitrations may however require specific rules on the taking of evidence, such as on the participation of third parties (*amici curiae*), which have not been included in the 2010 revision.⁴⁹

The Preamble and Article 1 of the 2010 IBA Evidence Rules also reveal interesting information about how the drafters would like to see the rules applied in practice.

Paragraph 1, first sentence, of the Preamble states the scope of the 2010 IBA Evidence Rules: they are “intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly those between Parties from different legal traditions”. The goals of efficiency, cost-effectiveness and fairness are already fostered by the widespread adoption of the IBA Evidence Rules *per se*. Indeed, arbitrators and parties can agree on a basic set of rules and do not have to “reinvent the wheel” every time an issue regarding evidence arises. Therefore, IBA Evidence Rules are not just an “additional layer[...] of procedural order, taking a bit from here and a bit from there”,⁵⁰ but an important piece of the increasing harmonization of arbitral practice enhancing the efficiency and cost-

⁴⁷ H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Hungtington 2010, p. 525.

⁴⁸ R. KREINDLER, *Possible Future Revisions to the IBA Rules on the Taking of Evidence in International Commercial Arbitration*, in: Böckstiegel/Berger/Bredow (eds.), *The Taking of Evidence in International Commercial Arbitration*, Schriftenreihe der Deutschen Institution für Schiedsgerichtsbarkeit, Band 26, p. 88.

⁴⁹ IBA Review Subcommittee 2010, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration* (available at <http://www.ibanet.org> [10.09.2012]), Article 1, section 3.

⁵⁰ A. MARRIOTT, *Breaking the Deadlock*, *Arbitration International*, Vol. 22, No. 3 (2006), p. 426.

effectiveness of international arbitral proceedings.⁵¹ The goal of fairness is achieved by the fact that such harmonized rules increase predictability and assist, in particular, less experienced parties. In arbitrations where the 2010 IBA Evidence Rules apply, the parties now know from the outset that the arbitral tribunal may, for instance, draw adverse inferences if they do not adhere to production orders (Article 9.5). This knowledge alone will lead to better compliance with such orders and enhance efficiency as well.⁵² By harmonizing the Common Law and the Civil Law traditions in the taking of evidence, the IBA Evidence Rules also contribute towards the development of an international *lex evidentiaria*.⁵³

According to the second sentence of paragraph 1 of the Preamble, the 2010 IBA Evidence Rules “are designed to supplement the legal provisions and the institutional, ad hoc or other rules that apply to the conduct of arbitration”. The scope of application of the 2010 IBA Evidence Rules is thus limited to issues related to the taking of evidence. The Rules are not intended to provide a complete mechanism for the conduct of an international arbitration (whether commercial or investment). Therefore, the parties must still agree on a set of institutional or *ad hoc* rules, such as those of the ICC⁵⁴ or the Swiss Chambers’ Arbitration Institution,⁵⁵ or design their own rules to establish the overall procedural framework for their arbitration. The 2010 IBA Evidence Rules merely fill in gaps intentionally left in those procedural framework rules with respect to the taking of evidence.⁵⁶ While the 2010 IBA Evidence Rules have been drafted to conform to the principal institutional and *ad hoc* rules (in particular UNCITRAL Rules) generally used by the parties, conflicts may nevertheless arise

⁵¹ T. ZUBERBÜHLER/D. HOFMANN/C. OETIKER/T. ROHNER, *IBA Rules of Evidence – Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, Zurich/Basel/Geneva 2012, Preamble, N 6.

⁵² T. ZUBERBÜHLER/D. HOFMANN/C. OETIKER/T. ROHNER, *IBA Rules of Evidence – Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, Zurich/Basel/Geneva 2012, Preamble, N 7.

⁵³ Cf. J. K. SHARPE, *Drawing Adverse Inferences from the Non-production of Evidence*, *Arbitration International*, Vol. 22, No. 4 (2006), pp. 551 et seq., with respect to the drawing of adverse inferences.

⁵⁴ Available at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/> (29.08.2012).

⁵⁵ Available at https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf (29.08.2012).

