

The impact of IBA guidelines and rules on the search for the truth in arbitration

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*Nous dirons les choses au fur et à mesure que nous les
verrons et que nous saurons. Et ce qui doit rester obscur le sera malgré nous.
Jules Supervielle, L'Enfant de la haute mer*

1 The topic of this year's CEPANI/NAI event is "The Search for the Truth in Arbitration". No participant in an international arbitration, be it the parties, their counsel or the arbitrators, can ignore the fact that the truth plays an important role in resolving the dispute that is made subject to arbitration. However, finding the objective truth in and of itself is not the main purpose of an arbitration (or court litigation). The main purpose is for the arbitrators to deliver an accurate award that rests on a reasonable view of what happened, as well as what the law says. (*1) Procedural rules do not prescribe how the objective truth should be found but provide safeguards for finding the truth.

2 Arbitration is known for its procedural flexibility. Arbitral tribunals typically have more discretionary power in applying procedural rules than State courts do. As such, "soft law" is often explicitly accepted to serve as guidance in international arbitration. In this chapter, we will discuss the impact of "soft law" on finding the truth in international arbitration.

(*1) W.W. PARK, "Truth-Seeking in International arbitration" in M. WIRTH, C. ROUVINEZ and J. KNOLL (eds.), *The Search for Truth in Arbitration, ASA Special Series No. 35*, New York, *JurisNet* 2011, 1-4.

I. Rules and guidelines – their origins and scope

3 Over the years, the International Bar Association and its Arbitration Committee have produced a number of guidelines and rules with regard to the practice of international arbitration. These guidelines and rules have considerable authority and are very often adopted by parties, counsel and arbitrators, most notably as they are considered to be a high-quality set of rules, endorsed by counsel with different backgrounds, and comprising a good compromise between a civil law and a common law approach. (*2)

For the purpose of this chapter, we will focus on two IBA documents that are particularly relevant to the search for the truth in arbitration: the 2010 IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Evidence Rules”) and the 2013 IBA Guidelines on Party Representation in International Arbitration (the “IBA Party Representation Guidelines”). (*3) The IBA Evidence Rules are accompanied by a commentary prepared by its drafters (*4); the IBA Party Representation Guidelines contain comments in the text.

4 Rules and guidelines have no binding force by themselves. They do not constitute laws or regulations – they are so-called “soft law”. They only acquire authority when, and to the extent that, parties or arbitral tribunals decide that they should. (*5)

However, it is important to note that the IBA’s “soft law” is, at least on occasion, applied by national courts. By way of example, courts in the Netherlands have applied

(*2) A first version, issued in 1983, of the rules on the taking of evidence appears to have won little following in the arbitral practice, and success only came with the 1999 revision of these rules. See S. SATTAR, “Document Production and the 2010 IBA Rules on the Taking of Evidence in International Arbitration: A Commentary”, *Int’l Arb. L. R.* 2011, 210; S.I. STRONG and J.J. DRIES, “Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?”, *Arb. Int’l* 2005, 301.

(*3) Available at www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. The third essential contribution of the IBA to a harmonisation of the rules of the game in international arbitration, the Guidelines on Conflicts of Interest in International Arbitration, was most recently revised in 2014.

(*4) 1999 IBA WORKING PARTY AND 2010 IBA RULES OF EVIDENCE REVIEW SUBCOMMITTEE, “Commentary on the Revised Text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration”, *DRI* 2011, 45. A detailed commentary is also published in P. ASHFORD, *The IBA Rules on the Taking of Evidence in International Arbitration: A Guide*, Cambridge University Press, 2013. Issue 5 of 2010 of the “*International Arbitration Law Review*” is dedicated to the IBA Evidence Rules and contains a dozen articles that discuss various aspects of the IBA Evidence Rules. Issue 1 of 2016 of the *ICC Dispute Resolution Bulletin* contains a set of annotated “Extracts from ICC Case Materials on the Taking of Evidence with References to the IBA Rules” at pp. 127 to 176.

(*5) J. WAINCYMER, “The IBA Guidelines on Party Representation in International Arbitration and the New LCIA Rules and Annex”, *Arb. Int’l* 2014, 513, at 530; T. CUMMINS, “The IBA Guidelines on Party Representation in International Arbitration – Levelling the Playing Field?”, *Arb. Int’l* 2014, 429, at 446; G. STEPHENS-CHU and J. SPINELLI, “The Gathering and Taking of Evidence Under the IBA Guidelines on Party Representation in International Arbitration: Civil and Common Law Perspectives”, *DRI* 2014, 37, at 49.

the IBA Guidelines on Conflicts of Interest in setting aside proceedings to assess the impartiality and independence of an arbitral tribunal. (*6)

5 The IBA Evidence Rules, in their foreword, suggest that parties add the following to their arbitration clauses:

[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of the arbitration].

The IBA Evidence Rules also offer the alternative of using them as guidelines. Section 2 of their preamble states:

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.

In practice, the IBA Evidence Rules are rarely adopted as a contractually binding instrument. Rather, arbitral tribunals and parties generally provide – in the terms of reference or in a procedural order – that the IBA Evidence Rules will serve as “guidance” or as “inspiration”. The decision to follow this approach is often dictated by a desire to maintain the flexibility of the arbitration, and by prudence against exposing the award to a risk of challenge on the grounds that “the arbitral procedure was not in accordance with the agreement of the parties” (*7) if the tribunal then steers away from a strict application of the IBA Evidence Rules. (*8)

(*6) Dutch Supreme Court 15 June 2018, ECLI:NL:HR:2018:914, *Bursa Büyükşehir Belediyesi/Güriş İnşaat Ve Mühendislik A.Ş. a.o.*, par. 3.17-3.18 (following the conclusion of the Advocate-General dated 23 March 2018, ECLI:NL:PHR:2018:263, par. 3.33-3.42); Court of Appeal of the Hague 6 December 2012, *Bursa Büyükşehir Belediyesi/Güriş İnşaat Ve Mühendislik A.Ş. a.o.*, ECLI:GHDA:2016:4377, par. 8.4-8.6; District Court of Rotterdam 11 May 2011, *Bureau Veritas-Inspection-Valuation Assessment and Control-BIVAC B.V./X*, ECLI:RBROT:2011:BQ6204, par. 4.6-4.7.

(*7) The expression appears as grounds for setting aside awards in Article 5(1)(d) of the New York Convention and in Article 34(2)(a)(iv) of the UNCITRAL Model Law. Article 1721, § 1, a, v) of the Belgian Judicial Code determines it to be grounds for setting aside as well, unless the non-compliance has had no effect on the award. Under Articles 1065(e) and 1076(b) of the Dutch Code of Civil Procedure, failure to conduct the arbitral procedure in accordance with the agreement of the parties is only grounds for setting aside an award if the manner in which the arbitral award came about was contrary to public policy (which is a notably high standard).

(*8) This rationale is set out in an ICC Interim Award on Jurisdiction of December 2014, *ICC ICArb.Bull.* 2016/1, 129.

The IBA Party Representation Guidelines are expressly formulated to operate as part of the parties' agreement. Its preamble indicates, somewhat counterintuitively, that "The use of the term guidelines rather than rules is intended to highlight their contractual nature". Guideline 1 states:

The Guidelines shall apply where and to the extent that the Parties have so agreed, or the Arbitral Tribunal, after consultation with the Parties, wishes to rely upon them after having determined that it has the authority to rule on matters of Party representation to ensure the integrity and fairness of the arbitral proceedings.

Some critical views have been held on the usefulness of the many attempts to codify, in the form of guidelines or other rules or notes, good practices in arbitration. Michael Schneider, in particular, argues that the IBA Evidence Rules lead to "ever growing numbers of procedural motions" and that the IBA Guidelines on Conflicts of Interest "have replaced independent thinking". (*9) A different view is expressed for instance by Alexis Mourre, who believes that "Codification of arbitration law is a healthy phenomenon. It is an evolution towards more predictability and more consistency of a global system of justice that cannot be left to local idiosyncrasies, and which needs to reach a common framework that is acceptable to all players". (*10) The debate is appropriately described by Jeffrey Waincymer as "a subset of a perennial problem in legal regulation when we aim for an appropriate trade-off between certainty and flexibility". (*11) Either way, the fact is that the IBA rules and guidelines have gained wide acceptance and are here to stay. In the words of one of the opponents of the guidelines, "Whatever one thinks of the IBA Guidelines: The genie is out of the bottle". (*12)

(*9) M.E. SCHNEIDER, "President's Message: Yet another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation", *ASA Bull.* 2013, 497; M.E. SCHNEIDER, "The Essential Guidelines for the Preparation of Guidelines, Directives, Notes, Protocols and Other Methods Intended to Help International Arbitration Practitioners to Avoid the Need for Independent Thinking and to Promote the Transformation of Errors into 'Best Practices'", *Liber Amicorum en l'honneur de Serge Lazareff*, Paris, Pedone, 2011, 563. See also U. DRAETTA, "The Transnational Procedural Rules for Arbitration and the Risks of Overregulation and Bureaucratization", *ASA Bull.* 2015, 327, at 338: "it is questionable whether the IBA Rules on document production end up furthering an efficient and economical development of the arbitration proceedings. On the contrary, they may produce inefficiencies, delays and unnecessary costs. [...] the most perverse effect of the IBA Rules on document production seems to be that they imply that document production is a regular part of an arbitration proceeding, rather than the exception".

(*10) A. MOURRE, "About Procedural Soft Law, the IBA Guidelines on Party Representation and the Future of Arbitration", *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer*, Alphen aan den Rijn, Kluwer Law International, 2017, 239, at 241.

(*11) J. WAINCYMER, *o.c.*, 528.

(*12) F. DASSER, "Equality of Arms in International Arbitration: Do Rules and Guidelines Level the Playing Field and Properly Regulate Conduct? – Can They? Will They? Should They? The Example of the IBA Guidelines on Party Representation" in A. MENAKER (ed.), *International Arbitration and the Rule of Law: Contribution and Conformity, ICCA Congress Series*, Vol. 19, Alphen aan den Rijn, Kluwer Law International, 2017, 634, at 640.

In 2018, a new codification of evidentiary rules was adopted in the form of the Rules on the Efficient Conduct of Proceedings in International Arbitration (the “Prague Rules”), signed on 14 December 2018. (*13)

The Prague Rules initiative is based on the understanding that arbitration proceedings are generally too costly, lengthy and inefficient. (*14) The intended purpose of the Prague Rules is to increase the efficiency of arbitral proceedings by encouraging that tribunals “take a more active role in managing the proceedings (as is traditionally done in many civil law countries)”. (*15)

Key provisions in the Prague Rules not found in the IBA Rules include:

- (a) that the tribunal is encouraged to express its preliminary views on the parties’ positions at the case management conference (*16);
- (b) an encouragement to avoid any document production, excepting production requests for specific documents (*17);
- (c) having the arbitral tribunal control which witnesses shall be called for examination (*18); and
- (d) that, although evidence by party-appointed experts is allowed, tribunal-appointed experts are the norm. (*19)

As opposed to civil law systems, a common law style of fact-finding is generally more adversarial in nature, leaving the process of gathering evidence and testing witnesses and experts primarily to parties’ counsel. (*20)

In comparison to the IBA Evidence Rules, the more “inquisitorial” Prague Rules are geared towards a resolution of disputes that specifically excludes an extensive common law style fact-finding process. Under the Prague Rules, the ability of the parties and their counsel to shape the truth-searching process seems more limited than under the IBA Evidence Rules.

Based on a 2016 survey conducted by the International Bar Association, the IBA Evidence Rules remain highly popular, even when they are not formally declared binding. (*21) In particular, the IBA Evidence Rules’ provisions on document production (Art. 3) and admissibility of evidence (Art. 9) are frequently cited. (*22)

(*13) Rules on the Efficient Conduct of Proceedings in International Arbitration (Prague Rules), accessible at praguerules.com.

(*14) DUARTE G. HENRIQUES, “The Prague Rules: A Regression or A Step Towards More Efficiency?”, *New York Dispute Resolution Lawyer*, Vol. 12 No. 1, 2019 (forthcoming).

(*15) Prague Rules, Preamble.

(*16) Art. 2.4 Prague Rules.

(*17) Art. 4.2 Prague Rules.

(*18) Art. 5.2 Prague Rules.

(*19) Art. 6 Prague Rules.

(*20) W.W. PARK, “Truth-Seeking in International Arbitration” in M. WIRTH, C. ROUVINEZ and J. KNOLL (eds.), *The Search for Truth in Arbitration*, ASA Special Series No. 35, New York, JurisNet, 2011, 12-17.

(*21) IBA ARBITRATION GUIDELINES AND RULES SUBCOMMITTEE, “Report on the reception of the IBA arbitration soft law products”, September 2016, par. 19-21.

(*22) IBA ARBITRATION GUIDELINES AND RULES SUBCOMMITTEE, “Report on the reception of the IBA arbitration soft law products”, September 2016, par. 44-46.

It is at this stage too early to judge the success of the Prague Rules as an alternative (or addition) to the IBA Evidence Rules, given that the Prague Rules were only adopted in December 2018.

II. Counsel's duty of candour and honesty

6 The IBA Party Representation Guidelines impose on counsel an obligation not to knowingly mislead the tribunal as to matters of fact. This is often described as a duty of candour or a duty of honesty. (*23) It may sound like a platitude – and hopefully it is. The principle is of fundamental importance, however, when it comes to ensuring that arbitral (or judicial, for that matter) proceedings have a fair chance of finding the truth. In order to appreciate how essential this is, one must only imagine an arbitration in a world without a duty of honesty where lawyers would routinely lie to tribunals and tell with inscrutable poker faces stories that they would know to be untrue.

Guideline 9 states that “A Party Representative should not make any knowingly false submission of fact to the Arbitral Tribunal”. In addition, Guideline 11 notes that “A Party Representative should not submit Witness or Expert evidence that he or she knows to be false” and Guideline 23 adds that “A Party Representative should not invite or encourage a Witness to give false evidence”. So far this is uncontroversial and – one hopes – goes without saying.

The duty of candour and honesty applies to issues of fact. There is no similar principle with regard to legal arguments. In this respect, the IBA Party Representation Guidelines merely indicate that “With respect to legal submissions to the Tribunal, a Party Representative may argue any construction of a law, a contract, a treaty or any authority that he or she believes is reasonable”. (*24) The submission of far-fetched or ill-considered legal theories may do no good to counsel's credibility, but it is not prohibited by the IBA Party Representation Guidelines.

7 Delicate issues arise when it comes to remediation. What should counsel do if he becomes aware that a statement of fact that he made in good faith, believing it to be correct, was actually untrue? What should she do if she learns that a witness statement she has already filed with the tribunal was deliberately false or misleading?

The IBA Party Representation Guidelines set out a duty to correct errors – within limits. The subject was widely debated among the authors who sought to find a balanced solution acceptable in different cultural traditions and legal systems. (*25) There certainly is no platitude here, and the duty to correct errors must be assessed subject

(*23) See, in the IBA Party Representation Guidelines, the Comments to Guidelines 9-11.

(*24) *Ibid.*

(*25) A. MOURRE and E. ZULETA, “The IBA Guidelines on Party Representation in International Arbitration”, *DRI* 2013, 135, at 139. T. CUMMINS, *o.c.*, 450, notes that the IBA Party Representation Guidelines reflect in this respect a “tension between ethics and appointer loyalty”.

to sometimes conflicting rules of professional conduct applicable to counsel in their respective jurisdictions and subject to considerations of confidentiality and privilege. Guidelines 10 and 11 therefore provide as follows:

10. In the event that a Party Representative learns that he or she previously made a false submission of fact to the Arbitral Tribunal, the Party Representative should, subject to countervailing considerations of confidentiality and privilege, promptly correct such submission.

11. A Party Representative should not submit Witness or Expert evidence that he or she knows to be false. If a Witness or Expert intends to present or presents evidence that a Party Representative knows or later discovers to be false, such Party Representative should promptly advise the Party whom he or she represents of the necessity of taking remedial measures and of the consequences of failing to do so. Depending upon the circumstances, and subject to countervailing considerations of confidentiality and privilege, the Party Representative should promptly take remedial measures, which may include one or more of the following:

- (a) advise the Witness or Expert to testify truthfully;*
- (b) take reasonable steps to deter the Witness or Expert from submitting false evidence;*
- (c) urge the Witness or Expert to correct or withdraw the false evidence;*
- (d) correct or withdraw the false evidence;*
- (e) withdraw as Party Representative if the circumstances so warrant.*

The suggested remedial measures cover the whole range, from the most benign (advising the witness to tell the truth) to the most drastic (resigning from the case). The IBA Party Representation Guidelines do not impose one ahead of another and this indecisiveness shows how difficult the question can be in practice.

The comments to the IBA Party Representation Guidelines make it clear that the duty also applies to newly appointed counsel who discover a false submission of fact made by a predecessor. Again, the duty to correct errors applies only to matters of fact and not to legal arguments.