⁵⁶ IBA Review Subcommittee 2010, *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration* (available at <http://www.ibanet.org> [10.09.2012]), Preamble sect. (i).

with the other set of rules chosen by the parties.⁵⁷ Conflicts may also arise with the mandatory law at the seat of arbitration. This is why Article 1 of the 2010 IBA Evidence Rules provides several basic principles as to how arbitral tribunals should apply the 2010 IBA Evidence Rules in the event of a conflict with any of these other provisions: (i) in a conflict between the 2010 IBA Evidence Rules and mandatory legal provisions determined to be applicable to the case, the mandatory law shall govern the taking of evidence (Article 1.1); (ii) in a conflict between the 2010 IBA Evidence Rules and the general procedural rules, arbitral tribunals shall attempt to harmonize the two sets of rules to the greatest extent possible. However, because party autonomy is crucial to any arbitration, the parties have a right to resolve any such conflict in the manner they choose, as long as both parties agree (Article 1.3);⁵⁸ (iii) if there is a negative conflict, in the sense that the 2010 IBA Evidence Rules and the general rules are silent on any matter concerning the taking of evidence and the parties have not agreed otherwise, the arbitral tribunal shall conduct the taking of evidence as it deems appropriate, in accordance with the general principles of the 2010 IBA Evidence Rules (Article 1.5).

Paragraph 2 of the Preamble is also crucial in understanding the nature of the 2010 IBA Evidence Rules. It is based on the recognition that there is not a single best way to conduct all international arbitrations, and that the flexibility inherent in international arbitration procedures is one of the key advantages over court proceedings.⁵⁹ Thus, paragraph 2 of the Preamble specifies that the 2010 IBA Evidence Rules are not intended to limit this flexibility. The 2010 IBA Evidence Rules should be used by parties and arbitral tribunals in the manner that best suits them, by either (i) adopting them as a whole; (ii) adopting them in part, i.e. adopting only certain provisions; (iii) adopting them, but varying certain provisions to fit the particular circumstances of their arbitration; or (iv) using them simply as guidelines in developing their own procedures.⁶⁰ In order to establish

⁵⁷ The General Rules in the parlance of the Rules (see Definitions).

⁵⁸ IBA Review Subcommittee 2010, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration (available at <http://www.ibanet.org> [10.09.2012]), Article 1, section 2.

⁵⁹ IBA Review Subcommittee 2010, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration (available at <http://www.ibanet.org> [10.09.2012]), Preamble sect. (iii). See also C. MÜLLER, *Développements futures de l'arbitrage*, in: A. Bonomy/D. Bochatay (eds.), *Arbitrage interne et international*, Genève 2010, p. 162.

⁶⁰ T. ZUBERBÜHLER/D. HOFMANN/C. OETIKER/T. ROHNER, *IBA Rules of Evidence – Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, Zurich/Basel/Geneva 2012, Preamble, N 13.

the manner that best suits the parties and the arbitral tribunal, the tribunal “shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence” (Article 2.1; “meet and consult” approach).

3.2 Issues Not Covered by the 2010 IBA Evidence Rules

As mentioned above (see chapter 3.1), the scope of application of the 2010 IBA Evidence Rules is limited to issues relating to the taking of evidence. But even within this limited scope, the 2010 IBA Evidence Rules do not, by far, cover all issues related to the taking of evidence.⁶¹

The most important issue left open is probably the evaluation of evidence. Article 9.1 of the 2010 IBA Evidence Rules laconically provides that “[t]he Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of the evidence”. The principle that arbitrators have discretion to determine these criteria when assessing the evidence is generally accepted⁶² and expressly codified, for example, in Article 27(4) of the UNCITRAL Rules 2010 and Article 24(2) of the Swiss Rules 2012. Article 9 of the 2010 IBA Evidence Rules gives very little guidance to arbitrators as to how they shall assess the admissibility, relevance, materiality and weight of evidence (see below, chapter 4.5). Important issues closely related to the evaluation of evidence, such as the burden of proof or the standard of proof, could have been clarified as well.⁶³ The 2010 IBA Evidence Rules could have contributed to the development of a *lex evidentiæ* that would also embrace common principles for the evaluation of evidence by international tribunals.⁶⁴

Despite its 10 subsections, Article 4 of the 2010 IBA Evidence Rules relating to the taking of fact witness testimony leaves a number of points uncovered that should preferably be known in advance by the parties and the arbitral tribunal. Such issues have thus to be

⁶¹ Other issues left open are «*certain important timing aspects of documents production*» (R. H. SMITH, *Towards Greater Efficiency in Document Production before Arbitral Tribunals – A North American Viewpoint*, ICC Bulletin, 2006 Special Supplement, Document Production in International Arbitration, p. 95).

⁶² G. B. BORN, *International Commercial Arbitration*, Vol. II, Austin/Boston/Chicago/New York/The Netherlands (2009), p. 1851 et seq.

⁶³ See T. ZUBERBÜHLER/D. HOFMANN/C. OETIKER/T. ROHNER, *IBA Rules of Evidence – Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, Zurich/Basel/Geneva 2012, Article 9, N 8 et seq.

⁶⁴ C. N. BROWER, *The Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence*, in: R. B. Lillich (ed.), *Fact-Finding Before International Tribunals*, New York 1992, p. 150.

clarified in a procedural order organizing the hearing and/or during the pre-hearing conference call: Which witnesses (and party-appointed experts) will be heard when and in which sequence (by subjects, alternating between the parties, or first all witnesses from one party, then all witnesses from the other)? What about arrangements for chess-clock time management? Will there be opening and/or closing statements by the parties? What about the presence of witnesses in the hearing room before and after they have testified? Are witnesses of fact allowed to discuss the case with anyone at breaks during oral testimony? If one party has no questions to ask a witness from the other side, may the presenting party redirect question its own witness? May witnesses be recalled? How should new documents presented at the hearing be handled?⁶⁵

Another interesting gap is hearsay. Hearsay is a statement that is made by someone other than the person testifying at the hearing and offered to prove the truth of the matter stated.⁶⁶ The 2010 IBA Evidence Rules are silent on the question of hearsay, an evidentiary issue that is well known in the Common Law tradition, but which is virtually unknown in the Civil Law tradition, mainly due to the non-adversarial nature of civil judicial proceedings.

Furthermore, the IBA Evidence Rules gloss over some difficulties, such as, for instance, the issue of confidentiality. Even though the 2010 revision (Article 3.13) added some clarification compared to the 1999 version (Article 3.12), they still essentially just say that “[t]he Arbitral Tribunal may issue orders to set forth the terms of confidentiality” and that “this requirement shall be without prejudice to all other obligations of confidentiality in arbitration” (Article 3.13).

Hence, the parties and the arbitral tribunal must clarify these and other issues related to the taking of evidence “at the earliest appropriate time in the proceedings” (Article 2.1 of the 2010 IBA Evidence Rules).

An example to the contrary is the exclusion of evidence for reason of legal impediment or privilege: The 1999 edition laconically provided that such exclusion is to be based on “the legal or ethical rules determined by the Arbitral Tribunal to be applicable” (Article 9.2(b) of the 1999 IBA Evidence Rules). The 2010 edition still refers the

⁶⁵ P. A. KARRER, *Internationalization of Civil Procedure – Beyond the IBA Rules of Evidence*, in: N. P. Vogt (ed.), *Reflections on the International Practice of Law, Liber Amicorum for the 35th Anniversary of Bär & Karrer*, Basel/Geneva/Munich 2004, p. 130 et seq.

⁶⁶ See Rule 801(c) of the US Federal Rules of Evidence (available at http://www.law.cornell.edu/rules/fre/rule_801; 29.08.2012). S. I. STRONG/J. J. DRIES, *Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?*, *Arbitration International*, Vol. 21, No. 3, (2005), p. 312.

arbitrators to “any mandatory legal or ethical rules that are determined by it to be applicable” (Article 9.3 of the 2010 IBA Evidence Rules). However, Article 9.3 now includes a list of points that the arbitral tribunal may take into account when considering issues of legal impediment or privilege under Article 9.2(b) of the 2010 IBA Evidence Rules.