8 The IBA Evidence Rules require each party to act in good faith in connection with the taking of evidence. Paragraph 3 of its preamble states:

The taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely.

Article 9.7 of the IBA Evidence Rules adds that failure to conduct oneself in good faith may be taken into account by the tribunal when allocating the costs of the arbitration. Other than in respect of costs, the concrete effect of the duty of good faith under the IBA Evidence Rules is probably quite limited. A commentator notes, in particular, that this duty “should not be interpreted to impose affirmative duties beyond those expressly imposed by the IBA Rules”, does not “require voluntary submission of documents that would be adverse to the party’s case” and does not “give rise to an affirmative duty to preserve evidence or prevent destruction of potentially relevant and material evidence once a dispute appears likely”. (*26) With regard to this last point, however, the IBA Party Representation Guidelines are more demanding – see paragraph 18 below.

III. Document production

9 Documentary evidence has a preponderant weight in most arbitrations. When it comes to searching for the truth, documents can have considerable benefits compared to testimonies: contemporaneousness with the disputed facts, inalterability, ease of access, searchability and precision. Of course, these features may not apply to all documents or in all circumstances.

However, one potential difficulty is that the necessary documents may not be in the possession of the party that bears the burden of proof, referred to as *bewijsnood* (“evidentiary distress”). (*27) Consequently, in civil law systems where claimants are expected to supply their own evidence in support of their case, claims that should, in theory, be successful on their merits may nevertheless fail or may not be pursued because of a lack of evidence: the party that bears the burden of proof is unable to demonstrate the factual truth. Common law systems attempt to alleviate this injustice by making various tools available to potential claimants, including the “discovery” of documents which is meant to give a party access to useful documents that are not in its possession but are held by its opponent – who, absent such a technique, would, of course, not spontaneously make available to a court documents that are detrimental to its position. The search for the truth is more elaborate in the common law approach, but the process comes at a cost. (*28)

(*26) A.C. KLÄSENER, “The Duty of Good Faith in the 2010 IBA Rules on the Taking of Evidence in International Arbitration”, *Int’l Arb. L. R.* 2010, 160, at 161; J. WAINCYMER, *Procedure and Evidence in International Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2012, 833. See also N.D. O’MALLEY, “Document Production Under Article 3 of the 2010 IBA Rules of Evidence”, *Int’l Arb. L. R.* 2010, 186: “failure to voluntarily (e.g. without an order from the tribunal) disclose evidence adverse to a party’s position is not a violation of the Rules”. *Contra*: G. VON SEGESSER, “The IBA Rules on the Taking of Evidence in International Arbitration: Revised version, adopted by the International Bar Association on 29 May 2010”, *ASA Bull.*, 2010, 735, 741.

(*27) W. VANDENBUSSCHE, “Omgaan met bewijsnood bij aansprakelijkheid uit onrechtmatige daad”, *RW* 2018-19, 323.

(*28) One must remember, however, that “As is the case with all comparative law questions of significance, differences are often oversimplified. Not all common law or civilian jurisdictions take the same approach. [...] At other times, suggested differences are misleadingly simplistic”: J. WAINCYMER, *o.c.* (*Procedure and Evidence ...*), 746 and 747.

International arbitration initially vacillated between the two regimes, depending primarily on the background of the arbitrators and counsel involved – with resulting frustrations on one side or the other when backgrounds were mixed. A sort of middle ground has progressively been found and is now reflected by the sections of the IBA Evidence Rules that deal with document production. As stated in their foreword, “The IBA Rules of Evidence reflect procedures in use in many different legal systems, and they may be particularly useful when the parties come from different legal cultures”. Their commentary indicates that they “contain procedures initially developed in civil law systems, in common law systems and even in international arbitration processes themselves”, and that “the question of document production was the key area in which practitioners from common law countries and civil law countries differ. The debate produced a balanced approach that became a central aspect of the IBA Rules of Evidence and has become widely accepted by both common law and civil law practitioners”. (*29) Document production, as the technique is known in the arbitral jargon, is more restricted than US-style discovery but is more intrusive than the civil law practice where, even though courts have wide-ranging powers to order a party to produce evidence that may be detrimental to its position, the reality is that they rarely exercise these powers. (*30)

10 The document production mechanics organised by the IBA Evidence Rules apply to documents in paper form as well as to electronic records such as emails. (*31) The IBA Evidence Rules define a document as “a writing, communication, picture, drawing, program or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means”.

The IBA Evidence Rules do not impose or suggest any timetable in respect of the document production process. This is left to the discretion of the arbitral tribunal. It is important in practice that the procedural timetable drawn up by the tribunal expressly provides for a defined time window – or, if appropriate, two or more time windows – during which document production may be requested. If the timing is not guided by the tribunal and if parties are left at liberty to ask for documents whenever they feel like it, the arbitral process may very quickly run out of control. Often, the document production

(*29) Commentary, *o.c.*, at 47 and 53.

(*30) Article 871 of the Belgian Judicial Code provides that the judge may order any party to produce the items of evidence in its possession (*De rechter kan niettemin aan iedere gedingvoerende partij bevelen het bewijsmateriaal dat zij bezit, over te leggen/Le juge peut néanmoins ordonner à toute partie litigante de produire les éléments de preuve dont elle dispose*); the Supreme Court consistently holds that this is at the judge’s discretion (for instance, Cass. 28 June 2012, *Pas.* 2012, 1504). Similarly, Article 843a of the Dutch Code of Civil Procedure provides that the court may order production of documents at the request of a party with a lawful interest therein, unless the documents are covered by a duty of confidentiality, there are substantial reasons not to grant the request or the proper administration of justice is sufficiently guaranteed without such production.

(*31) A. BOUCHENAKI, “The IBA Rules Lay the Ground for Solutions to Address Electronic Document Production Disputes”, *Int’l Arb. L. R.* 2010, 180; R.H. SMIT, “E-Disclosure Under the Revised IBA Rules on the Taking of Evidence in International Arbitration”, *Int’l Arb. L. R.* 2010, 201.

phase is scheduled to take place after the first round of written submissions, *i.e.* after the statement of claim and the statement of defence have been exchanged.

11 The first step in the procedural sequence set up by the IBA Evidence Rules is simple and self-evident: each party submits the documents on which it wishes to rely. This is the principle provided for in Article 3.1 of the IBA Evidence Rules. Usually, the first procedural order or the procedural timetable will provide that these documents be submitted together with the respective party's written submissions. So far, there is not much difference between the IBA Evidence Rules on the one hand and the process followed in judicial proceedings in Belgium or in the Netherlands on the other. However, in Belgian judicial proceedings the evidence files are initially exchanged between the parties only and will be delivered to the court shortly before the hearing date (*32), while in arbitration (and Dutch court proceedings) they are delivered to the tribunal together with the submission. Many arbitrators do read the submissions as they receive them and give at least a cursory look to the evidence.

12 Each party may then, pursuant to Article 3.2 of the IBA Evidence Rules, submit a "Request to Produce" to the tribunal and to the other party. Many tribunals opt to depart slightly from the IBA Evidence Rules in this respect and order that requests for production of documents must first be handled directly between counsel, without any copy to the tribunal, and that a request should only be submitted to the tribunal in relation to the – hopefully shorter – list of items that remain in contention after this co-operative phase.

The request to produce generally adopts the so-called "Redfern Schedule" format, in which parties identify documents or categories of documents and substantiate why those documents or categories should (or should not) be ordered by the tribunal to be produced. (*33)

13 Article 3.3(a) of the IBA Evidence Rules requires the requesting party to state in its request to produce "(i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents". This provision is of fundamental

(*32) Art. 736 et 756 Judicial Code.