4. APPLICATION OF THE IBA EVIDENCE RULES IN PRACTICE

4.1 How Do the Parties Agree on the Application of the IBA Evidence Rules?

Statistical data compiled on the actual use of the IBA Evidence Rules is almost inexistent. Of course, most commentators agree that “the IBA Rules have developed into a commonly accepted standard in international arbitration proceedings”,⁶⁷ that “the IBA Rules on the taking of evidence enjoy an increasing recognition and acceptance by the international arbitration community”,⁶⁸ that “there is hardly an arbitration which does not refer to the 1999 IBA Rules of Evidence, and now the aptly modernized version of 2010”⁶⁹ or that “the IBA Rules of Evidence [...] are followed for the conduct of the arbitral procedure by parties and arbitral tribunals in nearly all international arbitration.”⁷⁰ However, such statements seem to be based mainly on personal experience⁷¹ and not on any reliable statistics.

The only publicly available data is the result of an online survey launched by the IBA Subcommittee in preparation of its 2010 revision. The survey thus related to the use of the 1999 IBA Evidence Rules. It

⁶⁷ D. KÜHNER, *The Revised IBA Rules on the Taking of Evidence in International Arbitration*, *Journal of International Arbitration* (2010), p. 667.

⁶⁸ G. VON SEGESSER, *The IBA Rules on the Taking of Evidence in International Arbitration*, *ASA Bulletin* 4/2010, p. 736.

⁶⁹ P. A. KARRER, *Law, Para-Regulatory Texts and People in International Arbitration: Predictability or Fureur Réglementaire?*, in: S. M. Kröll/L. A. Mistelis et al. (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Alphen aan den Rijn 2011, p. 291.

⁷⁰ B. HANOTIAU, *International Arbitration in a Global Economy: The Challenges of the Future*, *Journal of International Arbitration*, Vol. 28 No. 2 (2011,) p. 96.

⁷¹ See also P. A. KARRER, *Law, Para-Regulatory Texts and People in International Arbitration: Predictability or Fureur Réglementaire?*, in: S. M. Kröll/L. A. Mistelis et al. (eds.), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution*, Alphen aan den Rijn 2011, p. 294, who reports that when the IBA Evidence Rules “were not yet well known, one had to travel to Terms of Reference hearings with copies of the IBA Rules to be distributed to the participants so that nobody would have to lose face. [...] Generally, acceptance of the IBA Rules of Evidence was smooth [...]”.

drew 173 responses from 30 different jurisdictions.⁷² The survey led to the following results with respect to the use of the 1999 IBA Evidence Rules prior to 2010:

In terms of frequency of application of the 1999 IBA Evidence Rules by reference in the *arbitration agreement*, 18 per cent of the respondents stated that they used the 1999 IBA Evidence Rules in “nearly every” arbitration or “most” arbitrations and 31 per cent in “some” or “a few” arbitrations.

In terms of frequency of application by reference in the *procedural framework* (i.e. Terms of Reference or Specific Procedural Rules), 43 per cent indicated that they used the 1999 IBA Evidence Rules in “nearly every” arbitration or “most” arbitrations, while 42 per cent used them in “some” or “a few” arbitrations.

Therefore, the IBA Evidence Rules rarely apply due to the parties’ agreement on their use in their arbitration agreement. This is somewhat surprising considering that the 1999 IBA Evidence Rules recommended in their foreword that parties wishing to adopt the Rules should refer to them in their arbitration clause.⁷³ However, at the time the contract is negotiated and drafted, the parties’ mind is generally not focused on dispute resolution issues—and even less on the presentation of evidence therein.⁷⁴

The IBA Evidence Rules apply more frequently because the parties agree on their use in the procedural framework, either with or without the tribunal’s encouragement to do so.⁷⁵ This may happen for instance in the Terms of Reference in ICC arbitrations or in initial procedural orders such as Specific Procedural Rules issued by the

⁷² USA (41), UK (21), Switzerland (13), Croatia (9), France (9), Australia (8), Canada (6), Germany (6), Hong Kong (4), Italy (3), New Zealand (3), Singapore (3), Spain (3), Denmark (2), Finland (2), India (2) and 1 each for Argentina, Austria, Belgium, Brazil, Chile, Egypt, Japan, Malaysia, Netherlands, Nigeria, Portugal, Romania, Sweden and Venezuela (R. KREINDLER, Possible Future Revisions of the IBA Rules on the Taking of Evidence, DIS Fall 2009 Conference, Stuttgart, 21 October 2009, p. 7).

⁷³ The foreword of the 1999 IBA Evidence Rules suggested to add the following language to the clause: “In addition to the [institutional or ad hoc rules chosen by the parties], the parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence”. The foreword of the 2010 IBA Evidence Rules suggests a slightly more comprehensive version of such a clause.

⁷⁴ H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Hungtington 2010, p. 526.

⁷⁵ E.g., Final Award of 14 March 2003 in the UNCITRAL Arbitration, *CME Czech Republic B.V. vs. The Czech Republic*, p. 18 para. 42: “the parties proposed to apply the IBA Rules”, and p. 18 para. 43: “the Tribunal decided, to the extent appropriate, to apply the IBA Rules [on the Taking of Evidence in International Commercial Arbitration]”.

arbitral tribunal in consultation with the parties.⁷⁶ The IBA Evidence Rules may be incorporated by a general reference or, alternatively, by repeating the substance of the Rules, or selected provisions of the Rules, in the body of the tribunal's procedural order.⁷⁷

4.2 How Do the Parties Use the IBA Evidence Rules?

In most cases, parties (and arbitral tribunals) will not adopt the IBA Evidence Rules outright, but will instead use them merely as "guidelines for", "principles to inform" or as "guidance for" its decisions.⁷⁸ Parties (and arbitral tribunals) seem to fear a strict application of the IBA Evidence Rules. They prefer to use them as hortatory guidance. According to HANOTIAU, "[i]t seems indeed that in the United States procedures to set aside an award have been initiated in some cases on the ground that the arbitrators did not correctly or fully apply the IBA Rules that the parties adopted at the beginning of the arbitration. It is therefore better to refer to them only as a source of guidance".⁷⁹ However, despite extensive case law research, this assertion could not be verified.

One has the impression that everyone wants to cite the IBA Evidence Rules when it suits them, but few want them to apply as strict rules.⁸⁰ Parties regularly accuse each other of too broadly formulated document production requests ("fishing expeditions") when commenting on the other party's document production requests, while they have themselves submitted equally broad requests.

⁷⁶ See also H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Huntington 2010, p. 526.

⁷⁷ G. B. BORN, *International Commercial Arbitration*, Vol. II, Austin/Boston/Chicago/New York/The Netherlands 2009, p. 1794, footnote 277.

⁷⁸ G. B. BORN, *International Commercial Arbitration*, Vol. II, Austin/Boston/Chicago/New York/The Netherlands 2009, p. 1794; W. W. PARK, *Arbitration of International Business Disputes*, Oxford 2006, p. 47, footnote 276; B. HANOTIAU, *Document Production in International Arbitration: A Tentative Definition of 'Best Practice'*, ICC Bulletin, 2006 Special Supplement, Document Production in International Arbitration, p. 114. See, e.g., Zürich Chamber of Commerce, Award of 7 August 2006, ASA Bulletin No. 4 (2007), p. 758: "the IBA Rules of Evidence, 1 June 1999, are to be used as a guide".

⁷⁹ B. HANOTIAU, *Document Production in International Arbitration: A Tentative Definition of 'Best Practice'*, ICC Bulletin, 2006 Special Supplement, Document Production in International Arbitration, p. 114.

⁸⁰ N. ULMER, *The Cost Conundrum*, *Arbitration International* Vol. 26, No. 2 (2010) p. 229 et seq.

4.3 Does the Arbitral Tribunal Have the Power to Apply the IBA Evidence Rules against the Parties' Will?

Does the arbitral tribunal have the power (in the exercise of its discretion over evidence-taking) to adopt the IBA Evidence Rules and direct the parties to proceed in accordance with them? Some commentators answer this question affirmatively.⁸¹ However, this opinion does not find any basis in text of the IBA Evidence Rules itself. First, the new Article 2.1 of the 2010 IBA Evidence Rules provides for a mandatory consultation between the arbitral tribunal and the parties "at the earliest appropriate time in the proceedings". Second, in many instances, the arbitrators have to apply the IBA Evidence Rules "after consultation with the parties",⁸² so that the parties keep their say.⁸³

4.4 Can the IBA Evidence Rules Apply in the Absence of an Agreement between the Parties or a Decision of the Arbitral Tribunal?