(*33) N. BLACKABY, C. PARTASIDES *a.o.*, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford University Press, 2015, par. 6.100.

importance in that it purports to prevent fishing expeditions (*34), warehouse discovery (*35) or global enquiries. (*36) Requests for production may only concern a specifically identified document – this is limb (i) of the above provision – or a set of documents provided that their description meets the tests of narrowness and specificity – this is limb (ii). Each arbitral tribunal of course has its own yardstick to measure whether a request is sufficiently narrow and specific and it is unavoidable that variations arise in the arbitral jurisprudence, and that the arbitrators’ cultural background continues to have an influence on their assessment of these issues. By and large, however, there is a degree of consistency that positions the arbitral practice midway between broad common law-style discovery and restrictive civil law approaches. The commentary to the IBA Evidence Rules indicates that “Expansive American- or English-style discovery is generally inappropriate in international arbitration. [...] At the same time, however, it was believed that there is a general consensus, even among practitioners from civil law countries, that some level of document production is appropriate in international arbitration”. (*37)

The request to produce must include “a statement as to how the documents requested are relevant to the case and material to its outcome”, pursuant to Article 3.3(b) of the IBA Evidence Rules. Article 9.2(a), in turn, requires the arbitral tribunal to dismiss the request if it suffers from a “lack of sufficient relevance to the case or materiality to its outcome”. (*38) This is a delicate exercise for the tribunal because, at the early stage of the proceedings when document production takes place, the tribunal may not be able to determine yet whether a particular factual allegation, that the requested documents seek to prove, will or will not be relevant to its decision. Also, the tribunal will not wish to prejudge the case. Very often it will be sufficient for the requesting party to show that the documents concerned are potentially relevant and the tribunal will be happy to leave the question of actual relevance open for another day. Conversely, a tribunal that rejects a request for lack of relevance or materiality will often wish to make it clear that this is not prejudging the case and that its decision may be revisited if necessary. (*39)

(*34) Commentary, *o.c.*, 55: “The Working Party and the Subcommittee did not want to open the door to ‘fishing expeditions’. However, it was understood that some documents would be relevant and material and properly produced to the other side, but that they may not be capable of specific identification”.

(*35) The expression arose “because one party was sometimes literally given access to the other party’s warehouse full of documents and allowed to take what they wanted (subject to scrutiny by the other party’s lawyers in relation to such issues as legal professional privilege)”, according to A. REDFERN, “Documentary Disclosure in International Arbitration: The IBA Rules and the Redfern Schedule”, *International Arbitration under Review, Essays in Honour of John Beechey*, Paris, ICC, 2015, 343, at note 17.

(*36) A. REDFERN, again, gives the following example of a global enquiry that would not be tolerated under the IBA Evidence Rules: “all the company’s internal reports, including minutes of Executive Committee and Board meetings over the five years for which the project lasted”, *o.c.*, 352.

(*37) Commentary, *o.c.*, 53.

(*38) A commentator notes that “Specificity is the key means to ensure that document production in arbitration does not equate to broad-ranging common law style discovery. When allied to materiality requirements, it should ensure that only targeted requests are made and that the transaction costs of compliance are minimised”: J. WAINCYMER, *o.c.* (*Procedure and Evidence ...*), 861.

(*39) *E.g.* Procedural order of July 2010, par. 15, *ICC ICArb.Bull.* 2016/1, 129.

Under Article 3.3(c) of the IBA Evidence Rules, the request to produce must also state “that the Documents requested are not in the possession, custody or control of the requesting Party” or “why it would be unreasonably burdensome for the requesting Party to produce such Documents”; in addition, the request must explain “the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party”.

Articles 3.9 and 3.10 of the IBA Evidence Rules open the possibility to request the production of documents that are in the possession of third parties. They provide, in particular, that “the Arbitral Tribunal may [...] request any Party to use its best efforts to take [...] any step that it considers appropriate to obtain Documents from any person or organisation”. Tribunals have considered that parties can legitimately be expected to produce documents in the possession of their affiliated entities. (*40)

14 The addressee of a request to produce may object to the production of some or all of the documents requested. Article 9.2 of the IBA Evidence Rules contains the possible grounds for a refusal to produce. Paragraph (a), as mentioned above, is about insufficient relevance or materiality. Paragraph (b) protects against disclosure documents that are subject to privilege, such as those covered by the attorney–client privilege, the confidentiality of settlement negotiations or mediations and, in certain jurisdictions such as Belgium and the Netherlands, the confidentiality of lawyer-to-lawyer exchanges. Issues of privilege in an international arbitration context, where the parties and their lawyers are subject to sometimes widely divergent professional rules and have totally different expectations as to the risk of disclosure of their internal documents, can be extraordinarily difficult to unravel. The IBA Evidence Rules do not attempt to offer a solution and merely refer to “the legal or ethical rules determined by the Arbitral Tribunal to be applicable”; in Article 9.3 they list various factors that the tribunal may take into account in making its assessment, including “the need to maintain fairness and equality as between the Parties, particularly if they are subject to different legal or ethical rules”.

Paragraph (c) provides for the rejection of a request to produce in the case of an “unreasonable burden to produce the requested evidence”. In the same vein paragraph (g) calls for a rejection of the request when there are “considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling”. These two grounds leave a very broad discretion to tribunals, which are actually granted the power to apply a common sense test. One knows how subjective common sense can be but, applied with wisdom, these provisions are essential to the efficiency of the proceedings. They allow the arbitrators to bring back within sensible limits the document production process when parties or their counsel get

(*40) N.D. O'MALLEY, *o.c.*, 193; G. BORN, *International Commercial Arbitration*, Alphen aan den Rijn, Kluwer Law International, 2014, Vol. II, 2366; Final Award in ICC case 15583 of November 2010, *ICC ICArb.Bull.*, 2016/1, 139.

carried away by a will to win their case at all costs. Commenting on the new text of the IBA Evidence Rules, Christopher Newark noted that “Proportionality [...] is a sensible and helpful addition. It clearly enables tribunals to exclude evidence the value of which is not sufficient to justify the cost of its production”. (*41)

Paragraph (d) is self-evident and allows a party to escape the obligation to produce a document if it can show “with reasonable likelihood” that the document has been lost or destroyed.

Paragraphs (e) and (f) deal with confidentiality concerns, of a commercial or technical nature under (e) and of a political or institutional nature under (f). In both cases, considerations of confidentiality can justify the non-disclosure of documents in the arbitration if the tribunal considers them to be “compelling”. Again, this leaves a broad discretion to the tribunal.

Article 9.4 provides that “The Arbitral Tribunal may, where appropriate, make necessary arrangements to permit evidence to be presented or considered subject to suitable confidentiality protection”. This includes the possible appointment by the tribunal of an independent confidentiality expert who will look at the document alleged by one party to be confidential and report to the tribunal about its findings so that the tribunal does not see what it should not. (*42)

This also allows the tribunal, for instance, to order “confidentiality ring” arrangements of the same type as recently introduced in Belgian and Dutch judicial law to implement the European Trade Secrets Directive. (*43)

15 Once the arbitral tribunal has ruled on the objections and if it orders the production of documents, the parties must then comply with the order within the time frame set by the tribunal. Usually, documents are exchanged between the parties only and are not at that point submitted to the tribunal; each party will select, among the documents that it received, those that it wishes the tribunal to see and will only submit this limited selection into the record available to the tribunal. This approach can save the tribunal from being inundated with a mass of unsorted and useless papers. Sometimes all documents are produced both to the other party and to the tribunal at the same time. Article 3(4) of the IBA Evidence Rules allows both approaches, at the option of the tribunal – the default rule being that the exchange takes place between parties only.

(*41) CHR. NEWARK, “Efficient, Economical and Fair” – the Mantra of the New IBA Rules”, *Int’l Arb. L. R.*, 2010, 165, 168.

(*42) The process is regulated by Article 3(8) of the IBA Evidence Rules. See also H. VAN HOUTTE, “The Use of an Expert to Handle Document Production: IBA Rules on the Taking of Evidence (Art. 3(7))” in A.J. VAN DEN BERG (ed.), *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, Vol. 13, Alphen aan den Rijn, Kluwer Law International, 2007, 622.

(*43) Directive 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure; Article 871bis, § 2 Judicial Code, inserted by the law of 30 July 2018 on the protection of trade secrets; Dutch Code of Civil Procedure, Article 22a(3), inserted by the law of 17 October 2018 concerning the protection of trade secrets (*Wet bescherming bedrijfsgeheimen*), *Stb.* 2018, 369.

Article 3(12)(d) states that “translations of Documents shall be submitted together with the originals”. The commentary, however, clarifies that this only applies “if translations of documents are to be submitted” and that “the IBA Rules of Evidence do not govern whether translations are required in particular arbitral proceedings”. (*44) This is a point to be addressed in the terms of reference or in a procedural order.

16 The failure by a party to comply with a document production order can be sanctioned by the tribunal drawing a so-called “adverse inference” from that failure, in accordance with Article 9(5) of the IBA Evidence Rules:

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.

This is a very powerful tool in the process of searching for the truth. (*45) In a common law environment, tribunals are sometimes reluctant to use this tool unless and until various conditions are satisfied, including the existence of some corroborating *prima facie* evidence and a prior warning to the defaulting party that adverse inferences might be drawn. (*46) The civil law world appears to be more relaxed about relying on adverse inferences. A recent judgment of the Paris Court of Appeal decided that “Il ne peut donc être reproché aux arbitres aucune méconnaissance du principe de la contradiction, ni des droits de la défense” in a case where the arbitrators had relied on the IBA Evidence Rules to draw an adverse inference from a party’s failure to produce an audit report requested by the other party. (*47) It remains good practice, nevertheless, to include in orders for production of documents a standard paragraph alerting the parties that adverse inferences may follow if they do not comply.