Even when the parties have not agreed to, or when the arbitral tribunal has not decided to, apply the IBA Evidence Rules, they remain guidelines for the parties and the arbitral tribunals. They can still "use them as guidelines in developing their own procedures".⁸⁴ In this way the IBA Evidence Rules have indeed been frequently invoked by one party or by the arbitrators as authoritative.⁸⁵ The widespread use of the IBA Evidence Rules as general guidelines in evidentiary matters, even in non-commercial arbitrations, is illustrated by the following citation from the ICSID award of 12 October 2005 in *Noble Ventures vs. Romania*: the IBA Rules "though not directly applicable in this case and primarily provided for use in the field of commercial arbitrations, can be considered (particularly in Articles 3 and 9) as giving indications of

⁸¹ E.g., G. B. BORN, *International Commercial Arbitration*, Vol. II, Austin/Boston/Chicago/New York/The Netherlands 2009, p. 1794.

⁸² Article 3.7, Article 3.8, Article 3.14, Article 6.1 («after consulting with the Parties») and Article 7.

⁸³ H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Hungtington 2010, p. 527.

⁸⁴ Preamble, section 2, first sentence.

⁸⁵ See, e.g., for the decision on preliminary issues of 23 June 2008 in the ICSID Case No. ARB/06/8, *Libananco Holdings Co. Limited and Republic of Turkey*, para. 30c; Partial Award Tribunal of the Bank for International Settlements, 22 November 2002, *Reineccius v. Bank for International Settlements*, para. 38; Award on Jurisdiction of 28 January 2008 in the NAFTA and UNCITRAL Case Award, *The Canadian Cattlemen for Fair Trade v. United States of America*, p. 28.

what may be relevant criteria for what documents may be requested and ordered to be produced, in ICSID procedures between investors and host States”⁸⁶.

The IBA Evidence Rules therefore created standards for the future. A certain creeping normalization in the field of taking of evidence is undeniable.⁸⁷ However, with respect to Switzerland, the Swiss Federal Supreme Court has not yet confirmed this tendency. In an unpublished decision of 2004,⁸⁸ the Swiss Federal Supreme Court refused to take the IBA Evidence Rules into account and stated that they are not applicable to the case at hand, which was exclusively governed by the ICC Rules. In a later decision of 2007,⁸⁹ the Court held that a violation of the IBA Evidence Rules is not grounds for setting aside according to Article 190(2) of the Swiss Private International Law Act (PILA). This restrictive approach is in contrast to the Swiss Federal Supreme Court’s attitude towards the IBA Guidelines on Conflicts of Interest in International Arbitration:

In order to verify the independence of their arbitrators, Parties may also refer to the directives of the IBA Guidelines on Conflicts of Interest in International Arbitration, approved on 22 May 2004. [...] Such guidelines admittedly have no statutory value [...]; yet they are a precious instrument, capable of contributing to harmonization and unification of the standards applied in the field of international arbitration to dispose of conflicts of interest [...] and such an instrument should not fail to influence the practice of arbitral institutions and tribunals.⁹⁰

⁸⁶ Award of 5 October 2005 in the ICSID Case No. ARB/01/11, *Noble Ventures, Inc. and Romania*, 12 October 2005, para. 20. This ICSID case, as the other ICSID cases mention in FN 85, was decided in 2005. Therefore the 1999 version of the IBA Evidence Rules applied whose title only referred to “International Commercial Arbitration” (see above, chapter 2.2).

⁸⁷ H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Hungtington 2010, p. 527.

⁸⁸ Decision of the Swiss Federal Supreme Court 4P.196/2003 of 7 January 2004, available at <http://www.bger.ch> (30.08.2012).

⁸⁹ Decision of the Swiss Federal Supreme Court 4A_2/2007 of 28 March 2007, available at <http://www.bger.ch> (30.08.2012).

⁹⁰ Decision of the Swiss Federal Supreme Court 4A_506/2007 of 20 March 2008, consid. 3.3.2.2, available at <http://www.bger.ch> (30.08.2012).

4.5 How Does the Arbitral Tribunal Apply the IBA Evidence Rules?

In any case, independently of whether or not the parties agreed on the application of the IBA Evidence Rules (see above, chapter 4.2), whether the arbitral tribunal unilaterally decided on their application (see above, chapter 4.3) or if the Rules apply in the absence of any agreement of the parties or formal decision by the arbitral tribunal (see above, chapter 4.4), the Rules leave arbitrators considerable discretion. The IBA Evidence Rules grant such discretionary power by referring to “exceptional circumstances”,⁹¹ by recognizing the arbitrators’ discretion to determine⁹² or their power to use appropriateness as a criterion⁹³. The arbitral tribunal has overall discretion to determine “the admissibility, relevance, materiality and weight of evidence”,⁹⁴ i.e., what evidence is all about.⁹⁵

Sometimes, the arbitral tribunal will have to interpret the 2010 IBA Evidence Rules. Article 1.4 of the 2010 IBA Evidence Rules gives some guidance: “In the event of any dispute regarding the meaning of the IBA Rules of Evidence, the Arbitral Tribunal shall interpret them according to their purpose and the manner most appropriate for the particular arbitration”. This means, according to the IBA Review Subcommittee 2010, in greatest possible compliance with the general principles set forth in the Preamble,⁹⁶ i.e. efficiency, cost-effectiveness and fairness (Preamble, section 1), as well as flexibility (Preamble, section 2) and good faith (Preamble, section 3). This sounds convincing in theory, but might be difficult in practice. Article 3.3c of the 2010 IBA Evidence Rules permits arbitrators to deny requests for document production because it would be unreasonably burdensome for the requesting party to produce such documents. The vague notion of “unreasonable burden” is a concept that needs to be interpreted and which is likely to vary from one legal culture to another. It would be surprising if the evaluation of what production is burdensome did not

⁹¹ Article 3.8, Article 4.7 and Article 5.5.

⁹² Article 3.9 and Article 5.4.

⁹³ Article 1.4, Article 1.5, Article 2.1, Article 2.3, Article 2.3(b), Article 3.9, Article 3.10, Article 4.9, Article 6.3, Article 7, Article 8.4 and Article 9.4.

⁹⁴ Article 9.1.

⁹⁵ H. VAN HOUTTE, *Arbitration Guidelines: Straitjacket or Compass?*, in: K. Hobér/A. Magnusson/M. Öhrström (eds.), *Between East and West: Essays in Honour of Ulf Franke*, Hungtington 2010, p. 527.

⁹⁶ IBA Review Subcommittee 2010, Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Commercial Arbitration (available at <http://www.ibanet.org> [10.09.2012]), Article 1, section 3.

vary dramatically when seen through the eyes of a Swiss *avocat* and a New York litigator.⁹⁷

State courts are unlikely to offer their opinion on the interpretation of the IBA Evidence Rules, since the taking of evidence falls within the discretion of the arbitrators and is thus beyond the scope of setting aside proceedings.⁹⁸ The absence of binding or even persuasive authority entails an increase in the costs of arbitration, since parties may be more likely to make requests to their panels for interim rulings. This may increase the costs of arbitration, particularly in arbitrations involving participants from different legal cultures.⁹⁹

5. IMPACT OF THE IBA EVIDENCE RULES

Statistical data shows that almost two thirds of arbitration practitioners use the IBA Evidence Rules in nearly every arbitration, while almost four fifths use them in some arbitrations (see above, chapter 4.1). This very wide use of the IBA Evidence Rules reflects the perfect balance these Rules have achieved between the Common Law and the Civil Law traditions. The fair compromise they express makes them acceptable for arbitration practitioners coming from the two most important legal traditions in the world. This is why they enhance predictability and efficiency in the taking of evidence in international arbitration on a global scale, in particular also for less experienced parties (see above, chapter 3.1).

It is thus imaginable that the IBA Evidence Rules merely represent a step in a more general development towards an international *lex evidentiæ*. Such an international law of evidence could extend to issues currently not yet covered by the 2010 IBA Evidence Rules, such as the admissibility, relevance, materiality and weight of evidence (see Article 9.1 of the 2010 IBA Evidence Rules) and the taking of fact and expert witnesses (sequence, time management, opening and closing statements, presence in the hearing room of other witnesses, witness conferencing, etc.). Today, all these issues and others, such as the issue of confidentiality, have to be discussed and possibly negotiated between the parties and the arbitral tribunal. Preferably, such discussions and negotiations take place at the beginning of the proceedings (see Article 2 of the 2010 IBA Evidence

⁹⁷ W. W. PARK, *Arbitration of International Business Disputes*, Oxford 2006, p. 47.