17 The IBA Party Representation Guidelines add to the IBA Evidence Rules a set of rules of conduct that regulate the role of counsel in the document production process.

Most lawyers in international arbitration wish to behave ethically. In endeavouring to do so they quite naturally rely on the standards of good conduct that prevail in their professional environment, which is generally that of their own jurisdiction. Such a local

(*44) Commentary, *o.c.*, 59.

(*45) The recent Belgian bill on the law of evidence sets out a duty of the parties to collaborate in the taking of evidence and empowers the courts to reverse the burden of proof in exceptional circumstances where not doing so would be manifestly unreasonable (new Civil Code, Article 8.4, 5th paragraph). The explanatory memorandum states that this can apply when a party fails to collaborate in the taking of evidence (memorie van toelichting wetsontwerp houdende invoeging van Boek 8 “Bewijs” in het nieuw Burgerlijk Wetboek, *Parl. St. Kamer* 2018-19, 54-3349/001, 14-15) – in effect, this is similar to drawing an adverse inference from a party’s failure to comply with a document production order.

(*46) G. BORN, *o.c.*, Vol. II, 2393; J.K. SHARPE, “Drawing Adverse Inferences from the Non-production of Evidence”, *Arb. Int’l*, 2006, 549.

(*47) Paris 28 February 2017, Dresser-Rand Group Inc./Diana Capita I FCR, *Rev.arb.* 2017, 1060.

anchoring, however, does not work when one has to determine how counsel should conduct themselves in connection with document production: domestic litigation practices and the accompanying rules of ethics vary too widely across jurisdictions. (*48)

The IBA Party Representation Guidelines aim precisely at dealing with this disparity of approaches. Their commentary explains the rationale (*49):

Party Representatives often are unsure whether and to what extent their respective domestic standards of professional conduct apply to the process of preserving, collecting and producing documents in international arbitration. It is common for Party Representatives in the same arbitration proceeding to apply different standards. For example, one Party Representative may consider him- or her-self obligated to ensure that the Party whom he or she represents undertakes a reasonable search for, and produces, all responsive, non-privileged Documents, while another Party Representative may view Document production as the sole responsibility of the Party whom he or she represents.

18 The IBA Party Representation Guidelines in the first place import in international arbitration the “litigation hold” practice that prevails in common law jurisdictions: a party facing a prospective litigation must retain all documents that may become relevant in the litigation, and may no longer destroy or erase these documents even if their destruction would otherwise have taken place as a matter of course pursuant to the party’s document retention policies. Furthermore, counsel must push their client to comply. Guideline 12 states:

When the arbitral proceedings involve or are likely to involve Document production, a Party Representative should inform the client of the need to preserve, so far as reasonably possible, Documents, including electronic Documents that would otherwise be deleted in accordance with a Document retention policy or in the ordinary course of business, which are potentially relevant to the arbitration.

This provision is probably the most controversial part of the IBA Party Representation Guidelines because it imposes a rule that most lawyers in civil law jurisdictions – and their clients – are totally unfamiliar with and that they may regard as shooting themselves in the foot. Felix Dasser sees here an “obvious evidence of a US bias” and Michael Schneider objects that “under the guise of regulating party representation, this

(*48) See C. BENSON, “The IBA Guidelines on Party Representation: An Important Step in Overcoming the Taboo of Ethics in International Arbitration”, *Cah. arb.* 2014, 47, 48. See also G. STEPHENS-CHU and J. SPINELLI, *o.c.*, 46-48; A. MOURRE and E. ZULETA, *o.c.*, 140: “In some jurisdictions, for example, counsel may consider that he or she is the one imposed with the duty of producing the documents while in others, counsel may consider that producing documents is the exclusive responsibility of the represented party”.

(*49) See, in the IBA Party Representation Guidelines, the Comments to Guidelines 12-17.

‘guideline’ expands the scope of the obligations of the parties themselves and introduces an obligation of document preservation”. (*50) Looking at it from the perspective of a continental European counsel or party, one may or may not find such a constraint desirable – after all, it may hurt the opponent as much as oneself – but in any event it is essential to be well aware of what one is stepping into when agreeing to the application of the IBA Party Representation Guidelines.

19 The IBA Party Representation Guidelines also impose on counsel a duty to actively assist their client in complying with document production orders – counsel are not supposed to just sit back and watch. Under Guideline 15,

A Party Representative should advise the Party whom he or she represents to take, and assist such Party in taking, reasonable steps to ensure that: (i) a reasonable search is made for Documents that a Party has undertaken, or been ordered, to produce and (ii) all non-privileged, responsive Documents are produced.

The precise extent of the duty is far from clear – and the double reference to a reasonableness test (“reasonable steps to ensure that a reasonable search is made”) does not help. It would probably be unrealistic, however, to try and draft more specific guidance given the wide variety of situations that may arise.

Clearly, counsel may not “suppress or conceal, or advise a Party to suppress or conceal, Documents” that should be produced. (*51) A delicate situation can arise when counsel learn that their client has infringed. In that case, Guideline 17 does not go further than the somewhat ineffective requirement that counsel “should advise the Party whom he or she represents of the necessity of producing the Document and the consequences of failing to do so”.

20 It is worth noting, eventually, that neither the IBA Evidence Rules nor the IBA Party Representation Guidelines address the difficult question of the admissibility of improperly obtained evidence. (*52) The arbitral tribunal is on its own in this respect.

IV. Witnesses and experts

21 Reliance on witnesses by State courts varies considerably across jurisdictions. Common law courts use them extensively, while civil law courts, when dealing with civil and commercial disputes, rarely bother to hear witnesses. In common law jurisdictions, witnesses face examination and cross-examination by counsel; civil law courts,

(*50) F. DASSER, *o.c.*, 654; M.E. SCHNEIDER, *o.c.* (“Yet another Opportunity ...”), 498.

(*51) Guideline 16.

(*52) T. CUMMINS, *o.c.*, 454.

on the few occasions when they do hear witnesses, run the show themselves and take the lead in asking the questions.

International arbitration is not always uniform in this respect, but generally it tends to follow a harmonised practice which has been codified to a large extent by the IBA Evidence Rules: witnesses are often heard, they are expected to provide witness statements in advance of their oral testimony, there is little direct examination and counsel do most of the questioning.

22 The IBA Evidence Rules do not make it mandatory to hear witnesses in every arbitration but they clearly assume that this will generally be done. Article 2 of the IBA Evidence Rules encourages the tribunal to consult the parties at an early stage of the proceedings about evidentiary issues. The consultation is expected to address, if appropriate, “the preparation and submission of Witness Statements” and “the taking of oral testimony at any Evidentiary Hearing” (*53) – this focuses on the “how” more than on the “whether”. The commentary confirms that “the facts of the case are often established through witnesses”. (*54)

If a party to the proceedings is an individual, he or she may provide a witness statement and may be heard as a witness, with the consequence that he or she will then be submitted to cross-examination by opposing counsel. More frequently, officers or employees of the parties will appear as witnesses. This practice is reflected in Article 4.2 of the IBA Evidence Rules: “Any person may present evidence as a witness, including a Party or a Party’s officer, employee or other representative”.

In Belgium and the Netherlands, witness testimony by anyone is allowed and its weight and credibility is freely assessed by the court. (*55) (*56) However, when a party or party representative acts as a witness, the evidentiary value of its statements will often be limited. (*57)

23 It is customary in arbitration that witnesses first provide a written version of the testimony that they are prepared to give orally. These are the “witness statements”. Parties are generally expected to submit the written statements of the witnesses on whom they wish to rely at the same time as their documentary evidence. When proceedings adopt the “submissions” format – this is systematically the preferred route in Belgium and in the Netherlands – the witness statements must be filed at the same time as the submissions. When parties or their counsel prefer the “pleadings” format – this is more prevalent in London-seated arbitrations – witness statements are provided at a later

(*53) Art. 2.2(a) and (b) IBA Evidence Rules.

(*54) Commentary, *o.c.*, 61.

(*55) Art. 1700, § 4 Judicial Code: “Het scheidsgerecht [...] kan ieder persoon verhoren/Le tribunal arbitral [...] peut entendre toute personne”.

(*56) As confirmed most recently by the Dutch Supreme Court on 23 December 2016, ECLI:NL:HR:2016:2986, *X/Stichting Continuïteit SWW II a.o.*, NJ 2017/24; see also *Asser Procesrecht/Asser* 3 2017/174.

(*57) Art. 164(2) of the Dutch Code of Civil Procedure.

time; pleadings are filed first, then documentary evidence, and only then witness statements. (*58)

Article 4.5 of the IBA Evidence Rules prescribes the standard content of a witness statement. His or her identification details should obviously be mentioned and should include a description of “his or her present and past relationship (if any) with any of the Parties” (paragraph (a)); given that officers and employees of a party may act as witnesses, this item of information is essential. Many arbitrators like to add a requirement that a photograph of the witness be attached; when too many witnesses have been heard or too many weeks have passed between the evidentiary hearing and the drafting of the award, this may sometimes be necessary for the arbitrators still to be able to put a face to a name or to a transcript. Paragraph (b) demands “a full and detailed description of the facts” together with – and this is sometimes overlooked – “the source of the witness’s information as to those facts”. If the witness refers to documents that are not in the record already, they should be attached. The witness should include an express “affirmation of the truth of the Witness Statement” (paragraph (d)), and the statement should be signed and dated.

24 A witness statement must express the witness’s own version of the facts. It need not, however, be in the witness’s own words. The practice is that witness statements are generally drafted by counsel on the basis of the information given to them by the witness, or are edited by counsel when the first draft was supplied by the witness.

In international arbitration, in contrast to court litigation in some jurisdictions (including Belgium), there is nothing wrong or unethical with this practice. Local rules of professional conduct concerning permitted contacts with witnesses can be at opposite extremes depending on the lawyers’ jurisdictions and, if each counsel in arbitration were obliged to abide by the rules of his or her own bar, equal treatment of the parties and fairness of the process would be illusory. Article 4.3 of the IBA Evidence Rules therefore unambiguously indicates that “It shall not be improper for a Party, its officers, employees, legal advisors or other representatives to interview its witnesses or potential witnesses and to discuss their prospective testimony with them”. The IBA Party Representation Guidelines add the following rules of conduct:

20. A Party Representative may assist Witnesses in the preparation of Witness Statements and Experts in the preparation of Expert Reports.

21. A Party Representative should seek to ensure that a Witness Statement reflects the Witness’s own account of relevant facts, events and circumstances.

(*58) M. GROSE and K. CYWICKI, “Pleadings or Memorials: Which Are More Appropriate for Construction Arbitrations?”, *BCDR Int’l Arb.Rev.* 2017/4, 43, 44.

Bar rules in Belgium recognise that arbitration requires a different regulation of contacts with witnesses. The Belgian OBFG's *Code de déontologie* still contains in Article 7.16 a general prohibition against counsel contacting witnesses, but Article 7.18 provides for an exception in the case of arbitral proceedings. (*59)

Bar rules in the Netherlands do not prevent counsel from contacting witnesses or drafting or editing witness statements on the basis of information supplied by the witness, subject to the limitation that counsel may not commit any actions that might lead to undue influencing of witnesses. (*60)

It is worth mentioning that a witness may be properly remunerated for his or her testimony; the remuneration, however, should not go beyond a reimbursement of expenses and a “reasonable compensation for the loss of time incurred by a Witness in testifying and preparing to testify”. (*61) Anything more might look suspiciously like an attempt at witness subornation.

25 The submission of a written witness statement does not imply that the person concerned will necessarily be called to testify orally before the tribunal. It is up to each party and to the tribunal to request the appearance of a witness. The commentary to the IBA Evidence Rules confirms the usual practice of not asking witnesses whose statement is not contested or is not considered material to attend the hearing. (*62)

If a particular witness is not called, his or her witness statement may still be taken into consideration and the arbitrators have full power to assess the weight and the credibility of the testimony. Article 4.8 of the IBA Evidence Rules provides that “If the appearance of a witness has not been requested [...], none of the other Parties shall be deemed to have agreed to the correctness of the content of the Witness Statement”. By contrast, if a witness is called and fails to show up “without a valid reason”, then under Article 4.7 “the Arbitral Tribunal shall disregard any Witness Statement related to that Evidentiary Hearing by that witness unless, in exceptional circumstances, the Arbitral Tribunal decides otherwise”. (*63)

An important point to be addressed in an early procedural order is whether a witness whose written statement has been presented by a party will only be requested to appear before the tribunal if the other party wishes to cross-examine him or her, or whether each party may also require the appearance of its own witnesses. By default, the IBA

(*59) Art 7.18, paragraphs 2 to 4 *Code de déontologie de l'avocat*. The Flemish *Codex Deontologie voor Advocaten* used to contain the following provision in its Article 155: “Gelet op de wapengelijkheid is het verbod in het vorige artikel niet van toepassing op de buitenlandse of transnationale gerechtelijke of scheidsrechtelijke rechtsplegingen waarbij dergelijke contacten toegelaten zijn krachtens de procedureregels van toepassing op die rechtspleging”. Bizarrely, the “verbod in het vorige artikel” was not a prohibition to contact witnesses but was just a prohibition to encourage false testimonies. Articles 154 and 155 were both repealed in 2018 (*BS* 30 April 2018, 37077).

(*60) *Gedragsregels* 2018, 22(1) “De advocaat stelt zich zorgvuldig op in zijn contacten met getuigen en zal geen handelingen verrichten die zouden kunnen leiden tot ongeoorloofde beïnvloeding van getuigen”.

(*61) IBA Party Representation Guidelines, Guideline 25(b).

(*62) Commentary, *o.c.*, 64.

(*63) For an occurrence of this, see Final Award in ICC case 16695 of March 2011, *ICC ICArb.Bull.*, 2016/1, 152.

Evidence Rules allow parties to call their own as well as the opponent's witnesses; this is, according to the commentary, the "current best practice". (*64) Some arbitrators nevertheless prefer to see only those witnesses who are going to be cross-examined, and this approach is consistent with the frequent practice of skipping almost entirely the direct examination of witnesses.

26 The IBA Evidence Rules assume that there will generally be a so-called evidentiary hearing. They make it clear that, at the hearing, the tribunal is running the show (*65):

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 [...]. Questions to a witness during direct and re-direct testimony may not be unreasonably leading.

The power to manage the hearing is given by the IBA Evidence Rules to the tribunal collectively. In practice, this is generally a prerogative of the president. Belgian law expressly states: "De voorzitter van het scheidsgerecht bepaalt de gang van zaken ter zitting en leidt de debatten/Le président du tribunal arbitral règle l'ordre des audiences et dirige les débats". (*66)

27 Witnesses appearing before international arbitration tribunals are usually not sworn in. Given the broad cultural variations, a formal oath is regarded as inappropriate. Instead, witnesses are generally requested by the tribunal's president, at the commencement of their testimony, to express their commitment to tell the truth.

The IBA Evidence Rules confirm this practice: Article 8.4 provides that "A witness of fact providing testimony shall first affirm, in a manner determined appropriate by the Arbitral Tribunal, that he or she commits to tell the truth". Article 5 demands that "Each Witness Statement shall contain: [...] (d) an affirmation of the truth of the Witness Statement". When the arbitration is seated in Belgium or in the Netherlands, this is consistent with the local arbitration law. Article 1700, § 4, of the Belgian Judicial Code provides that witnesses are heard without taking an oath. Article 1041(4) of the Dutch Code of Civil Procedure provides an arbitral tribunal with the discretion to determine whether

(*64) Commentary, *o.c.*, 65.

(*65) Art. 8.2 IBA Evidence Rules.

(*66) Article 1705, § 2 Judicial Code; see also G. KEUTGEN, "Le président du tribunal arbitral – Éléments de droit comparé", *RDIDC* 2006, 309, No. 4.1.

witnesses shall take an oath. (*67) However, a straightforward affirmation of truth is more common in practice than a formal oath.

In Belgium, the lack of an oath implies that a false testimony cannot be criminally sanctioned. The offence of perjury under Article 220 of the Belgian Penal Code only applies to testimonies made under oath. (*68) It is sometimes said that a formal oath might be more conducive to uncovering the truth. (*69) That might perhaps be the case. However, the point is to a very large extent moot because of the systematic usage of written witness statements. A witness who lies during his or her testimony before an arbitral tribunal may not be guilty of perjury, but if the same lie is already included in his or her witness statement, he or she will be guilty of documentary fraud (*valsheid in geschrifte/faux en écritures*) under Article 196 of the Belgian Penal Code or Article 225 of the Dutch Criminal Code.

Under Belgian law, it can be inferred from a 2009 judgment of the Supreme Court that a deliberately untrue witness statement can be characterised as documentary fraud. (*70) Legal commentators read from this judgment that false statements constitute the offence of documentary fraud. (*71) The reasoning must apply equally to witness statements submitted in arbitration proceedings.