⁹⁸ See, e.g., for the case law rendered in this sense by the Swiss Federal Supreme Court, C. MÜLLER, *Swiss Case Law in International Arbitration*, 2nd ed., Geneva/Zurich/Basel 2010, p. 233 and 235 et seq.

⁹⁹ S. I. STRONG/J. J. DRIES, *Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?*, *Arbitration International*, Vol. 21, No. 3 (2005), pp. 301 et seq.

Rules). Their result is then contained in specific procedural rules issued by the sole arbitrator respectively the chairperson of the arbitral tribunal. However, detailed issues are often clarified only shortly before the evidentiary hearing, on the occasion of a pre-hearing (telephone) conference.

A more comprehensive international *lex evidentiaria* would limit such discussions and negotiations and thereby further enhance predictability and efficiency in the taking of evidence. However, the price to pay would consist in a loss of flexibility. Such a further crystallization or “calcification” of the evidence taking would put in jeopardy not only the suitability of arbitration for a given dispute, but the success of arbitration as a whole as an alternative dispute resolution method. Arbitration would in fact lose one of its main advantages over state court proceedings (see below, chapter 6).

6. CONCLUSION

The IBA Evidence Rules had, and still have, a great impact on evidentiary proceedings in international arbitration. This is mainly due to the fact that the IBA Evidence Rules succeeded in striking a fair compromise between Common Law and Civil Law evidentiary devices.

However, the IBA Evidence Rules do not cover all issues related to the taking of evidence. Important issues, such as the evaluation of evidence, organizational matters relating to the taking of fact witness testimony, hearsay and confidentiality must still be clarified by the parties and the arbitral tribunal “at the earliest appropriate time in the proceedings” (Article 2.1 of the 2010 IBA Evidence Rules).

The IBA Evidence Rules rarely apply because the parties have already agreed on their use in their arbitration agreement. The parties more frequently agree on their use in the procedural framework, either with or without the tribunal’s encouragement to do so, typically in the Terms of Reference in ICC arbitrations or in Specific Procedural Rules. In most cases, arbitral tribunals will not adopt the IBA Evidence Rules outright, but will instead use them merely as “guidance” for its decisions. Even in the absence of a parties’ agreement or a tribunal’s decision, the IBA Evidence Rules remain guidelines for the parties and the arbitral tribunals. The IBA Evidence Rules have therefore created standards for the future. A certain creeping normalization in the field of taking of evidence is undeniable.

This is not to say that the IBA Evidence Rules are becoming a straitjacket for parties and arbitrators. Only the mentally ill wear straitjackets. The IBA Evidence Rules are rather a compass that helps

parties and arbitral tribunals to find their way through evidentiary problems. When arbitrators face an evidentiary problem, they will inevitably have a look at the IBA Evidence Rules. They will do so not only when the Terms of Reference or the Specific Procedural Rules empower them to “seek guidance in” or “take into account” the IBA Evidence Rules. Parties should therefore make use of the enormous flexibility and freedom of arbitration.

Counsel must be perfectly aware of the content and the practical impact of the IBA Evidence Rules in any given proceedings. Even though these rules reflect international best practice in the taking of evidence, they may not be the best solution for all arbitrations, be it for tactical or other reasons. In such a case, parties must prevent the automatic application of the Rules by clarifying the issue at the outset of the proceedings.

Arbitrators have a duty to assist the parties in this search for tailor-made evidentiary proceedings. They should refrain from using their standard Terms of Reference and their standard Specific Procedural Rules for all their different arbitrations. They should suggest drafts that specifically take into account the needs of the case at hand.

This does of course not prevent the parties from using the IBA Evidence Rules as a compass for the drafting of their own evidentiary rules. Section 2 of the Preamble of the 2010 IBA Evidence Rules underlines this:

Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunal are free to adapt them to the particular circumstances of each arbitration.

This is probably the most important sentence in the entire text of the IBA Evidence Rules. Every counsel and arbitrator should remember this sentence when starting an arbitration case. In fact it is not only the liberty of the parties and the arbitrators in a given arbitration that is at stake. It is the very success of arbitration as a dispute resolution mechanism. If arbitration as a whole is put into more and more straitjackets, it will lose its attractiveness and market shares in favor of more flexible ADR methods.