28 The IBA Evidence Rules deal with both party-appointed experts and tribunal-appointed experts. (*72) Experts in international arbitration may be legal entities as well as individuals and it is indeed common to appoint accountancy firms, economic consultancies or engineering firms as experts. The definition of an expert in the IBA Evidence Rules refers to “a person or organisation”. This would not be allowed before State courts in Belgium, where court-appointed experts must be natural persons. (*73) In respect of

(*67) Dutch Code of Civil Procedure, Article 1041(4): “Indien het scheidsgerecht het nodig oordeelt, hoort het de getuigen nadat dezen op de bij de wet bepaalde wijze de eed hebben gezworen de gehele waarheid en niets dan de waarheid te zullen zeggen”.

(*68) Opinion Adv. Gen. BOSCH before Cass. 5 April 1892, *Pas.* 1892, I, 157; A. DE NAUW and F. KUTY, *Manuel de droit pénal spécial*, Waterloo, Wolters Kluwer, 2014, No. 129 and 137; M.-A. BEERNAERT, “Du faux témoignage et du faux serment” in H.-D. BOSLY and CHR. DE VALKENEER (eds.), *Les infractions*, Vol. 4, Brussels, Larcier, 2012, No. 11 to 13; I. LIETAER, “Vals getuigenis in burgerlijke zaken”, *RW* 1989-1990, 1326.

(*69) C. VERBRUGGEN, “La vérité: jusqu’où l’arbitre doit-il pousser la recherche de la vérité?”, *Hommage à Guy Keutgen pour son action de promotion de l’arbitrage*, Brussels, Bruylant, 2013, 401, 414.

(*70) Cass. 17 November 2009, *Pas.* 2009, 2667, and *RABG* 2010, 416, with observations P. WAETERINCKX and K. DE SCHEPPER, “Een vals getuigenis sluit valsheid in geschriften niet uit”.

(*71) F. MOURLON BEERNAERT, *La preuve en matière civile et commerciale*, Waterloo, Wolters Kluwer, 2017, No. 275; D. MOUGENOT, “Mesures d’instruction en matière civile”, *RPDB*, Brussels, Bruylant, 2016, No. 62; B. VANLERBERGHE, “Actualia gerechtelijk recht: procedure en rechtsmiddelen”, *CBR jaarboek 2013-2014*, 1, No. 32; A. HOC, “Les attestations écrites dans le Code judiciaire”, *JT* 2013, 277, 280; D. MOUGENOT, “La loi du 16 juillet 2012 modifiant le Code civil et le Code judiciaire en vue de simplifier les règles qui gouvernent le procès civil”, *JT* 2012, 633, No. 15.

(*72) Art. 5 and 6 respectively IBA Evidence Rules.

(*73) Art. 991ter and 991quater Judicial Code.

State courts in the Netherlands, the academic and practical consensus is that court-appointed experts may be both natural and corporate persons. (*74)

In practice, international arbitration relies on party-appointed experts much more than on tribunal-appointed experts, contrary to the judicial practice that prevails in Belgium and in the Netherlands. A party-appointed expert in arbitration is regarded as owing a duty to the tribunal, not just to the party that appointed him or her; he or she is expected to provide the arbitral tribunal with some form of objective truth, not just with his or her appointer's version of the truth. This is reflected in the IBA Evidence Rules through the requirement that expert reports – whether they originate from a party-appointed or a tribunal-appointed expert – contain “an affirmation of his or her genuine belief in the opinions expressed”. (*75) This affirmation is to be repeated orally by the experts at the hearing if they are called to testify, as they often are. (*76) The IBA Evidence Rules also require party-appointed experts (not tribunal-appointed experts, for whom the matter goes without saying) to include in their report “a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal”. (*77) The IBA Party Representation Guidelines specify that “A Party Representative should seek to ensure that an Expert Report reflects the Expert's own analysis and opinion”. (*78) The IBA Party Representation Guidelines, of course, also confirm that the expert may receive “reasonable fees” from the appointing party. (*79)

As the Commentary points out, the IBA Evidence Rules do not regulate how arbitral tribunals should treat reports provided by experts appointed by a national court at the request of a party. An arbitration clause does not prevent parties from seeking interim measures from local State courts (*80) and it is not uncommon, in Belgium and in the Netherlands, that a party applies to the court for the appointment of an expert with a view to subsequent arbitration proceedings. This can be justified by a need to urgently proceed to expert investigations at a time when no arbitral tribunal has been constituted yet, or by the circumstance that the claimant cannot know, until an expert will have looked into the cause of the events concerned, whether the prospective respondent bears

(*74) BEENDERS, in: *T&C Burgerlijke Rechtsvordering*, Art. 194 (*Wetboek van Burgerlijke Rechtsvordering, Boek I, Titel 2, Afd. 9*), aant. 5.

(*75) Art. 5.2(g) and 6.4(e) IBA Evidence Rules. The Commentary mentions, 68, “the duty of each party-appointed expert to evaluate the case in an independent and neutral fashion”. A commentator nevertheless noted that “from the standpoint of an English lawyer, one notable omission from the IBA Rules is an unambiguous statement that expert witnesses, whether party-appointed or not, owe an overriding duty to the tribunal. [...] The point is that experts should understand at all times that if a conflict arises between their duty to assist the tribunal and their client's interests, the former should prevail”: Chr. HARRIS, “Expert Evidence: The 2010 Revisions to the IBA Rules on the Taking of Evidence in International Arbitration”, *Int'l Arb. L. R.* 2010, 212, 215.

(*76) Art. 8.4 IBA Evidence Rules.

(*77) *Ibid.*, Art. 5.2(c).

(*78) Guideline 22.

(*79) Guideline 25(c).

(*80) Art. 1683 Judicial Code; Art. 1022(b) Dutch Code of Civil Procedure.

any liability for these events and whether there is any point in initiating arbitration proceedings. Note that in the Netherlands, such an application to a national court to appoint an expert will only be granted if it cannot be obtained or cannot be obtained in a timely manner in arbitral proceedings. (*81)

The Commentary notes that (*82):

It is often difficult for an Anglo-American lawyer to be convinced that such a judicially appointed expert is by definition independent, as such an appointment has first been sought by the other party. In such circumstances, an arbitral tribunal will therefore have to determine how such an expert should be considered – as a party-appointed expert, a tribunal-appointed expert, or otherwise – and to issue directions with respect to the production in evidence of his or her report or with respect to his or her appearance at an evidentiary hearing.

The appointment of experts by the arbitral tribunal requires prior consultation with the parties and the establishment of terms of reference. (*83) Contrary to judicial practice in Belgium and in the Netherlands, a tribunal-appointed expert is not required first to submit his report in draft form – as a *voorverslag*, *voorlopig advies*, *préliminaires* or *avis provisoire* – to the parties. The expert sends his report directly to the arbitral tribunal, after which “[w]ithin the time ordered by the Arbitral Tribunal, any Party shall have the opportunity to respond to the Expert Report in a submission by the Party or through a Witness Statement or an Expert Report by a Party-Appointed Expert”. (*84)

29 For the rest, experts are treated very much in the same manner as witnesses. Their reports are generally to be submitted at the same time as the witness statements. They may be called to testify at the hearing; if a party-appointed expert is not called, “none of the other Parties shall be deemed to have agreed to the correctness of the content of the Expert Report” and it will be up to the tribunal to assess its weight. (*85)

The IBA Evidence Rules suggest that the tribunal may ask the opposing party-appointed experts

who have submitted Expert Reports on the same or related issues [to] meet and confer on such issues. At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they

(*81) Art. 1022(c) Dutch Code of Civil Procedure.

(*82) Commentary, *o.c.*, 69. For an occurrence of this, see Final Award in ICC case 15151 of August 2012, *ICC IArb.Bull.*, 2016/1, 135.

(*83) Art. 6.1 and 6.2 IBA Evidence Rules.

(*84) *Ibid.*, Art. 6.5.

(*85) *Ibid.*, Art. 5.6.

shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore. (*86)

This process of advance consultation between opposing experts can be very effective in allowing hearing time to focus on the – fewer – areas of genuine disagreement. (*87) The IBA Evidence Rules also provide for the possibility of conferencing (or “hot tubbing”) experts at the hearing. (*88)

V. Impact on the search for the truth?

30 There is more than one single truth – *vérité au deçà des Pyrénées, erreur au delà* (*89) – and the truth found in arbitration can be different from the truth that would be found in judicial proceedings. This is the unavoidable consequence of the differences in the evidence taking processes. Different processes lead to different evidentiary records, and different records lead to different decisions on the facts. If, with regard to the same dispute, arbitrators have access to a particular set of evidence and judges have access to another set, it is axiomatic that both types of decision-makers may end up in another factual reality.

The guidelines and rules discussed in this paper, because of the considerable influence they exercise on the practice of international arbitration in respect of the taking of evidence, are key contributors to the specific version of the truth that emerges from arbitration proceedings when compared to the alternative version that judicial proceedings may have yielded.

31 The document production process commonly used in international arbitration, in the first place, is an invaluable tool for demonstrating to an arbitral tribunal facts that a party could not prove if it had to rely only on the documents already in its possession before the commencement of the case. Despite the clear disallowance of fishing expeditions under the IBA Evidence Rules, the process can help a claimant whose own records are initially less than convincing.

Conversely, and this is a worthwhile feature of the system as well, the knowledge that one will have to disclose detrimental documents to the opponent can somewhat refrain prospective claimants from making overly enthusiastic demands or fanciful assertions.

(*86) *Ibid.*, Art. 5.4.

(*87) The Commentary notes, 69, that “Experts from the same discipline, who are likely to know each other, can identify relatively quickly the reasons for their diverging conclusions and work towards finding areas of agreement”.

(*88) Art. 8.3(f) IBA Evidence Rules.

(*89) B. PASCAL, *Pensées*.

32 Whether witnesses, as they are used in international arbitration, make an effective contribution to truth finding and whether that contribution is proportionate to the costs of the exercise is a difficult question that deserves a nuanced response.

It seems clear that, in most commercial disputes, documentary evidence is by far more useful to the finding of the truth than witness testimonies. The wise and often cited words of Leggatt J in his *Gestmin* judgment apply equally in arbitration proceedings (*90):

the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

The IBA Evidence Rules leave it to the arbitral tribunal to determine whether any particular witness is worth hearing. If the tribunal takes the view that, given the documentary evidence already available, whatever the witness may say will not make a difference to its decision, or the chances that the witness may say something that would make a difference are too small to justify the time and costs involved in hearing him, then the tribunal should refuse to hear the witness. Article 9.2 of the IBA Evidence Rules provides that “The Arbitral Tribunal shall [...] exclude from evidence [...] any [...] oral testimony [...] for any of the following reasons: (a) lack of sufficient [...] materiality to [the case’s] outcome; [...] (c) unreasonable burden to produce the requested evidence”. A tribunal who does so, and explains why, does not breach the parties’ right to be heard and should not fear that its award is at risk of being set aside for violation of due process. The tribunal’s journey in search of the truth need not follow the scenic route.

(*90) *Gestmin SGPS SA/Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) (15 November 2013), para 22, commended in particular by Lord Kerr’s dissenting judgment in *Bancoult, R (No 3) v Secretary of State for Foreign and Commonwealth Affairs* [2018] UKSC 3 (8 February 2018), para. 103.

This being said, there is a balance to be struck. Efficiency is important, but so is the parties' perception. Arbitrators must sometimes accept wasting some time – within limits – in order to accommodate the very subjective idea of fairness of each party.

33 The practice of international arbitration, as it is reflected in the applicable rules and guidelines, allows the parties themselves and their officers and employees to contribute as witnesses to the truth-seeking exercise carried out by arbitral tribunals. Their testimonies are treated as evidence, while under domestic procedural law before State courts in Belgium and in the Netherlands they may have limited evidentiary value. (*91) (*92)

It takes an experienced tribunal to properly assess the degree of credibility that should be accorded to testimonies of witnesses who have some skin in the game. Subject to this caveat, these witnesses are often the best-informed persons with regard to the matters in dispute and their involvement in the process can be very valuable.

34 Cross-examination of witnesses and experts by counsel may often be more in the interest of truth-searching than examination solely by the tribunal because of counsel's in-depth knowledge of the documents underlying the case, the resources available to counsel and their ability to question witnesses more forcefully than may be appropriate for a tribunal. (*93)

35 Experts often have an essential role in the determination of the factual truth. The proper management of their input, however, remains one of the most difficult tasks of arbitral tribunals. This difficulty is not specific to arbitration; State courts are faced with similar challenges.

Party-appointed experts have the considerable advantage that counsel actively look over their shoulders and ensure that their reports are to the point, address the questions that the tribunal must deal with, and do so in an intelligible manner. Draft expert reports are first reviewed by and discussed with counsel, and usually go through successive iterations before being submitted to the arbitral tribunal. This process significantly enhances the quality of the reports provided by party-appointed experts, but at the same time it is also the cause of their main weakness, being their partisanship. Experts, including those who are appointed by a party, are expected to be independent and neutral. The reality, however, is that opinions delivered by party-appointed experts almost invariably support the position of the party who appointed them. No doubt this is often due to a party aligning its claims or defence with the views of its expert and

(*91) With regard to the lack of evidentiary value of unilateral assertions (to which evidence by party witnesses may be assimilated), see Cass. 14 January 2000, *Pas.* 2000, 107; Cass. 17 Avril 1989, *Pas.* 1989, I, 849; Cass. 3 March 1978, *Pas.* 1978, I, 759; H. DE PAGE and P. VAN OMMESLAGHE, *Traité*, t. II, *Les obligations*, vol. 3, No. 1654; D. MOUGENOT, "La preuve", *Rép.not.* 2012, No. 18-3.

(*92) See paragraph 22 *supra*.

(*93) C. PARTASIDES, "In Defence of Cross-Examination" in M. WIRTH, C. ROUVINEZ and J. KNOLL (eds.), *The Search for Truth in Arbitration*, *ASA Special Series No 35*, New York, JurisNet, 2011, 71-73.

dropping lines of argument that its own expert regards as indefensible; in this manner, party-appointed experts have the salutary effect of instilling a degree of reasonableness in the ambitions of their clients. But the fact remains that many a tribunal has been confronted with opposing party-appointed experts who presented, competently and with vows of independence, diametrically divergent opinions. If the issue of contention falls outside the field of expertise of the arbitrators – and this is of course often the very reason why experts were called in the first place – it can be extremely difficult for the tribunal to assess which is the better view and to explain convincingly in its award why it preferred one opinion to the other. Occasionally the only way out will be for the tribunal to appoint its own expert, who will assist the arbitrators in adjudicating between the two (or more) party-appointed experts.

Conversely, a tribunal-appointed expert does not normally give rise to an appearance of partiality. His report, however, does not benefit from the same degree of quality control by the parties as that of a party-appointed expert, and many a judicial court in Belgium and in the Netherlands has been faced with an expert report that left some crucial questions unanswered or contained inconsistencies or ambiguities. A practical solution is then for the tribunal to call its expert at the hearing and to ask for all necessary clarifications. (*94) Truth will then, in most cases, be uncovered.

VI. Conclusion

36 Although searching for the truth is not the main purpose of an arbitration, it is very relevant (if not key) to a good award. Dispute resolution is most effective when a decision is acceptable to both parties. This is the case when the parties feel that they have been able to present their case, that they have had a reasonable opportunity to submit, retrieve and test evidence and the arbitrators have carefully scrutinised the facts. This is particularly important in arbitration where there is generally no appeal possible and the award can only be set aside in very limited circumstances.

37 However, submitting, finding and testing evidence also comes at a cost, both in terms of money and efficiency. What one party may consider as necessary fact-finding, the other party may conceive as a burdensome fishing expedition. With the procedural discretion that the arbitrators have, it is that much more relevant that they can find guidance in rules and guidelines that are internationally acceptable.

(*94) In the same line, because “party-appointed experts may become ‘two ships passing in the night’”, a tribunal once “appointed an ‘expert co-ordinator’ with the task to constantly monitor the respective experts and make sure that they were doing their job, keeping their deadlines and answering each other’s arguments without overlaps or gaps”: H. VAN HOUTTE, “Document Production Master and Experts’ Facilitator” in B. BERGER and M.E. SCHNEIDER (eds.), *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions*, ASA Special Series No. 42, New York, JurisNet, 2014, 83.

38 For these reasons, the IBA Evidence Rules and IBA Party Representation Guidelines play such an important role in international arbitration. Compared to Belgian and Dutch procedural law, they provide for more ‘truth seeking’ tools. In particular, the rules and guidelines on document production and witness examination have proven to be key elements in searching for the truth in international arbitration. The rules and guidelines also provide for limits to these tools so that the arbitrators can balance truth finding on the one hand with costs and efficiency on the other. This balanced way of finding the truth as included in IBA Evidence Rules and IBA Party Representation Guidelines results in better awards.